

The Impact of the Federal Appellate Courts on State Abortion Policymaking

by

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Dedication

This dissertation is dedicated to everyone who had their dreams put on hold because of the pandemic, particularly the mothers who scaled back or gave up their careers in order to take on the immensely important work of caring for their families.

Acknowledgements

Any dissertation is the product of much more than its author, and this one is no exception. I have been fortunate to have been surrounded by countless wonderful people who made this process so much more enjoyable.

First, a note on the dedication: when the COVID-19 pandemic shut down public schools and daycares in March 2020, it was primarily women who bore the brunt. In our household, it was no different. We had good reason: my husband had just landed his dream job as an academic, and was on a strict timeline to finish his dissertation by May. So, like many women, I stepped back from work and shifted my focus to caring for our family. I do not regret a single second spent with my children during that time—it was exactly what our family needed, and “pandemic schoolhouse” will always be a favorite memory—but I’m acutely aware that it came at a cost. I was fortunate to have the support and resources to overcome that cost, but many women did not. On days when I felt too tired or unmotivated to write, I kept them in mind to remind myself that completing this dissertation was not just another item on my to-do list—it was a mission, an opportunity, and a gift.

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Abstract

Federal appellate courts are, on many issues, the “last word”: because the Supreme Court hears so few cases, it is the circuit courts that are left with the task of interpreting and shaping the law in important policy areas. In this dissertation, I explore the impact this has on state level policymaking. Specifically, I argue that state legislatures look across the boundaries of the American federal system to consider what impact federal courts will have on their policymaking endeavors. Because state legislators are strategically motivated to create policy that will ultimately become, and remain, law, federal appellate courts are an important factor for them to consider.

I focus on two factors that, I argue, structure how the state legislature thinks about the federal courts: ideology and uncertainty. Ideology simply refers to the policy preferences of the state and the court. Uncertainty refers to how easy it is for the legislature to pinpoint where the court’s ideology is, and depends on factors such as doctrinal clarity and legislative professionalism. This dissertation suggests that (1) when a state legislature is ideologically close to its circuit, it should be more likely to pass a law, because that law is likely to be upheld; and (2) when a state legislature is highly uncertain about what its circuit will do, it should be less likely to pass a law, because it cannot accurately predict the outcome.

I use abortion policy as a case study to examine this theory. Because abortion is a constitutional issue, generally litigated in federal courts, it is an ideal case to focus on the links across and between the levels of federalism. I take a mixed methods approach and examine

legislative histories, court opinions, and bill introductions and passage in all fifty states over a twenty year period. I find that there is, indeed, evidence that federal court doctrine is something that state legislators research and discuss in their deliberations about a bill. There is also some evidence that state legislatures consider federal appellate court doctrine while choosing whether or not to pass a bill, though the evidence is weaker than we may expect. These findings contribute to both the literature on state policymaking, by adding to our understanding of what state policymakers consider when they craft a law; and the literature on federalism, by identifying an important, and often overlooked, link between state and federal governments.

Chapter 1

Introduction

The federal circuit courts are not merely a way station on the way to the Supreme Court: as I will argue in this dissertation, they can be drivers of a wealth of policymaking decisions at the state level. Take, for example, a 2017 conflict over whether public school districts can invite students to deliver religious invocations before school board meetings. Does this violate the First Amendment’s Establishment Clause? Because the Supreme Court declined to weigh in, it depends on where you live: the Third and Sixth Circuits held that this kind of “school prayer” is not acceptable, while the Fifth Circuit held that this type of activity qualifies for a “legislative prayer” exception, and thus is permissible. As a result, schools in Texas, Louisiana, and Mississippi are all free to adopt this policy, while schools in Kentucky, Michigan, Ohio, Tennessee, Delaware, New Jersey, and Pennsylvania cannot.

This situation is commonly called a “split” in appellate court doctrine—a situation where two or more federal circuit courts offer conflicting rulings on the same legal issue. These splits are often discussed in the context of Supreme Court doctrine and behavior. Litigants petitioning for certiorari try to emphasize the lack of policy uniformity in order to encourage the Supreme Court to take a case, and considerable research addresses how the type, depth, and timing of splits matters to the Supreme Court. But doctrinal inconsistencies across circuits also poses interesting questions for state policymakers. The Supreme Court cannot possibly resolve every circuit split, leaving many courts of appeals decisions—with whatever inconsistencies they may

have—as the final word on a particular issue. As a result, policymaking in different states occurs in different doctrinal contexts. Strategic political actors must take into account the characteristics of the circuit court when making policy if they want that policy to last as the circuit court can act as a gatekeeper for the kind of policies a state can pass. Therefore, this dissertation seeks to answer the following broad question: how does the relationship between a state and its federal circuit affect that state’s ability to make policy?

This dissertation uses state-level abortion politics as a way to examine this question. It seeks to offer an institutional explanation for why states like Texas and Alabama (which are conservative, and in what are generally considered conservative circuits) pass very conservative abortion restrictions, while other red states (like Kentucky and Oklahoma), which are in more moderate circuits, tend not to. Circuit ideology is a frequently overlooked part of the environment in which a state legislature makes policy, and one that, I argue, plays an important role in shaping policy outcomes.

This dissertation makes two specific contributions to our understanding of legislative policymaking: first, it adds insight into how states make policy. This is important for both academics and policymakers. State policy often has an immediate, profound effect on citizens’ lives. Understanding what constrains and empowers states to craft policy is an essential component of understanding the American policy landscape.

More broadly, this dissertation can add to our understanding of federalism. The United States is often referred to as a canonical example of “symmetrical federalism,” meaning that all 50 states have equal constitutional powers (Bednar 2011). While the text of the Constitution may technically make that promise, the relationship between a state and the federal circuit it resides in conditions how much practical power and discretion that state has to make policy: a

state that is ideologically close to its circuit has a lot of latitude to make policy, because its policies will be upheld, as opposed to a state in a circuit where its policies will be struck down repeatedly. This dissertation offers a way to think about federalism as a dynamic concept, that changes depending on the context of time and place and the political preferences of the institutions operating in that context.

This chapter first describes the structure of the federal courts as background context for understanding their relationship with state legislatures. Next, I summarize the central argument and contributions of the dissertation. Finally, I outline the chapters that follow.

A. Background: The Structure of the Federal Courts

Article III of the U.S. Constitution created the Supreme Court and grants Congress the power to establish lower courts. Congress created a system with three levels: trial (district) courts, intermediate (appellate/circuit) courts, and a single Supreme Court. These federal courts have limited jurisdiction. Unlike state courts, which have general jurisdiction over most matters that occur within their borders, Congress must grant the federal courts subject matter jurisdiction over a dispute in order for the federal court to hear it. These include, for example, criminal prosecutions brought by the United States, civil actions where the United States is a party or the parties are citizens of different states or countries, and cases that involve interpreting the federal Constitution or federal law.¹

The physical jurisdiction of district and circuit courts has remained largely unchanged over time. Unlike congressional districts, judicial districts do not change based on population. The last major modification was in 1982, when the old Fifth Circuit was subdivided into the

¹ 28 U.S.C. § 1331; 28 U.S.C. § 1332

current Fifth Circuit and the Eleventh Circuit. Currently, the United States has 94 district courts, 11 numbered “regional” circuit courts that cover groups of states; the D.C. Circuit, which handles appeals from the District of Columbia (because of its location, this generally includes a lot of administrative law); and the Federal Circuit, which primarily handles patent appeals.

The district courts handle most of the day-to-day business of the federal judicial system: motions are heard, injunctions are issued, and trials are held. In 2019, 390,555 cases were filed in district courts across the country. Decisions made by the district court are appealable to one of the thirteen circuit courts. A litigant who loses in district court is guaranteed the right to have an appellate court hear his or her appeal. At the appellate level, there are no juries—three judge panels drawn randomly from the full bench of judges in the circuit hear the case, consider the law, and issue a decision.

The circuit court’s decision can also be appealed: this time, to the Supreme Court. However, an aggrieved litigant is not guaranteed a Supreme Court hearing. Unlike the circuit courts, the Supreme Court has a discretionary docket, which simply means it gets to decide what cases it takes. Litigants must file petitions for certiorari to request that the Court hear their case. The scope of this discretion has increased over time. Most recently, Congress passed the Supreme Court Case Selections Act in 1988, which abolished the right to have certain appeals from state courts heard in the Supreme Court. Now, very few cases are automatically heard by the Supreme Court: with few exceptions, the Supreme Court gets to decide exactly which cases it wants to hear.

In practice today, the Supreme Court hears about 2% of all cases where a petition for certiorari is filed. Because it enjoys almost unfettered discretion, the Court can be strategic about how it manages its docket. It may strategically choose to do this based on the preferences

of those who sit on the Court, as well as the Court's ideological location relative to the other branches. (Moffett et al. 2016). When the Court is uncertain about whether a decision will trigger a negative reaction from the elected branches, it will choose hear fewer cases. And when the Supreme Court's docket is small, the Court plays less of a policymaking role, and more falls to the circuit courts.

The Supreme Court generally hears cases regarding issues of high political importance, or where there is disagreement between the circuit courts. These disagreements are called circuit splits, and occur quite frequently because each appellate court can act as its own policymaker—they need not follow the precedent set in other circuits (Beim and Rader 2018). Beim and Rader find that while the Supreme Court resolves some particularly harmful and important circuit splits, many are left unaddressed. This means that while the Supreme Court is technically the court of last resort, in reality the vast majority of cases are decided by the circuit courts.

There is considerable research examining the hierarchy of the federal court system, finding that all levels engage in strategic behavior (Beim 2017). Lower courts are generally highly responsive to what the Supreme Court decides (Westerland et al. 2010, Hansford and Sprigg 2006, Songer et al. 1994), though this is conditioned by how clear and unambiguous the precedent set by the Supreme Court is (Hitt 2010). According to one circuit court judge, “when the precedent is really clear, everyone will follow it” (Masood et al. 2017). Ambiguous precedents, such as decisions that result in multiple opinions where a majority of judges support the judgment but differ on the rationale supporting it, are more difficult for courts to follow and apply to new fact patterns.

The Supreme Court, for its part, relies on signals and information from the lower courts. It is more likely to hear a case if circuit courts have disagreed in how to answer the legal

question at issue. “Whistleblowing” behaviors like dissents can also signal to a Supreme Court overwhelmed with certiorari petitions which cases are worth of attention (Beim et al. 2014). It listens to state actors, too: states with formal solicitor general offices are more likely to win their cases at the Supreme Court (Owens & Wohlfarth 2014). It is clear that at all levels of the judiciary, strategic behavior is commonplace.

Key to my argument is the thesis that federal appellate courts have been understudied in the existing literature on how courts affect policymaking at the state level. As discussed above, studies that address how the judiciary affects policymaking tend to focus on either state courts or the Supreme Court. But state courts do not frequently hear crucial constitutional issues, and the Supreme Court only takes about 80-100 cases per term, and often even less—in 2019, for example, the Supreme Court issued just 53 opinions.² Without Supreme Court intervention, the decision of the court below stands. This means there are thousands of cases where it is actually the federal appellate courts that have the final word. And critically, this “final word” is not merely in unimportant or insignificant cases. These are cases that deal with issues that affect many Americans on a day-to-day basis: take, for example, criminal sentencing, equal pay, and carrying handguns outside the home.³

² <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1>; <https://www.scotusblog.com/2020/07/final-stat-pack-for-october-term-2019/>

³ Sentencing: *United States v. Whatley* (11th Cir 2013); *United States v. Eubanks* (7th Cir 2010); *United States v. Buck* (5th Cir. 2017); *United States v. Osborne* (4th Cir. 2017).

Equal pay: *Rizo v. Yovino*, 950 F.3d 1217 (9th Cir. 2020) (post-remand *en banc* decision); *Wernsing v. Department of Human Services*, 427 F.3d 466, 467 (7th Cir. 2005); *Lauderdale v. Ill. Dep’t of Hum. Servs.*, 876 F.3d 904, 908 (7th Cir. 2017); *Spencer v. Virginia State University*, 919 F.3d 199, 202-03 (4th Cir. 2019); *Taylor v. White*, 321 F.3d 710, 714-15 (8th Cir. 2003); *Price v. N. States Power Co.*, 664 F.3d 1186, 1193-94 (8th Cir. 2011).

Guns: *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 93 (2^d Cir. 2012); *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013); *Nat’l Rifle Ass’n of Am., Inc. v. McCraw*, 719 F.3d 338 (5th Cir. 2013); *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012).; *Drake v. Filko*, 724 F.3d 426 (3^d Cir. 2013), *cert. denied* 134 S.Ct. 2134 (2014).

These circumstances lead to a lack of legal uniformity across the country. While the courts of appeals must follow Supreme Court precedent, there is no requirement to follow precedent set in other circuits. When deciding a case, a circuit may choose to look to its sister circuits for guidance, but such guidance is merely persuasive, not binding. Therefore, it is both entirely possible and not uncommon for different circuits to resolve different questions of law differently. These differences are called “circuit splits.”

Circuit splits tend to occur when Supreme Court precedent is unclear. If the Supreme Court’s decision is vague or ambiguous, it offers space for circuit courts to interpret differently (Beim & Rader). Studies that examine circuit splits classify them as “deep” splits (where many circuits are involved) and “shallow” splits (where few circuits are involved) (Beim & Rader, Gressman et al. 2007). Only about one third of circuit splits are ultimately heard and settled by the Supreme Court, and if a split is not heard within two years, it is unlikely to be heard at all. Contrary to popular wisdom, Beim and Rader find that the majority of circuit splits go unresolved.

Taken together, these three things—(1) the ability for lower courts to engage in judicial review, (2) the Supreme Court’s small docket, and (3) the lack of agreement across circuits—mean that while the Constitution and our judicial system seem in theory designed to promote legal uniformity, the reality is far from it. Because the Supreme Court is silent in many policy areas, it creates space for circuits interpreting the law to come to different conclusions. Since these circuits cover different states, the relevant federal rules can differ depending on what circuit a state is in. This legal structure can constrain or empower state policymakers, depending on the degree to which they are aligned with the circuit court.

B. The Central Argument

In this dissertation, I argue that variations in state policymaking can be explained in part by institutional relationships between state policymakers and the federal appellate courts. These relationships are often characterized by doctrinal ambiguity and ideological disagreement between federal level and state level institutions. At the most basic level, the intuition is that when a state legislature is ideologically close to its circuit court, it is more likely to pass laws, because it knows these laws are unlikely to be overturned. More precisely, I test the hypothesis that state legislatures that are ideologically similar to their circuit courts and can predict with confidence that this is the case, will be more likely to pass legislation. For example, a conservative state in a liberal circuit will not pass an abortion restriction because the law has a high likelihood of being overturned, while a conservative state in a conservative circuit will, because the law has a high likelihood of being upheld. But, this will hinge on how effectively the legislature can accurately predict the court's ideology, which is a function both of the court's predictability and the legislature's professionalism.

Abortion is a useful policy to test the theory outlined above because it generates a lot of litigation at all levels of the federal courts. This litigation is generally appealed to the circuit level because of its salience and importance—so unlike with other issues, it is not the case that litigation ends with a district court decision. Second, it is a constitutional issue. While there is no legal bar to state courts arbitrating questions related to the federal constitution, abortion cases are usually filed in federal courts, which are seen as more politically independent and less biased than state courts (Bator 1981). Although explaining only one issue has obvious downsides in terms of generalizability, it is appropriate here. These interactions are complex and involve the interplay between a variety of institutions and actors. Consequently, selecting one issue allows

me to explore it deeply, conducting both quantitative and qualitative analyses that will, ideally, support and complement each other.

C. Plan of the Dissertation

This dissertation proceeds as follows. Chapter 2 reviews existing research in order to contextualize the question driving this dissertation. Specifically, I examine three main bodies of work: separation of powers, federalism, and judicial hierarchy. From this examination, it becomes obvious that while there is considerable work that looks at judicial hierarchy within a level of federalism (i.e. how state courts influence state legislatures; or how the Supreme Court influences Congress), there is very little that *crosses* those lines—which is a key contribution of this project.

In Chapter 3, I develop a theory for understanding how state legislation is shaped by circuit courts. Aided by a series of spatial models, I explain the logic underpinning the choices legislators and courts make. I also begin to develop the concepts of court ideology and doctrinal uncertainty, which together with legislative professionalism, are the key concepts underpinning the extent to which a legislature can successfully strategize to pass abortion restrictions. This theory leads to several specific, testable hypotheses that are the subject of the chapters that follow.

Chapter 4 offers an initial empirical examination of this theory. I first introduce a new dataset comprised of state-level legislative histories that discuss circuit courts. I then use insights from process tracing to analyze when, how, and why state legislators discuss the circuit courts. I explore in detail the introduction of “admitting privileges” bills (an abortion restriction that requires a physician to maintain admitting privileges at a local hospital) in New Mexico and Florida in order to understand how the characteristics of the Tenth and Eleventh Circuits (where

New Mexico and Florida, respectively, reside) shape the policy process. The findings from this chapter provide strong initial support for my theory by showing that state legislators do analyze and discuss circuit courts when drafting and considering legislation.

Chapter 5 then moves to describe key variables and how they are measured. Most importantly, I develop the dependent variable: abortion policies. I then draw on previous scholarship about abortion policymaking in order to articulate specifically how I will measure policies. I also develop a measure of circuit ideology that I employ in later chapters.

The following three chapters comprise the key quantitative analyses of the dissertation. Chapter 6 shifts to the perspective of the courts in order to consider the broader context of abortion litigation. This chapter establishes that abortion lawsuits are not unique to specific states or circuits, but rather occur across the country. It also shows that ideology plays a role in whether an abortion law is upheld or struck down. Finally, I examine discussions of state legislatures in court opinions in order to understand how courts address the relationship between state legislatures and circuit courts in the very opinions that state legislatures rely on to understand court doctrine.

Chapter 7 introduces a new dataset comprised of over 2,000 abortion-related bills introduced in state legislatures between 1990 and 2000. This chapter offers a descriptive look at this data, considering where and when bills are introduced. Using the policy categories developed in Chapter 5, it examines what policies are most commonly introduced, how these trends have changed over time, and what policies ultimately become law. This offers a deep understanding of state-level abortion politics before moving to the quantitative analysis in Chapter 8.

Chapter 8 builds directly on Chapter 7 in order to take up the central question of the dissertation: are, as the theory suggests and previous chapters support, state legislators less likely to pass bills when they are ideologically distant from their circuits? Does this depend on their level of uncertainty about such distance? Specifically, I conduct a series of regression analyses aimed at uncovering under what conditions state legislatures modify their bill-passage behavior in response to circuit courts. Here, I find that there is some—albeit weaker than expected—evidence that states that are ideologically close to their circuits do pass more abortion restrictions.

Finally, in Chapter 9 I summarize the previous chapters and offer reflections on the policy implications of the findings. Specifically, I discuss how the theory and analysis here might help us to understand the relationship between state *courts* and federal courts, which, I argue, is driven by many of the dynamics explored here. Additionally, I address the Supreme Court's recent decision in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ___ (2022), which overruled both *Roe v. Wade* and *Planned Parenthood v. Casey*, and removed many of the federal constraints on abortion regulation, giving states increased power to restrict abortion access. Finally, I suggest next steps for further inquiries that build on this project.

Chapter 2

Literature Review

There are several literatures that offer context for my central question: how do federal appellate courts affect state policymaking? This question emerges from underexplored areas of literatures that consider how institutional structures affect policymaking. Broadly, existing scholarship reveals three features of the American political system that are critical starting points for this project. First, we know that at both the state and federal level, the three branches of government interact strategically and dynamically, with each influencing its counterparts' ability to make policy. Second, it is clear that the federal government can influence state policymaking, through direct mandates and in more subtle ways. And last, we know that the structure of the federal court system leaves a great deal of unrestrained discretion to the appellate courts, making them a crucial, but often overlooked, player in policymaking.

Yet existing literature does not offer a complete picture of how policymaking in the context of American federalism works: far less time has been spent exploring dynamics that cross the boundaries of federalism to consider how variation in *state* policymaking decisions might be explained by *federal* court doctrine. The goal of this chapter is explain how the questions asked in this dissertation can contribute to our current understanding of institutional policymaking in the American federalism context, by situating it in existing perspectives on the state legislature-federal court relationship.

This chapter proceeds in three parts, further developing the three starting points referenced at the outset of this chapter. First, I review the separation of powers literature, which explores the conditions under which legislative policymaking is influenced by the judiciary, showing that inter-branch communication and strategizing exists in both the state and federal contexts. Then, I examine whether and when the federal government can influence state policymaking: existing work shows that although federalism grants each sovereign government its own sphere of influence, federal institutions can and do influence state policymaking. Last, a discussion of judicial hierarchy, focusing on the appellate court's independence and limitations concludes the chapter, demonstrating that while the Courts of Appeals are subject to oversight by the Supreme Court, they are in fact only minimally restrained, and therefore should be considered policymakers in their own right.

In the following chapter, I build on this existing work to develop a theory of state policymaking in response to federal appellate court doctrine. While existing work concentrates on the relationships *within* levels of federalism (i.e., how state courts influence state legislatures, or how the Supreme Court constrains Congress), this project looks *across* levels of federalism to offer a deeper understanding of the factors that influence state policymaking, and our understanding of federalism as a whole.

A. Separation of Powers

Policymaking in the American political system cannot be understood without an understanding of the dynamics and interactions between different branches of government. Broadly, the separation of powers literature makes clear that the various branches of government can influence each other: power may be separated, but each branch is strategic in considering how the others will respond to what it does. I first examine the considerable literature that

addresses the role of the federal courts in the separation of powers context. Although there are key differences that impact how this dynamic plays out when it is a *state* (rather than federal) policymaker interacting with a federal court this provides a useful background for identifying the central principles of interest that apply to my question. I then turn to the states to consider how state legislatures respond to state courts.

As Dahl put it, the Court is not just a legal institution, but a political one as well (Dahl 1957). While the literature is mixed on the *extent* to which the Supreme Court acts strategically to achieve its policy goals, but what is not in dispute is the notion that the Supreme Court does engage in at least some strategic behavior. Later work formalized Dahl's intuition, identifying two key aspects of the separation of powers game: (1) that the political branches have meaningful sanctions they can impose on the Court if they disagree with a decision and (2) that justices are forward-looking and base their decisions on what they expect the political branches to do (Epstein and Knight 1998, Ferejohn and Shipan 1990).

Many studies have tested these suppositions under various conditions. Broadly, the literature offers evidence of a bi-directional relationship between the Supreme Court and Congress, where each is influenced by the other: neither can achieve its own policy ideal point without strategically considering the other branch.

For example, there are strong indications that the Supreme Court is limited by Congress in the sense that the Court seeks to avoid having its decisions overturned by congressional legislation (Ignagni & Meernik 1994, Harvey and Friedman 2006). This appears to be particularly true in cases where the Court is deciding a constitutional issue, rather than one of statutory interpretation (Clark 2009). Further, the degree of constraint the Court faces may depend on the specific issues in a case: it tends to be less constrained in cases where

implementation of the decision is handled through the court system, rather than through external actors, which are difficult for the Court to control (Hall 2010).

Legislative action is also shaped by anticipating what the Court might do. The most straightforward example is judicial review: because the courts can strike down a law passed by Congress, a strategic congress should consider this when drafting legislation and work to avoid this outcome. Court decisions, even when they garner criticism, are generally not overridden by Congress, though estimates on how often this happens vary (Eskridge 1991, Barnes 2004). Meernik and Ignagni find in nearly 30% of cases where the Court overturned a federal law, Congress made “serious legislative attempts” to reverse or mitigate the decision (Ignagni and Meernik 1994). On the other hand, Hettinger and Zorn find that Congress overrides only 12% of the Supreme Court’s labor and antitrust decisions, while Hausegger and Baum find that Congress attempts to override the Court only about 6% of the time.

Regardless of the precise percentages of times the Supreme Court strikes down a statute, or Congress tries to override a Court decision that does not align with its preferences, it is clear that at least at the highest level of government, legislatures are responsive to court decisions (and vice versa). This is meaningful because it provides insight into how such dynamics may play out in the states, who generally have similar institutional structures.

Shifting to consider the realm of state policymaking, similar to the ongoing balancing and rebalancing of powers between branches of the federal government, many scholars characterize the relationship between state branches of government as an ongoing “dialogue” between state legislatures and state judiciaries on issues of constitutionality (Dahl 1957; Katzmann 1997; Bosworth 2017). Langer and Wilhelm’s (2005) qualitative work provides evidence of “conversations” between state legislatures and judiciaries, and is an important basis for

developing the intuition of the theory presented later. Langer and Wilhelm interviewed state legislators and state supreme court members in six states and found that 25% of the legislators interviewed perceived growing tensions between legislatures and state supreme courts. Over 50% of those they interviewed said that state policymakers (supreme court justices, legislators, and executive branch) engage in a “tit for tat” game across the three branches. 65% of legislators would rewrite or postpone adoption of a policy in order to avoid a negative response to the state supreme court.

Langer and Brace (2005) build on this work and ask whether state abortion restrictions and death penalty legislation are conditioned by the state supreme court’s ideology. They hypothesize that legislative expectations about (1) court preferences and (2) the likelihood of a court hearing a case condition the enactment of policy. They find that state legislators are less likely to introduce such laws when they believe the state supreme court is hostile to them, and believe the court will act on that hostility. And moving past the policy enactment stage, if a policy is ultimately overturned by the state supreme court, there is evidence that state legislatures are responsive, in the sense that they repeal or amend statutes that have been struck down by the courts (Bosworth 2017). These findings offer a strong indication that legislatures make strategic choices in the face of judicial ideology.

Overall, the separation of powers literature makes the critical point that at every level of government, branches interact with each other while making policy. This fact underpins much of our understanding of how politics operates. The American separation of powers system is not a perfectly clean division: there is overlap in the issues and policies each branch addresses, and the branches struggle and strategize in order to achieve their own policy ends. As the above demonstrates, this is true at both the federal and state level.

Yet, this work is limited by its focus on just one level of federalism: these studies generally look at within-federal or within-state relationships, rather than considering the relationship between a federal institution and a state institution. This dissertation expands on this thinking by crossing the boundaries of federalism to consider the separation of powers relationship between a federal court and state policymakers. Considering the impact of the federal courts on state policy is a critical addition to our understanding of policymaking in the American political system, because as discussed in the following section, there is considerably interplay between the federal and state governments.

B. Federalism

American federalism allocates power between the state and federal governments, granting to each a sphere of influence in which to make and implement policy. The Constitution lays out the framework for this relationship: the supremacy clause gives federal law precedence over state law and state constitutions; and the Tenth Amendment reserves all powers not delegated to the United States to the states. However, these divisions between the two levels of government are not impermeable. Here I briefly discuss existing work that establishes the mechanisms through which the federal institutions can influence their state counterparts.

Considering existing work on federalism is important, first, to establish that the federal government and state governments can interact in meaningful ways. This is particularly important in this context because federal appellate courts do not have any direct power over state legislatures. If no avenues to influence policymaking across federal boundaries existed, the questions at the heart of this dissertation would not be fruitful to pursue.

The federal structure allows the federal government to set national standards, while giving states latitude to experiment and innovate. Constitutional principles form the boundaries

for the extent of the relationship between the two. For example, the “anti-commandeering principle” provides that the federal government cannot directly seize control of state actors in order to implement federal policies (*New York v. United States*, 505 U.S. 144 (1999); *Printz v. United States*, 521 U.S. 898 (1997)). However, the federal government can condition grants on the adoption of such policies—which, of course, can essentially force a state’s hand into implementing the policy the federal government desires (*South Dakota v. Dole*, 483 U.S. 203 (1987)). Between these two constitutional guardrails, there are a wealth of ways in which institutions interact across the boundaries of federalism.

The simple fact that the federal government is paying attention to an issue increases its salience and can encourage states to act on it (Bednar 2011). For example, McCann et al. show that policy ideas can diffuse from the federal government to state governments as discussions at the federal level influence state policymaker’s understanding of the salience of the issue and possible benefits of specific policies. The extent to which this occurs varies by state: in more professionalized states, increased national activity will lead them to implement policy solutions discussed at the national level, whereas less professionalized states will take national focus on an issue as a signal that the national government will soon become involved in the issue, and will defer to them (McCann et al. 2015).

The federal government can also take more direct avenues to influence state policymaking. Mandates—for example, the 1970 Clean Air Act, which required states to meet certain air quality standards—can impose an obligation on states to act (Haider-Markel 1998). Congress can also pre-empt state law either expressly, by including a clause in a statute that declares its intent to pre-empt, or implicitly, by passing a law that conflicts with or causes an obstacle to administering state law. Congress can also use “field preemption,” when it has such a

vast web of statutes and regulations that it has manifested an intention for the federal government alone to regulate a specific issue, precluding any state regulations from entering that field and thereby limiting a state's ability to act on that issue. (*Gade v. Nat'l Solid Wastes Mgmt. Ass'n.*, 505 U.S. 88 (1992)). Nuclear power is an example of this: the Supreme Court held in 1983 that the federal government "has occupied the entire field of nuclear safety concerns." (*Pacific Gas and Electric Co. v. State energy Res. Conservation and Dev. Comm'n*, 461 U.S. 190 (1983)).

Finally, Congress and the president have a host of financial tools that they can employ in order to guide state policy. As mentioned previously, Congress can condition grants on the implementation of particular policies, in order to implement a national program in a state or as an incentive for a state to create a particular program (Chubb 1985). Additionally, the executive branch can use welfare and Medicaid waivers to shape how states implement these policies without taking unilateral action that may be perceived as an overuse of executive authority (Mann-Levesque 2019).

It is clear, then, that various federal-state interactions and influences do exist: particularly when it is the legislature and executive trying to influence the states. What is less clear, though, is how this dynamic plays out in the context of the judiciary. No court can wield financial benefits or sanctions to get states to do what they want, and they are by design reactive, so they cannot initiate national conversations. Their main direct avenue of influence on state policy is to overturn laws through judicial review. This is not uncommon; state laws are regularly struck down by federal courts. However, there is less attention paid to when court doctrine influences how states craft their laws. This dissertation seeks to add to the literature on federalism by investigating that role.

Finally, the United States is often referred to as a canonical example of “symmetrical federalism,” meaning that all 50 states have equal constitutional powers (Bednar 2011). I argue that while the text of the Constitution may technically make that guarantee, the relationship between a state and the federal circuit it resides in conditions how much practical power and discretion that state has to make policy. This dissertation offers a way to think about federalism not as an unchanging relationship or fixed structure but dependent on the context of political and policy preferences.

C. Judicial Hierarchy

Finally, I return to the discussion of the structure of the federal judicial system I began in Chapter I, focusing here on the role of judicial hierarchy. This hierarchical structure shapes how judges at different levels make decisions: at each level, judges and justices have different responsibilities, powers, and constraints, and act strategically within those boundaries, attempting to anticipate what judges at other levels will do (Baum 1994). As discussed below, considerable work has studied the judicial hierarchy and sought to explain when and how different levels of the federal court can influence each other. In this dissertation, I seek to expand this analysis to consider interactions across federal-state boundaries. Understanding the specific powers and constraints faced by the federal appellate courts is crucial for understanding their role in state policymaking.

There is considerable evidence that influence flows both top-down and bottom-up in the judicial hierarchy. Supreme Court decisions are precedential (Hitt), and the Supreme Court strategically audits cases to ensure compliance from lower courts (Caldeira, Wright, Zorn 1999). And the lower courts can influence the Supreme Court’s behavior too, mainly at the certiorari stage: justices consider signals sent by the lower courts, such as the ideology of the lower court,

or whether or not a dissent was written in a particular case, in order to determine whether to hear a case (Cameron, Segal, and Songer 2000; Black and Owens 2012). As Kenneth Vines (1963) described it, the judicial system is “essentially a complicated set of relationships among different levels of courts in the course of deciding issues.”

Particularly relevant to the research questions I seek to answer is the relationship between circuit courts and district courts: if it is the case that district court judges can act ideologically, essentially unconstrained by appellate courts, then perhaps it is that level of the courts that is important, rather than the appellate level. But district courts are subject to direct and frequent oversight from the court of appeals, because any litigant can appeal their case, so their decisions are reviewed routinely (Choi, Gulati, and Posner 2012). District judges are also motivated to agree with their circuit court to increase their chances of being promoted to the court of appeals (Hettinger, Lindquist, and Martinek 2006). Because of these constraints, district court judges try to make their judgments conform with what they perceive the appellate court wants.

The literature finds that district court judges and appellate court judges do have different motivations, and as a result, different behaviors. While district court judges are quite constrained, appellate court judges are relatively free to act ideologically. District court judges are responsive to the policies preferred by their circuit in specific case types, such as securities fraud, civil liberties, and economics (Randazzo 2008, Perino 2006). The ideology of individual district court judges does not seem to play a large role in decision making, because they are so constrained by judges above them in the judicial hierarchy (Zorn and Bowie 2010, Randazzo 2008). District court judges strategically anticipate whether their decisions will be reversed, or how their decisions may impact their ability to get promoted to a higher court, and act accordingly.

Finally, an important vein of the judicial politics literature focuses on the text of judicial opinions themselves, and asks whether the content or quality of opinions is meaningful above and beyond the outcome of the case. Because opinions are how judges communicate with other political actors, their content is important (Lax and Cameron 2007). If other branches are to understand and interpret what the court means, it is reasonable to assume that at least some of this knowledge will come from opinions, which may vary in how clear and easy to apply they are. Black et al. (2016) use text-reading software to determine the clarity of different United States Supreme Court opinions, and Goelzhauser and Cann (2014) use a similar method to analyze state Supreme Court opinions. These studies come to somewhat divergent conclusions: Black et al. find that the Supreme Court writes clearer opinions in highly salient cases where its decision contradicts public opinion, perhaps to better inform the public of the reasons behind their decisions, and to speak to other political actors who may object to the opinion. Goelzhauser and Cann compare elected judges to appointed judges, hypothesizing that elected judges in particular should strive to write clear opinions in salient cases, but find that they do not—though they note that it is possible judges in non-competitive elections simply have no incentive to do this, while judges in competitive elections do.

Other work considers a similar concept, doctrinal paradoxes, which are defined as opinions where every rationale for the Court's judgment is rejected by a majority (Kornhauser and Sager 1986, List and Pettit 2002, Hitt 2013). These paradoxes are difficult for lower courts to implement—how is a lower court to decide a similar case, if the appellate court cannot issue a clear decision to guide them? It stands to reason that they would also be difficult for other political actors to implement: for example, a state legislature trying to craft effective policy. The extent to which a legislature can understand what a court is saying, the better able it will be to

predict that court's future behavior. This is crucial for a district court endeavoring to have its decision upheld and its path to a promotion unhindered. And it is particularly important in the abortion context, as abortion cases are almost always highly salient.

Existing studies of the federal judiciary, then, offer two key principles on which I build my theory in Chapter 3. First, the literature clearly establishes the appellate courts as policy-motivated, independent courts that are infrequently audited by the Supreme Court. They therefore have a lot of power to issue final decisions in cases. Second, it shows that not all court decisions are created equally: some are easier to understand than others, which is very meaningful for other actors trying to implement the decisions. This project works to draw together these two concepts in order to show whether and when state policymaking is affected by the federal appellate courts.

D. Conclusion

Although the relationship between federal courts and state legislatures may not at first appear to be one of the more dynamic relationships in the American political structure, an examination of the separation of powers, federalism, and judicial hierarchy literature demonstrates that there are considerable links between state legislatures and state courts, and Congress and federal courts. The interplay between the branches has a very real effect on policymaking, shaping what options are realistically available to a strategic legislature.

However, none of these studies show if these relationships exist across levels of federalism. It is that relationship that is the focus of this dissertation. As this dissertation will show, much as Congress is influenced by the Supreme Court and state legislatures are influenced by state courts, state legislatures must make policy in the shadow of a federal court that has the power to strike down their legislative efforts—and may, depending on their ideological ideal

point, have a strong incentive to exercise that power. Ultimately, then, this project contributes to our understanding of both the separation of powers and federalism literatures by illuminating one of the key links between them.

Chapter 3

Theory

Here, I develop a theory of state legislative policymaking in the shadow of circuit court doctrine, and offer specific, testable predictions. Because the members of both legislatures and courts aim to create policies that are ultimately enacted, I assume that they will anticipate and be responsive to federal appellate court doctrine from the circuit in which they reside. First, I explore existing research addressing the importance of legislative incentives and resources on policy outcomes. Second, I use a series of spatial models to demonstrate how these factors shape a legislature's strategic decision-making. Finally, I present the theory underpinning this dissertation, and the hypotheses I will use to test it.

A. Understanding State Legislative Decisionmaking

As discussed in preceding chapters, there is robust evidence that legislators at both the federal and state levels anticipate how the judicial branch at the same level will behave when deciding when, how, and what kinds of policies to enact. Building on these existing theories of state legislative behavior, my theory of state legislature-federal court interaction posits that state legislators will be generally cognizant of federal appellate court doctrine and ideology, because it is a factor that can affect their policymaking success. Legislators want to maximize the benefits and minimize the downside risks of the time and effort it takes to successfully shepherd a bill through the legislative process. Strategically anticipating how the circuit court will handle a

particular bill can help them pass policies they can claim credit for later, and avoid wasting resources, inviting backlash, or creating bad law.

1. Legislative Incentives

There are a number of good reasons for a legislator to be mindful of how a court will treat a policy once it is passed. Legislators have multiple motivations: they are strategic actors generally working to enact “good” public policy, earn re-election, and achieve promotion to a higher office (Fenno 1973, Harrington 1992, Mitchell 1987, Wittman 1983. All cited in Langer & Brace 2005). Enacting policy requires the use of limited political resources, regardless of a legislator’s motivations, and legislators will not want to waste those resources (Boushey 2010). Therefore, it should be important to them that policies they pursue actually become and remain law: none of these goals are well served if the legislator does not actually legislate. Successfully passing a law allows the legislator to claim credit for it, which is useful both in terms of seeking re-election or seeking election to a higher office. It is certainly true that some bill introductions will simply be position-taking on the part of state legislators who are seeking public approval and re-election. But because re-election is not their only motivation, this will not control all of their behavior—while there is a baseline of policy activity that is simple position-taking, I should still be able to see variation above that baseline if and when policymakers anticipate and respond to court doctrine.

Further, while bill *introduction* may be position taking on the part of an individual legislator, it is unlikely that bill *enactments* will serve the same function. First, the resources involved in passing a bill are, of course, more significant than merely introducing one. Second, there are real downsides to passing legislation that is ultimately found as unconstitutional. In the abortion context, these bills are generally well covered in the media, and coverage of a circuit

court striking it down would be negative. This risks backlash or negative public opinion. Crucially, an ill-timed bill passage may also create “bad law”—that is, set a precedent that will be difficult to overcome later. A savvy legislative leader will forgo the opportunity to push a bill through this year if they can wait two years and have it be ruled constitutional (say, for example, the president and Senate are now of a different party, so judges with different ideological backgrounds will be appointed).

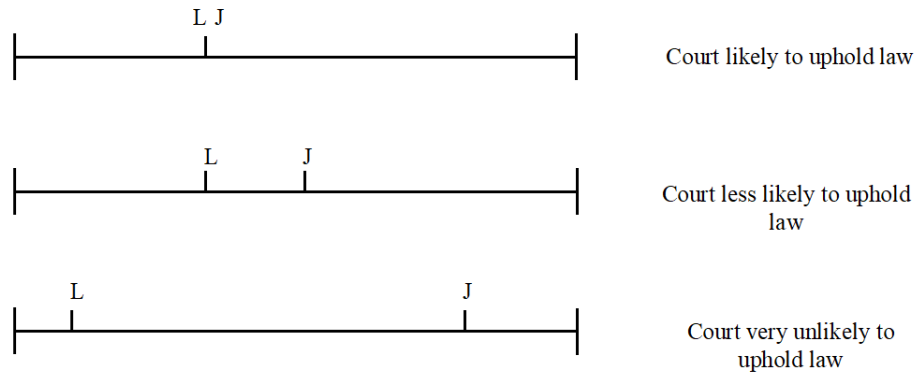
A legislator who cares about making policy doesn’t—and shouldn’t—see federal courts as a black box. The same applies to a legislature that is attentive to the costs and risks of passing unconstitutional legislation. Rather, they should see the courts as separate policymakers. Judges each have their own political preferences, and their role on the federal courts allows them to strategically interact with other members of their court and the other branches of government in order to pursue their policy goals.

2. Building a Framework of Legislative Decisionmaking

In this section, I use a series of spatial models to articulate the foundations of my theory, which takes into consideration ideology, ambiguity about the court’s doctrine and professionalism. I assume, supported by considerable research, that courts are motivated by policy (Epstien et al. 2001). Like other political actors, judges desire to have the policies they support enacted into law and work strategically to increase the likelihood of this happening.

First, consider a simple model in a state of perfect information. If the legislature (L) and circuit (J) have the same ideal point on a simple liberal-conservative ideological scale, the court will uphold the law, because it will be in alignment with the court’s own policy preferences. But as the distance between them grows, the court will become more likely to strike down the law:

Figure 3-1: Spatial Models of Distance

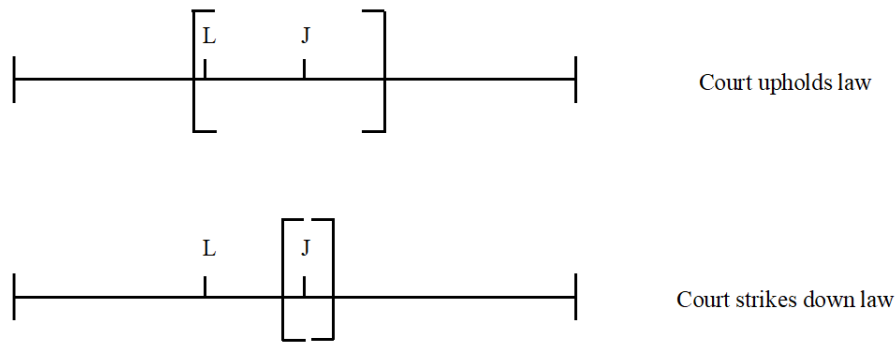


In Figure 3-1, the top row shows that a conservative state that wants to pass an abortion restriction should pass the law, because their ideal point is identical to the court, and therefore the court will uphold the law. In the second row, it is a more difficult choice for the legislature: there is a chance the law will be upheld, but a chance it will be struck down. Finally, in the last row, the conservative state should not pass the law: there is little chance the court will uphold it, so it makes strategic sense to avoid wasting legislative resources on a policy that will ultimately fail.

Of course, in reality it is not so simple for the legislature to predict where the court's ideal range is. Instead of pinpointing J, the legislature may only be able to generally ascertain the interval that J may be within. This interval is wider or narrower depending on the information the legislature has about the court's ideal point. Some legislature-circuit dyads might have a great deal of uncertainty about their relationship. Instead of accurately pinpointing J, legislature may only be able to roughly ascertain its location. The certainty with which a legislator or legislative body can accurately predict how a federal appellate court might decide a particular case will not be constant across all circumstances. Overall, in relationships where

uncertainty is high, state legislatures should become more risk-averse, and less likely to pass bills that are at a higher risk of being struck down.

Figure 3-2: Spatial Models Showing Uncertainty



In Figure 3-2, the brackets around J indicate the range where a law will likely be upheld. If L does not fall within the brackets, J will overturn the law. But if L does fall within that range, the law still may be overturned. The wider the interval between the brackets, the more likely a law passed by L will be overturned—because L is unsure of where J is located, and therefore can't craft a law that will definitely survive constitutional scrutiny.

Doctrinal clarity affects how accurately the legislature can predict the location of J—a very doctrinally clear court will have a narrow prediction interval, where the legislature can determine with reasonable accuracy what laws a court will uphold and what laws it will strike down. On the other hand, a more doctrinally ambiguous court will have a wider interval, because the legislature will have a difficult time honing in on exactly where J is located: perhaps it depends on what judges hear the particular case, if there is a lot of disagreement and

strategizing on the bench, or if their prior legal opinions are conflicting and confusing, making it difficult for the legislature to understand how they might decide a future case.

Finally, consider a last set of spatial models that demonstrates how the dynamics described above affect the legislature's strategic choices to pass legislation. This pulls together the concepts of both ideological distance and uncertainty:

Figure 3-3: Spatial Model of Bill Passage (Ideologically Close)

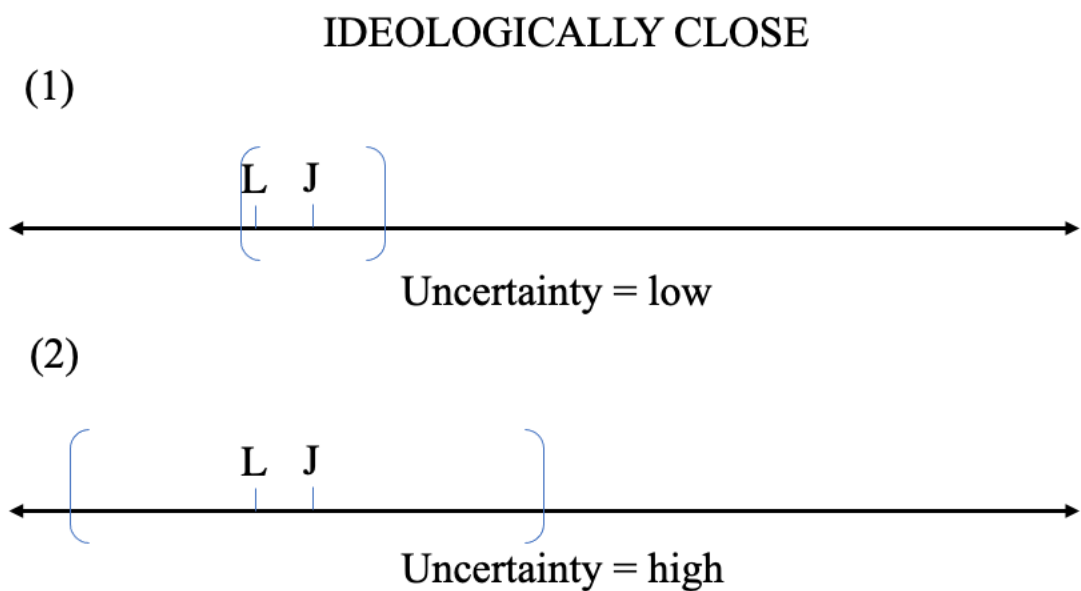
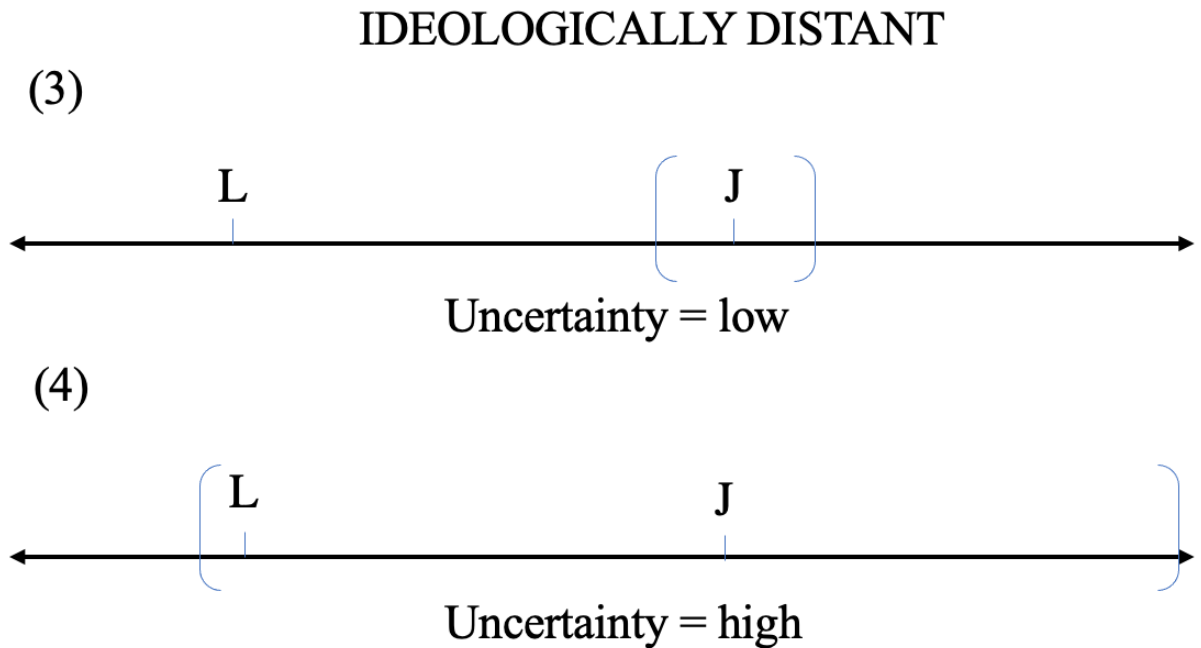


Figure 3-3 shows a legislature and court that are ideologically close. The first line (Figure 3-3(1)) shows a legislature with low uncertainty. The interval for predicting J is very small: the legislature can rest assured that it is highly likely the court will uphold the law. Of the four scenarios, this combination of distance and uncertainty results in the highest likelihood of bill passage because the court is ideologically close to the legislature, and has low uncertainty about this fact. Contrast this to (2), which shows a court and legislature the exact same distance apart as in (1), but here the legislature's uncertainty is much higher, and they are less able to

predict with confidence where J is located, and less able to strategically craft a bill that will pass constitutional review. The legislature might be fairly confident it is located near J, but the more uncertainty increase, the less sure of this it becomes, and the less likely it is to pass a bill.

Figure 3-4: Spatial Model of Bill Passage (Ideologically Distant)



The third and fourth figures show a legislature that is highly distant from the court. It is unlikely this court will uphold a law passed by the legislature. In Figure 3-4(3), it is easy for L to predict that J will not like the law, and it will act strategically and not pass a law. But in Figure 3-4(4), L is not sure where J is located, and will be hesitant to pass a law.

The most interesting comparison here is between figures two and four. These show the high-uncertainty legislatures, and show that the effect of uncertainty has different impacts depending on how far apart L and J are. For (3), L might be relatively certain it is close to J, but

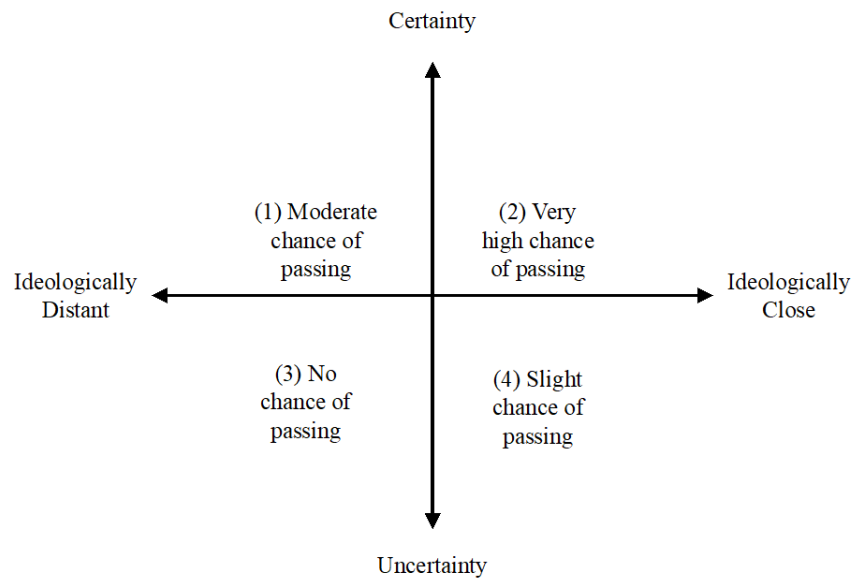
if uncertainty rises, it is less sure of this. But in (4), as uncertainty *increases*, there is a chance L will fall into the interval.

3. Ideology + Uncertainty

To summarize, the probability that a legislature will pass a bill depends on two things: (1) the likelihood that the circuit court will strike down the law and (2) the legislature's uncertainty about what the circuit court will do. The likelihood that the circuit court will strike the law is essentially a measure of the ideological distance between the state and the circuit court. If they are close together (and therefore ideologically aligned), it is unlikely the circuit court will strike down laws passed by a state with similar ideology (because they will be in alignment with the court's preferences). Uncertainty represents how well the legislature can predict the court's behavior.

The below diagram plots these two concepts on a chart showing how the legislature's best strategic option differs as ideological distance and certainty shift.

Figure 3-5: Ideology x Distance



Considering these dynamics in terms of real-life scenarios is helpful for fleshing out this portion of the theory. As in the figure above, for each, I assume that in each scenario, abortion restrictions will be introduced. I consider only conservative states here, as liberal states lack incentives to introduce abortion restrictions, but the same logic would apply to liberal states in a different policy context. There are many reasons why legislators may introduce bills that will not ultimately pass, but a strategic legislature will only invest resources in passing bills that have some likelihood of remaining in effect.

a. Conservative state – liberal circuit

A conservative state in a liberal circuit will likely *introduce* some number of abortion restriction bills regardless of the likelihood that they will get struck down. This is because individual legislators can still benefit from position-taking on these bills. However, when

legislative leadership is deciding what bills to focus on, they will not prioritize bills that are unlikely to survive appellate review. Therefore, we should expect fewer abortion restriction bills to actually *pass* in these situations. This scenario would fall into quadrant 1, above: the legislature has high certainty that their ideology is far from the circuit, and therefore will not pass bills.

For example, in 2016 Idaho introduced HB 1349, which would have imposed detailed reporting requirements on abortion clinics. This bill ultimately did not pass. Idaho is a relatively conservative state in the liberal Ninth Circuit. We can see the role of distance here: because they are ideologically distant, the bill would not have had a strong chance of surviving appellate review. Therefore, it would not be strategically wise for Idaho to invest resources in passing this particular law.

b. Conservative state – conservative circuit

This dyad is the most straightforward for a legislature. A conservative state legislature can decide to introduce and pass a variety of abortion restrictions with minimal concern about what the Court of Appeals will do. They can rest assured that their legislative efforts will not go to waste, because the Court will uphold the restrictions. An example of the conservative-conservative dynamic is Texas, which frequently passes abortion restrictions that are ultimately upheld by the Fifth Circuit. This would fall into quadrant 2: the Texas legislature is certain it is ideologically close to the Fifth Circuit, so it is willing to invest the legislative resources necessary to pass bills. They can be confident the highly conservative Fifth Circuit will uphold these bills. Their legislative effort then pays off when the bills remain law after appellate review.

c. Conservative state – ambiguous circuit

When circuit ideology is ambiguous, it is difficult for a state to know if a law will be struck down or upheld. The legislature does not know if they are located close to or far from the circuit court. This should lead them to become more cautious about spending legislative resources on a bill that may ultimately be struck down. These scenarios would fall into quadrants 3 and 4 above: the legislature is uncertain about the ideological distance between them and their circuit.

For example, the Sixth Circuit is generally considered a center-right circuit. It has some extremely conservative judges (Raymond Kethledge), and some very liberal ones (Karen Nelson Moore). In 2015, the Michigan legislature introduced HB 4145, which would have limited abortion coverage in Medicaid. At the time, Michigan was a more conservative state, with a Republican Senate and a Republican governor. The bill did not pass.⁴ The logic of this argument suggests that this may have been because Michigan legislators, although ideologically similar to the Sixth Circuit at that time, were uncertain about how the Sixth Circuit would decide the case.

B. Empirical Hypotheses

The above theory demonstrates the critical importance that ideology and uncertainty have on a legislature’s decision to pass a law. To summarize:

Table 3-1: Uncertainty x Distance

Uncertainty	Ideological Distance	Chance of Passing
High	High	Slight
High	Low	None
Low	High	Moderate

⁴ In contrast, a similar bill was introduced and passed in Iowa, which is in the conservative Eighth Circuit.

Low	Low	Very high
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Drawn from these findings, I develop specific, testable hypotheses I explore in Chapter 9.

Specifically, I plan to test the following hypotheses:

H1: State legislatures that are ideologically distant from their federal courts of appeals will pass fewer abortion restrictions.

H2: State legislatures that are certain they are ideologically distant from their federal court of appeals will pass fewer abortion restrictions.

H1 simply considers the role of distance. As distance between a state legislature and its circuit increases, the state should be less likely to pass an abortion restriction, because the risk it will be struck down increases. Adding to this, H2 flows from the idea that an appellate court that is ideologically distant from a state legislature it oversees will be likely to overturn bills that legislature passes, because the legislature's preferred policies will be contrary to the court's preferred policies. The legislature will therefore be unlikely to pass such laws, in an effort to avoid having them overturned.

C. Testing the Theory: Abortion as a Case Study

I plan to test this theory by examining how state legislatures engage in policymaking on a single specific issue that is frequently addressed by circuit courts. The logic here is to examine whether alignment between the politics of a state and the politics of a court of appeals allows the state more latitude to make policy and can therefore explain variation in state policy that is not explained by other sources. If constitutional law, as articulated by the circuits, requires and allows different things in different places, circuit decisions should impact states making policies that implicate constitutional rights—but would be unlikely to have the same impact on other

kinds of policies. Even though some of the resulting circuit splits might be ultimately resolved by the Supreme Court, given how few cases are ultimately reviewed by that court, it is impossible that all such circuit splits will be resolved, leaving a patchwork of doctrine for states to grapple with.

I've chosen to focus on abortion for a number of reasons. Most critically, abortion cases are common on federal circuit court dockets but are *not* generally heard in state courts. Although the state court system hears the vast majority of litigation overall, federal courts have jurisdiction over certain kinds of cases: for example, cases involving federal crimes, “diversity” lawsuits between citizens of different states, and cases involving the U.S. Constitution. Abortion cases are often heard by federal courts because they raise constitutional questions: litigation challenging abortion laws often invokes the First and Fourteenth amendments. There is also incentive for litigants challenging the law to file in federal court, as judges elected or appointed in a conservative state are likely also conservative, and unlikely to rule against an abortion law. Therefore, abortion is not a common issue in state courts. Additionally, abortion policies are passed and challenged with enough frequency to provide sufficient data to work with. Even setting aside 2019's unusually high influx of restrictive abortion laws, for the last 10 years abortion has been a key issue in state legislatures, with many bills being introduced and litigated.

The rationale for focusing on a single issue is twofold. First, if the dynamic I propose is, in fact, happening, we should expect to see it happen in this policy area. Since abortion policy is primarily decided by the state legislatures, but often ends up appealed to the circuit level, this allows me to come as close as realistically possible to isolating the state legislature-federal circuit relationship independent of other influences. Second, these interactions are complex and involve the interplay between a variety of institutions and actors—selecting one issue allows me

to explore it in depth, conducting both quantitative and qualitative analyses that will, ideally, support and complement each other.

Abortion is a useful policy to test the theory outlined above because it generates a lot of litigation at all levels of the federal courts. This litigation is generally appealed to the circuit level because of its salience and importance—so unlike with other issues, it is not the case that litigation ends with a district court decision. Second, it is a constitutional issue. While there is no legal bar to state courts arbitrating questions related to the federal constitution, abortion cases are usually filed in federal courts, which are seen as more politically independent and less biased than state courts (Bator 1981). The circuit court generally has the last word on determining the constitutionality of state abortion statutes. While there are several highly salient and publicized Supreme Court cases concerning abortion, there are a great many cases that terminated at the circuit level.

Chapter 4

Process Tracing

Before moving to quantitative tests of the preceding theory, it is worth considering whether there is any evidence that legislators consider or discuss federal appellate court doctrine while deliberating over policy options. Qualitative analysis of text from legislation and legislative history can help to understand how state policy actors themselves view the relationship between state policymaking and federal court doctrine, and how that relationship might change over time in a way that quantitative data analysis cannot.

In this chapter, I present findings from a new dataset comprised of legislative history documents from all 50 states, spanning the years 1991-2020. The key finding is that federal courts *are* a topic of discussion in legislative debates. Some of the citations or mentions of federal courts are merely symbolic or procedural, but others are—as I suggest in Chapter 3—substantive, in-depth discussions that indicate the legislature is concerned with the federal court’s likelihood of striking down a bill.

Further, this data also shows that discussions of this kind do not occur equally across the nation. Some states, in particular states with more professionalized legislatures, discuss issues relating to federal appellate court doctrine more than others. I revisit this finding in later chapters in order to explore the impact of professionalism in depth.

A. Data: Legislative History

My goal in this chapter is to examine circumstances where legislators themselves address, discuss, or otherwise mention federal appellate court doctrine, to understand whether they see this as a factor when determining what legislation to pass. To that end, I conducted extensive searches of news databases, and legislative history in order to determine how legislators conceptualize and talk about their circuit courts. This led to the creation of a new dataset of legislative history documents from all fifty states, from 1995 to the present.

I began by searching in both the Nexis Uni and Proquest News databases to see whether legislators comment on circuit court doctrine in comments to news organizations. First, I searched for “circuit court” within the same sentence as “legislator” or “legislature.” Reading the abstracts of the results showed that these generally fell into one of four categories: (1) comments from congressmen and women about the circuit courts (2) obituaries of local politicians who had served as state circuit court judges and/or legislators, (3) comments from legislators about state circuit courts, primarily regarding decisions in high profile criminal cases or (4) news reports about criminal cases where either a legislator or judge was involved.⁵

I next refined this search by focusing on specific circuits, and specifying “state legislator.” Two undergraduate research students conducted a similar set of searches in order to see if there was anything that had been missed. They also searched for all 50 state-circuit pairs (for example, “Kentucky legislature Sixth Circuit” or “Oklahoma legislature Tenth Circuit”). They, similarly, found mainly articles where legislators discussed circuit courts in contexts not relevant to this project. After these searches, it is safe to conclude there is little in

⁵ For example, in a press release, Lindsey Graham stated “I’m very supportive of the nominees submitted by President Trump to serve on the Ninth Circuit Court of Appeals.”
<https://www.judiciary.senate.gov/press/rep/releases/graham-on-ninth-circuit-nominees>.

news databases or legislative websites. Upon reflection, this is likely because these avenues of communication are directed to the public, whereas discussions of doctrine are more technical, detailed, and perhaps better left to the internal legislative process.

Next, I turn to legislative history. Finding legislative history information at the state level can be difficult: each state generally maintains its own legislative website, and the type and format of information available varies widely. However, LexisNexis has a State Legislative Bill History database. It contains a variety of documents generated during the lawmaking process, including drafts of bills, committee reports, committee analysis, debates, hearings fiscal data, amendments, and votes, from 1995-present for all states, and also from 1991-1994 for select states.

Here, because the database is already restricted to legislative history documents, I begin by searching for just “federal appellate court,” “federal court of appeals,” “U.S. Court of Appeals” and related terms, including the names of each circuit. The types of legislative documents available I consider is broad: the dataset includes committee reports, bill analyses, and bill tracking information. These searches also yielded some governors’ messages (most commonly veto statements), which I discard from the dataset because a governor’s veto statement necessarily comes after the legislature has decided whether to pass the bill.⁶ As discussed later, for a few particularly relevant bills, I also searched for the text of the bill, committee reports, and amendments on the relevant state website to examine the full trajectory of the bill.

⁶ Interestingly, these documents indicate that governors, too, consider circuit courts when signing legislation. For example, a veto message from the governor of Illinois called a bill “flawed” in the context of a Seventh Circuit ruling several months prior (2013 IL HB 183), and the governor of Nebraska noted that a bill relating to the DAPA program had been enjoined by a federal circuit court (2015 NE LB 623).

The final dataset is comprised of 400 documents. This is not specific to abortion-related bills: these bills cover a wide range of issues, such as campaign finance, dietary supplements, First and Second Amendment issues, criminal law, and election districting. While the main focus of this project is, as discussed previously, abortion legislation, it is useful to explore this broader set of issues in order to determine how legislatures discuss them. Interestingly, the bulk of these documents come from a few states: California, New York, and Florida in particular have both the largest amount of documents and the documents that go into the most depth. As discussed in more depth later, this is a first indication that highly professionalized legislatures may have more capacity to engage with judicial doctrine.

Below, I identify and discuss the four main categories identifiable in the data, before discussing them more in depth in following sections:

- 1) Not relevant: Documents that do not offer any insight into how state legislators think about federal courts.
- 2) Procedural/Administrative: Documents that address circuit courts in a non-substantive way, for example updating definitions or renaming buildings.
- 3) Symbolic: Documents that comment on circuit courts as a way for the legislature to signal something about their own ideology, but do not offer substantive analysis.
- 4) Circuit Reorganization: Documents that discuss creating new circuit courts.
- 5) Responsive: Documents that directly responded to a previous Court of Appeals ruling.
- 6) Discussions of Doctrine: Documents that had a substantive discussion of doctrine while a bill was being considered.

Before describing these in more detail, a brief note on terminology: while “ruling,” “doctrine,” and “ideology” describe similar concepts, it is important to distinguish them before continuing. A court ruling is simply the court’s judgment in a specific lawsuit. This could be a ruling on a motion (for example, a motion to dismiss or a motion for a preliminary injunction), or a final disposition in the case. It is a specific decision issued by a specific court. Legal doctrine, on the other hand, is a framework of rules, often drawn from different decisions, that structure how courts make those individual decisions. For example, consider admitting privileges. A legislature might discuss a ruling by citing the specific decision in *Planned Parenthood of Wisconsin v. Van Hollen*—perhaps considering the fact that a preliminary injunction did not bode well for the final fate of the legislation, or noting that legislation would need to be repealed in order to conform with the decision. On the other hand, a discussion of admitting privileges doctrine would involve discussing admitting privileges cases in other states, the general standards and legal logic applied in abortion cases, or perhaps the legal tests applied in right privacy cases more broadly. Doctrine concerns the legal process or structure that is applied in individual cases, not the result in an individual case.

Separate from both of these is the idea of ideology. Ideology can be inferred from both rulings and doctrine: for example, a judge or court with a conservative ideology is more likely to issue a ruling upholding the Second Amendment, and a judge who makes decisions by trying to discern what a text would have meant at the time that it became law is employing originalism, a conservative legal doctrine. Judicial ideology, though, simply describes the position of a judge or court on a left-right, liberal-conservative spectrum. Judicial ideology is not the law, but it shapes it. A discussion of ideology might look like a legislator saying “that judge is conservative,” or “this court is very liberal.”

All three of these concepts are relevant here. A legislature might think about or discuss any and all of these in trying to understand what decisions a circuit court might make in a specific case. Understanding ideology would reveal what a particular judge thinks about a given issue; understanding rulings would help a legislature understand how a court had decided similar cases in the past, and understanding doctrine would illuminate what kind of legal rules or tests a court would apply when deciding the constitutionality of a specific bill.

B. Initial Categorizations

1. Bills Irrelevant to this Study

Documents irrelevant to this study include governors' messages that cited a federal court decision, for example, from Chris Christie: "Thus, after a spirited legal effort, the Third Circuit's opinion that PASPA prevents the implementation of New Jersey's sports wagering law represents the binding and final judicial interpretation of federal law. While I do not agree with the Circuit Court's conclusion, I do believe that the rule of law is sacrosanct, binding on all Americans." (2014 NJ SB 2250); or Nebraska Governor Pete Ricketts, vetoing a bill that would have allowed undocumented immigrants to procure drivers licenses, citing the fact that there were lawsuits pending and a circuit court decision adjudicating similar issues (2015 NE LB 623).

Other documents not relevant to this study include federal court rules. Although they are not, by definition, legislative history, eight such documents did appear in my search. These documents contain information such as definitions about what an "adjudicated decision" means (Fla. Bar Reg. 6-26.2), when a litigant can appeal to federal versus state court (W. Va. R.C.P., Rule 54), and rules for serving affidavits (Ariz. Sup. Ct. R. 72). These clearly do not fit into any relevant categories because they are rules that govern how state courts operate, and thus do not

shed light on the relationship between state legislatures and federal courts. Finally, a handful of legislative histories included references to the United States Court of Appeals for the Armed Forces, which is part of the military judicial apparatus and is therefore entirely different.

2. Procedural/Administrative

A great deal of legislative history mentioning a federal court of appeals is procedural or administrative in nature. Oftentimes this just involved updating statutory definitions of “judge” or “judicial officer” (2007 TX HB 41, 2011 IL HB 5877); defining the scope of when a state Supreme Court can answer questions certified by the United States Supreme Court or Court of Appeals (2011 FL HB 7111); or renaming a building after a judge (2015 NY AB6627). Other similarly administrative actions include adding circuit court judges to the list of individuals who can perform marriages, or carry concealed weapons (for example, 2019 IL HB 911, 1996 NJ AB 2928, 2009 PA HB 270, 2001 RI SB 2197). Finally, some bills involved authorizing a state attorney general to respond to a court of appeals decision by appealing it (2001 MA 2484), or authorizing a circuit to hold an annual conference (2009 OH 242).

This category also includes resolutions congratulating newly confirmed appointees to the circuit court, or urging the confirmation of the same (2003 TX HR1201; AL HR 853, 2009, MS SCR 621, 2011). Generally these comments focused on members of the circuit in which the state resided: Texas, for example, congratulated the Honorable Edward C. Prado, a Texas attorney, on his confirmation to the Fifth Circuit; and Alabama commended Judge Joel Dubina on being named Chief Judge of the Eleventh Circuit (2009 AL HJR 852). Interestingly, several states had comments specifically on the nomination of Miguel Estrada, a 2001 nominee to the D.C. Circuit. For example, California had a report from the Senate Committee on Judiciary discussing Estrada’s qualifications and urging the Senate to allow a floor vote on his nomination (2003 CA

SJR 12). Nevada (2003 NV 1291) and Oregon (2003 OR HM 11) had similar, but briefer bills. Estrada experienced a highly polarized confirmation battle and was ultimately kept off the court by a Democratic filibuster.

3. Symbolic

Symbolic discussions are ones where the legislature mentions a court and their attitude toward it, but does not offer any substantive discussion or action. For example, Alaska “request[ed] that the United States Court of Appeals for the Ninth Circuit adjudicate those matters that come before the court in a fair and impartial matter.” This is an empty statement in terms of the practical effect it can have: the court certainly would not consider or respond to such comments. But, it does reveal something about the state’s relationship with the court: to request that the court decide impartially suggests the legislature is concerned there is a chance they may not—and therefore signals disagreement between the court and the circuit. Other symbolic bills include the Ohio General Assembly “express[ing] support” for the Ohio Attorney General’s decision to appeal a decision in the Sixth Circuit where Ohio lost (1999 OH SCR 35), and Georgia urging the Eleventh Circuit to reconsider a specific decision (2001 GA HR 50B). In these situations, the legislature’s actions have virtually no concrete impact, and are merely a symbolic statement of disapproval. But, they do show awareness of the court’s decisions and actions, and how it may differ from the legislature’s prerogatives.

4. Circuit Reorganization

A perennial issue discussed by state legislatures in the Ninth Circuit is the idea of dividing the district into two separate circuits. Over this 20-year period, several state bills were introduced and passed urging Congress to divide the Ninth Circuit into two circuits. Some of these are specific, asking the president and Congress to create a Twelfth Circuit comprised of

every Ninth Circuit state except California and Hawaii (which would remain in the Ninth Circuit) (1995 CA SJM 46), or Idaho requesting to become part of a new circuit in order to achieve “better regional representation,” (2004 ID HJM 4) whereas some more generally supported the creation of a Twelfth Circuit but did not mention specifics (1997 AK HJR 30, 1995 MT SJR 10). For example, Idaho wanted to become part of a new circuit in order to achieve “better regional representation.” While these legislative documents did not discuss doctrine specifically, like the symbolic documents discussed above, highlight the fact that state legislatures are aware of their circuit and may experience frustration with its decisions.

5. Discussions of Doctrine & Legislative Responsiveness

Some bills engage with federal circuit doctrine responsively: that is, they react and modify the law when a circuit court decision renders a law unconstitutional. The examples in this dataset are surely not the only examples of this happening: there is no requirement that a state has to say why it’s repealing a law, so it is entirely possible there are laws that are repealed without a discussion of why. It’s also possible for a state to simply leave an enjoined law on the books, though it will not be enforced. But again, *any* discussion of these matters at all is an indication that circuit decisions are something that the legislature is aware of.

About half of the bill histories I examined contained detailed discussion of federal appellate court doctrine. Some engaged mainly with the state’s own circuit, but others discussed relevant doctrine in other circuits, as well. These offer the clearest support that my theory is on the right track: not only are they aware of and discussing circuit court doctrine, but these are examples of legislatures explicitly trying to determine what kind of bill will be constitutionally permissible. It is these bills I primarily focus on in the next section.

C. Methodological Approach

The previous section outlines the various kinds of ways in which federal courts of appeals appear in legislative history, and provides some initial evidence of the validity of my theory. But in order to identify the causal mechanisms at work here, a more systematic assessment of the data is necessary. Process tracing—a qualitative method that offers a structured, rigorous way to examine how initial case conditions are translated into case outcomes—is particularly useful here. It can be used to help show that (1) an initial event/process took place, (2) a subsequent outcome occurred, and (3) the former was a cause of the latter (Mahoney 2012). Analogies about process tracing compare it to detective work: attempting to solve a crime by examining clues, suspects, motives, and events; or medical diagnosis, where symptoms and case histories are evidence, and different tests can distinguish between different kinds of infections. Beyond just asking if a particular cause and outcome are present at the same time, process tracing examines the links between the two to identify if a theorized causal mechanism exists (Owen 1994).

Generally, process tracing involves examining a single historical case. But this dissertation focuses on state policymaking in general, rather than one specific bill. At the same time, examining *all* bills introduced in state legislatures is unrealistic, as that number is far too high. Therefore, I draw on concepts and typologies from process tracing in order to impose structure on the qualitative evidence explored in the first half of this chapter, but I do not explicitly use process tracing as it is generally employed. This approach is appropriate here because my goal is to understand the mechanism behind the relationship between state legislatures and federal appellate courts. Process tracing allows me to weigh the evidence supporting my theory against other, rival explanations.

In order to do this, I closely examine all documents from the original dataset that fall into categories 3 and 4, “Responsive” and “Discussion of Doctrine,” which as addressed above, contain any legislative history documents that substantively discuss federal courts of appeals. As discussed in more detail later, this essentially means that all the cases considered here have already passed an initial process tracing test.

Process tracing defines four unique tests used to assess evidence: “Straw-in-the-Wind,” “Hoop,” “Smoking Gun,” and “Doubly Decisive.” Each of these has a specific kind of evidence necessary to “pass” the test, drawing on fairly intuitive logic about how the combination of uniqueness and certainty in particular pieces of evidence strengthens or weakens hypotheses. While these distinctions should not be viewed rigidly, discussing the differences of each test helps classify evidence and weigh the plausibility of a hypothesis (Collier). Drawing on process tracing allows me to categorize evidence in the legislative history as more or less probative, and more systematically identify the relationship between the evidence and my hypotheses.

First, Straw-in-the-wind tests are the weakest: “passing” or “failing” such a test can slightly increase or decrease the plausibility of a hypothesis, but they are neither necessary or sufficient to accept or reject a hypothesis. They can merely suggest that a hypothesis is more or less likely, but cannot provide (on their own) evidence that the theory is sound. Hoop tests are more demanding. A Hoop test identifies a necessary, though not sufficient, condition for the hypothesis to be valid: Therefore, failing a Hoop test eliminates a hypothesis, but passing it only provides slight evidence in favor of the hypothesis. It does little to rule out the possibility that an alternative hypothesis might be relevant. Next, the “Smoking Gun” test identifies a sufficient condition. Therefore, passing a Smoking Gun test convincingly confirms the validity of a

hypothesis. But, failing a Smoking Gun test does not definitively eliminate a hypothesis.

Finally, “Doubly Decisive” is the most demanding. A Doubly Decisive test identifies evidence that both is necessary and sufficient criterion for accepting a hypothesis. Therefore, if this test is met, we can be confident the evidence confirms one hypothesis and eliminates all others. These tend to be rare.

Virtually everything in this dataset passes the Straw-in-the-Wind test because they all mention, at least once, the federal court of appeals—and mentioning the federal court of appeals was how the data was gathered. To pass the Doubly Decisive test, I would need complete knowledge about the reason why a bill didn’t pass—which, of course, doesn’t exist. So, I focus on the Hoop and Smoking Gun tests. As Van Evera notes, Doubly Decisive tests in the social sciences are rare, but a Hoop test and a Smoking Gun test together can accomplish the same goal of illuminating causal mechanisms (Van Evera 1997).

To pass the Hoop test, the legislative history must have some substantive engagement with Court of Appeals doctrine. This is more than the Straw-in-the-Wind test, because it requires more than just a citation to the Court of Appeals, but a discussion of the doctrine. Therefore, while legislative history that congratulates a Court of Appeals nominee would pass the Straw-in-the-Wind test, it would not pass the Hoop test. To pass the Hoop test, the legislature must demonstrate some level of understanding of doctrine, case decisions, or ideology—such understanding is a necessary precondition to making decisions and strategy based on doctrine. Evidence passing the hoop test will include statements discussing specific cases; describing a case from another circuit; or discussing how a circuit usually rules on particular issues.

To pass the Smoking Gun test, the key evidence in the legislative history is an indication that the legislature specifically identifies the Court of Appeals as a reason not to pass a bill. This could include statements noting a difference in ideology between the Court of Appeals and the legislature that would make it difficult to pass the bill, citing constitutional concerns with the bill, or identifying the Court of Appeals as a reason to amend or modify the bill.

D. Analysis

In this section, I present the findings from my process-tracing informed qualitative analysis. Broadly, I find that appellate court doctrine is something that many state legislatures engage in. This engagement occurs on various levels of depth: sometimes it is brief, sometimes it is substantive. But the key takeaway is that state legislatures do have awareness of how the circuit courts behave, and often use that information to aid in their policymaking.

1. Hoop Test: Discussions of Doctrine

A bill passes the Hoop Test if engagement with doctrine goes beyond the procedural or administrative. For example, discussions of circuit court ideology, disagreement with court decisions, or discussion of specific cases would all qualify. Unlike the more stringent Smoking Gun test, it does not necessarily need to involve linking together Circuit Court doctrine with whether or not a specific bill should be passed, modified, or appealed. Simply discussing the courts, cases, and implications of them is sufficient to pass the Hoop Test.

California and New York, in particular, engage in a lot of discussion about doctrine, including doctrine from other circuits. For example, the following quotes are drawn from a variety of legislative histories from California and New York bills: “the term “right to publicity” originated in the United States Court of Appeals for the Second Circuit in 1953 [...],” “It should be noted, however, that the United States Court of Appeals [...] upheld the ordinance.” (2001

CA AB 1080); and “The United States Court of Appeals Ninth Circuit has ruled [...] the Controlled Substances Act of 1970 explicitly excludes non-psychoactive hemp from the definition of marijuana.” (2007 CA AB 684).

All of these show an engagement with rulings (as I define them above). The legislatures here are clearly aware of recent decisions affecting their ability to make policy regarding violent video games, benefits for domestic partnerships, and marijuana legalization, respectively. The committees considering these bills cite to specific court cases and offer a brief description of how these cases impact the law. Often these mentions are not connected directly to the specific bill at hand, but are part of a more general background section discussing various laws and decisions that affect the issue being discussed in the bills.

Additionally, there are instances of the California legislature engaging in discussions of doctrine—which, again, goes beyond individual cases and involves a discussion of legal processes or frameworks. For example, the California Assembly Appropriations Committee considered in detail a bill that would revise the process for contractors to appeal civil penalty orders (for violating, for example, wage laws). The comments begin by stating “The Federal Ninth Circuit Court of Appeals [...] declared that certain provisions of California’s statutory scheme for enforcing prevailing wage laws violate the due process rights of public works contractors” (1999 CA AB 1646). They then go on to discuss a case in the Federal Circuit that addressed due process issues in a similar context. The committee then concludes that existing law requires that due process requires more than a post-hoc remedy (a lawsuit), but a pre-emptive opportunity for the contractor to be heard (a prompt hearing). The bill requires the Labor Commissioner to commence a hearing within 30 days if a contractor files a written request for a hearing within 15 days of receiving a civil penalty order. This is a clear connection between doctrine and

legislation: the Assembly committee on Appropriations understands that there are due process issues surrounding the Labor Commissioner's ability to enforce civil penalties on contractors, and crafts a piece of legislation that meets these standards.

Similarly, in CA SB 900 (2002), the Committee on Public Safety issued a lengthy analysis of a bill addressing the sale of obscene material to minors. The Ninth Circuit discusses First Amendment doctrine, stating "if the statute is content-based, the courts must apply strict scrutiny to determine whether the statute is narrowly tailored to serve a compelling state interest and is narrowly drawn to achieve that end." This is critically important to the goal of the legislation, which is to restrict minors ability to access obscene books or other material through postal or package delivery. The committee then discusses at length a Third Circuit decision striking down the federal Child Online Protection Act (COPA), again discussing First Amendment issues. The analysis does not explicitly tie the contents of the bill, which offers "reasonable measures" to ascertain whether a person is 18 years of age, to the relevant doctrine, but it is clear that the legislature is at least aware of these relevant cases.

Moving beyond California to consider states with lower legislative professionalism, I find that other states, when commenting on circuit court doctrine, express general disapproval with decisions made by circuit courts, but don't explain or discuss how this relates to their own policymaking directly. For example, there are many legislative history documents critiquing a Ninth Circuit ruling on the Pledge of Allegiance. While the Ninth Circuit case was pending, the Virginia legislature "encourage[d] the United States Court of Appeals for the Ninth Circuit to uphold the Pledge of Allegiance in its current form" (2002 VA HJR 609). And after the decision was issued, other states weighed in to "Express[] the disgust of the Delaware House of Representatives at the decision of a panel of judges of the Ninth Circuit declaring the pledge of

allegiance to be unconstitutional” (2001 DE HR 70), and urge the Supreme Court to overturn the decision (2004 KY BR 417).

These examples show that the legislature is aware of circuit court doctrine—even beyond its own circuit—and has attitudes and preferences regarding it. They are less substantively meaningful than a discussion of doctrine that goes beyond just condemning a decision from another circuit—discussed in the next section—so they cannot conclusively demonstrate the accuracy of my theory. But their existence is important: they provide evidence that this is something legislatures discuss. If such discussions had been absent entirely, the data collected would fail to meet the Hoop Test, and the hypotheses developed in previous sections would be eliminated. Here, satisfaction of the Hoop Test cannot prove the hypotheses are valid, but when taken in combination with the evidence from the Smoking Gun test—discussed below—provide a strong indication that there is validity to causal mechanisms underlying my theory.

2. Smoking Gun: Constitutional Concerns & Legislative Responses

The Smoking Gun test can be satisfied by *directly* tying together legislative goals and appellate court rulings or doctrine. For example, a legislature might identify a specific conflict between the Court of Appeals doctrine and a bill, or identify a Court of Appeals ruling as a reason why a bill should not be passed, should be revised, or or should be repealed.

In three bills introduced in California, the state legislature engaged directly in the need for constitutional concerns to be addressed. For example, in CA AB 1792 (2003), a bill designed to prohibit the sale, rental, and distribution of violent video games to minors, the Assembly Committee on Arts, Entertainment, Sports, Tourism, and Internet Media first discusses the existing law, citing Supreme Court and Eighth Circuit precedent, which holds that the government can’t limit minors’ access to videogames. Specifically, the committee report states.

“The State of California would be required to meet this same standard for this measure to be upheld by the courts. Based on the studies submitted to the committee, the state could not meet this test [...] neither the author nor proponents were able to produce any research that will meet this standard established by the Eighth Circuit” (2003 CA AB 1792).

As a second example, a subsection in a lengthy California legislative history summary from the Assembly Committee on Public Safety titled “Will this bill pass strict constitutional scrutiny?” directly tackles the constitutional questions at issue. It describes First Amendment doctrine, including the evidence a state must have in order to restrict speech. The in-depth discussion cites Supreme Court, Ninth Circuit, and Second Circuit cases. In conclusion, the analysis notes “According to background material submitted by the author, ‘the Ventura County District Attorney’s Office has researched the issue and determined that the proposed statute would not violate the First Amendment.’” This, again, is a clear example that the legislature is not only citing court cases, but interpreting, analyzing, and applying them to the issue at hand (1999 CA AB 1853).

Third, the California Assembly Committee on Insurance considered the role of federal and state courts in the context of a bill that would modify insurance rules. It stated that “Federal courts must follow the law as interpreted by California courts.” This comment was followed by a discussion of California law on invoking estoppel against an insurance company, concluding that the bill at issue was consistent with existing caselaw on that issue because the California Court had not ruled on the estoppel question, and therefore the Ninth Circuit could not either (1999 CA SB 622). Although this dissertation does not analyze the role of state courts, this brief excerpt shows the sophistication of California committees.

There are also a plethora of documents that discuss responsiveness to specific Circuit Court decisions. Such responsiveness shows that the legislative branch is not only aware of court of appeals decisions, but analyzes them in the context of current law, and tries to make the two align, likely to avoid litigation or constitutional conflict. Generally, these responses are brief. For example, the Senate Budget and Appropriations Committee Report for NJ SB 2460 (2014) states explicitly that “this bill is in response to the decision of the United States Court of Appeals for the Third Circuit in *NCAA v. Governor of New Jersey*, 730 F.3d 208 (3d Cir. 2013). The bill repeals several provisions of a law the Third Circuit had ruled unconstitutional. Similarly, the Oregon Legislative Assembly repealed much of a law that the Ninth Circuit had found unconstitutional because “leaving unconstitutional statutes in the Oregon Revised Statutes can be a trap for the unwary.” Similarly, consider an Iowa bill that “removes certain provisions held to be unconstitutional by the United States Courts of Appeals for the 8th Circuit” (1999 IA HB 2409). The provisions of the bill are not discussed in the committee analysis. The reasoning for the legislation is clear (to comply with the Eighth Circuit), but there is no discussion of doctrine.

These responsive bills overwhelmingly came about in response to a decision issued by the circuit overseeing that particular state. However, there were some occasions where a state commented on or responded to a different circuit. For example, three state legislatures responded to a Ninth Circuit decision concerning the pledge of allegiance. These bills and resolutions simply “expressed [] disgust” (DE HR 70, 2001); urged the Ninth Circuit to reconsider (2002 VA HJR 609), and urged the Supreme Court to get involved (2004 KY BR 417). They did not involve any changes to the laws in those states—but do show that legislatures are apprised of at least some, highly salient, circuit court decisions.

Finally, some bills indicated a more proactive approach, addressing issues with a law before a lawsuit questioning it was filed. This shows very deep engagement with doctrine: the legislature is not just responding to the court striking down a law, but is recognizing when federal appellate court doctrine is inconsistent with their laws, and making changes accordingly. For example, a 2016 Colorado bill addressed a 2016 Tenth Circuit decision by re-engrossing a bill to account for the Court’s interpretation of the Fair Campaign Practices Act. The legislature’s summary stated “in light of this opinion, section 2 of the bill makes existing disclosure and reporting requirements otherwise applicable to an issue committee inapplicable to a “small sale issue committee.” As a result, several sections of the bill relating to small scale issue committees were modified (2016 CO SB 186).

Similarly, a Connecticut bill was designed to change the law in light of a decision from the D.C. Circuit– which is particularly intriguing given Connecticut is in the Third Circuit. It would have “require[d] each telephone company to offer nondiscriminatory access to any advanced services offered by it or its affiliates as required by the United States court of Appeals for the District of Columbia.” (2002 CT SB 408). The bill did not pass, but indicates again the importance of legislative professionalism: unlike the Ninth Circuit pledge of allegiance case discussed above, this case was not highly salient or publicized. It is unlikely that a less professionalized legislature would be so capable of remaining apprised of doctrine in different circuits.

Taken together, these bills are all examples of situations that pass the “Smoking Gun” test – they are clear demonstrations that legislatures are not only aware of circuit court doctrine, but analyze and interpret it with the goal of having it inform their legislative decisionmaking and strategizing. The plethora of bills from California that discuss rulings and doctrine in depth also

indicate that legislative professionalism may be at play: as I investigate later in Chapter 8, a more professionalized legislature may be more likely to have the capacity to conduct legal research and make decisions accordingly.

3. “Admitting Privileges” in Florida and New Mexico

In this section, I discuss two specific bills in greater depth to examine how the theory presented in Chapter 3 and discussed above plays out over the course of the legislative process. Though this is just one example, it is illustrative of the foundational mechanisms of the theory I will test in later chapters.

The issue of admitting privileges provides a uniquely useful way to approach the smoking gun test. In the early 2010s, admitting privileges laws, which require an abortion-providing physician to have the right to admit patients at a local hospital, began to be passed in many states. Missouri passed the first of these laws in 1986 and it wasn't until 2010 when Americans United for Life began drafting admitting privileges bills and encouraging states to adopt them that they became common. By 2012, 5 states had passed such laws, and by 2014, 11 states had.

What makes this issue particularly interesting is that at this time, the constitutional landscape was very uncertain—it was not until *Whole Woman's Health v. Hellerstedt* was decided in 2016 that the issue of admitting privileges became (somewhat) settled. Before then, different circuits had issued drastically different opinions: for example, the Fifth Circuit found such provisions constitutional but the Seventh Circuit found an almost identical law finding it an undue burden. Several states introduced bills on this topic around the same time as these lawsuits were proceeding, offering fruitful ground for understanding how legislatures think about appellate court doctrine.

On February 12, 2016, HB 1411 was introduced in the Florida legislature. It contained several policies relating to abortion: revising the requirements and criminal punishments for disposal of fetal remains, requiring the Agency for Health Care Administration to develop and enforce rules relating to license inspections, requiring abortion-providing physicians to have admitting privileges at a local hospital, and limits public funding for organizations that own, operate, or are affiliated with a licensed abortion clinic. After introduction, the bill was referred to the Health Quality Subcommittee, the Health Care Appropriations Subcommittee, and the Health and Human Services Committee.

Each committee produced its own bill analysis, and there is a fourth analysis that summarizes the final bill. Each committee analysis contains an identical summary of the current federal law on abortion, including citations to and discussions of *Roe* and *Casey*. They discuss the standards that guide the Supreme Court's interpretation of abortion law, describing the standard in *Roe* as "Using strict scrutiny, the Court determined that a woman's right to an abortion is part of a fundamental right to privacy guaranteed under the Due Process Clause of the Fourteenth Amendment," and *Casey*'s undue burden standard as "health regulations which impose undue burdens on the right to an abortion are invalid." They also highlight the space *Casey* left for abortion restrictions, stating "not every law which makes the right to an abortion more difficult to exercise is an infringement of that right." This framing could well be intentional, as it implies that there are some laws that make abortion more difficult but are constitutionally permissible.

The three committee analyses also discuss current litigation on admitting privileges. They note that passage of HB 1411 would make Florida the eleventh state to enact such a law, and that "eight of these laws generated constitutional challenges." They note that

the issue is largely undecided: some district courts overturned such laws and others upheld them, while the two cases that made it to the appellate court by this time (a challenge to a Wisconsin law was heard by the Seventh Circuit and a challenge to a Texas law was heard by the Fifth Circuit) reached entirely opposing conclusions on this issue. The bill analysis frames the admitting privileges issue as an open question, mentioning the fact that there were pending cases on the issue. It specifically notes that while a district court in Alabama (which, along with Florida, is in the Eleventh Circuit) ruled a similar law unconstitutional, “final orders have not yet issued and the case[] [is] ongoing.”

Each committee analysis contains a section addressing the effect of proposed changes that would occur as a result of the passage of HB 1411. These discussions do not directly discuss circuit court rulings, ideology, or doctrine. They conclude by again referencing the possible constitutional issues, specifically citing *Whole Woman’s Health v. Cole*, 790 F.3d 563 (5th Cir. 2015), the case that would ultimately bring admitting privileges to the Supreme Court (as *Whole Woman’s Health v. Hellerstedt*).

The Health and Human Services Committee offered one amendment, which allowed physicians to be exempt from the admitting privilege requirement if the clinic has a written transfer agreement with a hospital within reasonable proximity to the clinic. Although the is not cited, such transfer agreements had been discussed somewhat favorably in other similar cases, such as *Planned Parenthood of Wisconsin v. Van Hollen* (7th Cir. 2013), which ruled an admitting privileges provision unconstitutional, but did not question a pre-existing transfer agreement requirement. Finally, the summary analysis published with the passage of the bill contains substantively the same discussion of abortion law, though it deletes the section about constitutional issues that appears at the end of the committee analyses.

HB 1411 was ultimately passed and signed into law by Governor Rick Scott. Various pro-choice groups opposed the law, and Planned Parenthood and the ACLU quickly filed lawsuits: Planned Parenthood attacking the admitting privileges and public funding provisions, and the ACLU attacking the state-mandated counseling and parental notification provisions. Both resulted in injunctions preventing the challenged portions of the law from going into effect.

In 2017, Florida State Senator Jeff Clemens and Representative Lori Berman, both Democrats, each filed a bill in their respective chambers striking unconstitutional language from the law. They critiqued the legislative process, arguing that the original bill was not heard by the Judiciary Committee, and constitutional concerns were simply dismissed by supporters of the bill. Senator Clements stated: “It’s unfortunate that the majority in the Legislature continues to pass unconstitutional bills.”⁷

New Mexico HB 437 (2015) addressed just one of the issues present in the Florida bill: admitting privileges. In a bill analysis prepared by the Legislative Finance Committee, there was a full discussion of the constitutional issues in addition to a brief financial analysis. In a section titled “significant issues,” the analysis identifies the constitutionality of the bill as the key issue. The legislative history offers an analysis from the Attorney General’s Office, which commented that the law “may be unduly burdensome on the pregnant woman” because many New Mexican women live in rural areas, and the requirement that abortions can only be provided within 30 miles of a hospital may be too restrictive. The Administrative Office of the Courts provided a detailed discussion of the lawsuits in Texas, Alabama, Mississippi, and Wisconsin that were “winding their way through the legal system,” highlighting the different outcomes in

⁷ <https://www.plannedparenthoodaction.org/florida-alliance-planned-parenthood-affiliates/press-releases/sen-jeff-clemens-and-rep-lori-berman-file-bill-to-strike-unconstitutional-language-from-hb-1411>

different circuits and concluding “it is likely that the issue of the constitutionality of the admitting privileges provision of HB 2 [a Texas law] will end up before the US Supreme Court.”

The New Mexico analysis did not come to a firm conclusion on the constitutionality of the bill. At the time it was introduced, the Tenth Circuit had not yet heard or decided any cases on this issue. So it would be difficult for the legislature to predict exactly what the Tenth Circuit would do. The bill died in committee without any amendments, hearings, or votes.

These examples demonstrate many of the component parts of the theory developed in Chapter X. The Florida legislature was clearly aware that the case would be headed for litigation (and it was correct: Planned Parenthood filed a complaint on June 29, 2016 - though the admitting privileges component was not challenged as it had been struck down in *Whole Woman’s Health v. Hellerstedt*, which was decided by the Supreme Court two days prior to the filing of the Florida lawsuit). Its discussions of constitutional issues were cogent, accurate, and detailed, and perhaps contributed to the Health and Human Services Committee’s decision to add a transfer agreement provision to the bill. Lastly, the Florida legislature is a relatively professionalized one: although it is part-time, it has high staffing levels and expenditures per legislator, both of which contribute to an ability to conduct more research about bills (Bowen & Greene).

E. Conclusion

This dataset is a rich example of what legislators choose to research, consider, and debate when drafting legislation. As these legislative histories make clear, federal doctrine does matter to state legislators and state legislatures: they spend valuable time contemplating and discussing it during the legislative process. It also shows that more well-resourced states like California,

New York, and Florida are capable of doing this more often and in more depth. This suggests that legislative professionalism plays a role in how a state legislators can understand and predict court behavior.

Taken together, these legislative histories provide initial confirmatory evidence of the mechanism underlying the central theory of this dissertation: the examples examined here show clearly that federal appellate court doctrine is something that at least some legislators are aware of and consider when making their strategies.

This dataset cannot, of course, show whether federal court doctrine plays a relevant but unseen role in policymaking: bills that could have been introduced but were not; bills that were drafted specifically to avoid court review; and bills where federal doctrine was discussed in venues other than the committee reports that are accessible on Lexis. However, insights from process tracing allow me to take a useful first step toward understanding the mechanisms underpinning the theory I developed in Chapter 3.

In the next chapter, I supplement these findings by taking an entirely different approach. While Chapter 4 deals with how state legislatures discuss the courts, Chapter 5 deals with how the courts discuss state legislatures. I view this pair of chapters as working in tandem: by illuminating the dialogue between these two institutions, it becomes easier to see that there is a real relationship between them—one where, as discussed in this chapter, state legislators consider federal appellate court doctrine while legislating, and as discussed in the next, federal appellate courts view state legislators as policy-driven, strategic actors—before moving to a focused quantitative analysis that investigates how these linkages drive bill passage.

Chapter 5

Background Data

A crucial component of understanding the relationship between state legislatures and appellate courts is the cases decided by appellate courts from 1989-2010. These decisions are key to understanding the relationship between legislatures and courts because they are essentially the only “conversations” these institutions have on these issues. Legislators and judges do not formally interact outside the context of deciding cases about state laws. While legislators might discuss policy objectives and bill drafts with outside lobbyists and members of the executive branch, it would be considered unacceptable for them to do so with a judge. Further, the federal courts cannot opine on an issue before a case reaches them: while some state courts can issue advisory opinions without a case in front of them, the federal courts are required by Article III of the Constitution to decide only an actual “case or controversy.” Because of this, the only formal signal legislators have about a courts’ views on a bill is through rulings. Therefore, we must turn to cases heard and decided by the appellate court for insight into their understanding of how legislatures behave.

This chapter outlines that data. It explains how I collected these cases, and the distribution of cases across circuits, states, as well as some trends over time. Finally, I conclude the chapter with some initial tests of the relationship between state courts and state legislatures, in order to understand under what conditions an appellate court overturns a state abortion restriction. These distributions, trends, and decisions are the key pieces of information state

legislators consider when legislating, so it is worth investigating what signals and messages the appellate courts are sending the states.

The cases dataset is composed of cases that were heard by the federal appellate courts, and therefore necessarily deals only with laws that passed state legislatures (not laws or policies that were introduced but ultimately failed to be enacted). Because abortion cases are so common, and have been heard in every circuit at least once, the analysis in this chapter can address a preliminary set of questions, such as:

- (1) How often are state legislatures passing abortion laws reversed?
- (2) Do reversals occur more often in particular circuits?
- (3) What trends do we see over time?

Answering these questions begins to shed some light on the dynamic between how federal appellate courts can influence state legislative policymakers, and thereby shape state policy.

A. Data: Abortion Cases 1989-2010

Abortion cases were found using Westlaw, which is a comprehensive collection of over 40,000 databases of case law, statutes, and administrative codes. It includes all federal court of appeals cases. To gather these data, undergraduate research assistants searched for “abortion” in all cases with the jurisdiction “Federal Courts of Appeals” from 1989-2010. The search process yielded over 5,000 cases; quite a large number simply because it included *any* case that contained the word abortion at least once. They then skimmed these cases to determine their relevance by using the synopsis that Westlaw provides, which summarizes the key issues in the case. A relevant case was defined as one where the appellate court is deciding on a law related to abortion regulation, as opposed to other cases that used the word abortion in another context.

After this initial relevance check, the dataset consisted of just over 150 cases. These were then read in detail and coded to extract the following information: case name, circuit, date decided, whether a state law was overturned, the procedural posture of the case, and the panel of judges who issued the decision. Each case was reviewed by two of my four research assistances, and discrepancies were discussed among the full team of four research assistants and myself. At this stage, after reading the cases more thoroughly, we eliminated several other categories of cases that are not relevant to this study: for example, cases that dealt with federal laws or city ordinances, because these are not passed by state legislatures, or tort or tax claims that dealt with abortion. This left a total of 81 cases that fit my criteria.

I confirmed these amounts by running similar searches in LexisNexis, a competing legal database. A search for “abortion” in all federal appellate courts from 1989-2010 yielded 5,428 cases. I did not review these cases individually for relevance, but instead used search restrictions on Lexis to estimate how many of these cases addressed abortion legislation specifically. I restricted the Case Type to “Civil,” the “Practice Area and Topic” to Constitutional Law, and restricted the “Motion Type” to include only cases that were final decisions on the merits, which resulted in 227 cases. After searching for the word “legislature” in this dataset, to capture cases that address bills introduced in state legislatures, 82 cases were left—almost the same amount as in the carefully reviewed set from Westlaw.

Of the 81 relevant cases, the state law was entirely overturned 35 times, or about 43%. In an additional four cases, a state law was partially overturned. I define a partial overturn as where part of the law is overturned as unconstitutional, but another part is upheld. Because this is a significant rebuke to the state legislature, going forward I group these as overturns.

In the following sections I use this data to explore trends in these decisions, beginning with patterns in specific circuits, before moving to discuss states, and trends over time.

1. Circuits

There are notable and important differences between the federal circuit courts. To start, circuits have different caseloads. This is primarily because circuit boundaries have not been adjusted since the 1980's and populations have changed rather significantly since then. The Ninth Circuit's 29 judges, for instance, cover over 20% of the U.S. population whereas the 13 judges of the Third Circuit are responsible for around 7% of the population. Interestingly, this creates a situation where three judges can rule on a case that influences large subsets of Americans. Further, cases in California, for instance, can shape policy and law in ideologically divergent states like Montana because of the structure of the circuit system.

In addition, there are differences in the types of cases that circuits hear. The Second Circuit, for example, hears more terrorism cases than other circuits because it hears appeals from the Southern District of New York, which covers Manhattan. The Ninth Circuit also has an unusually large caseload, because of the number of states it covers. Figure 5-1 shows the circuits, the number of cases that they heard, and the states they are responsible for.

Figure 5-1: Map of Circuits and Cases

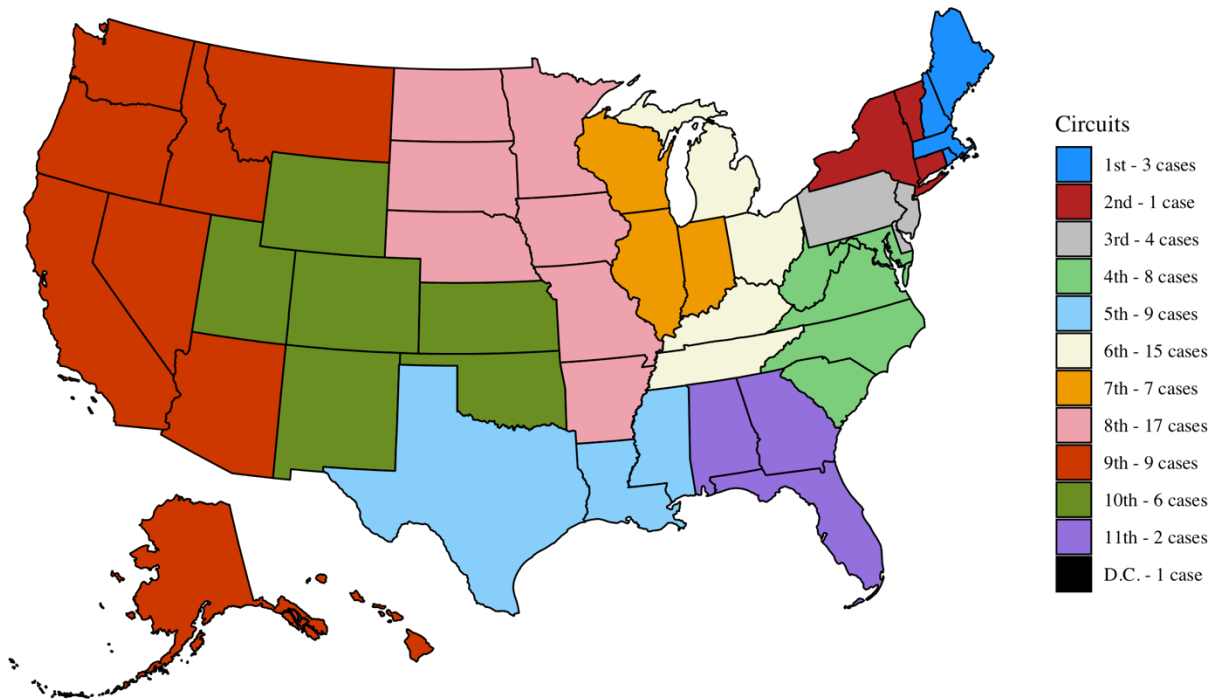
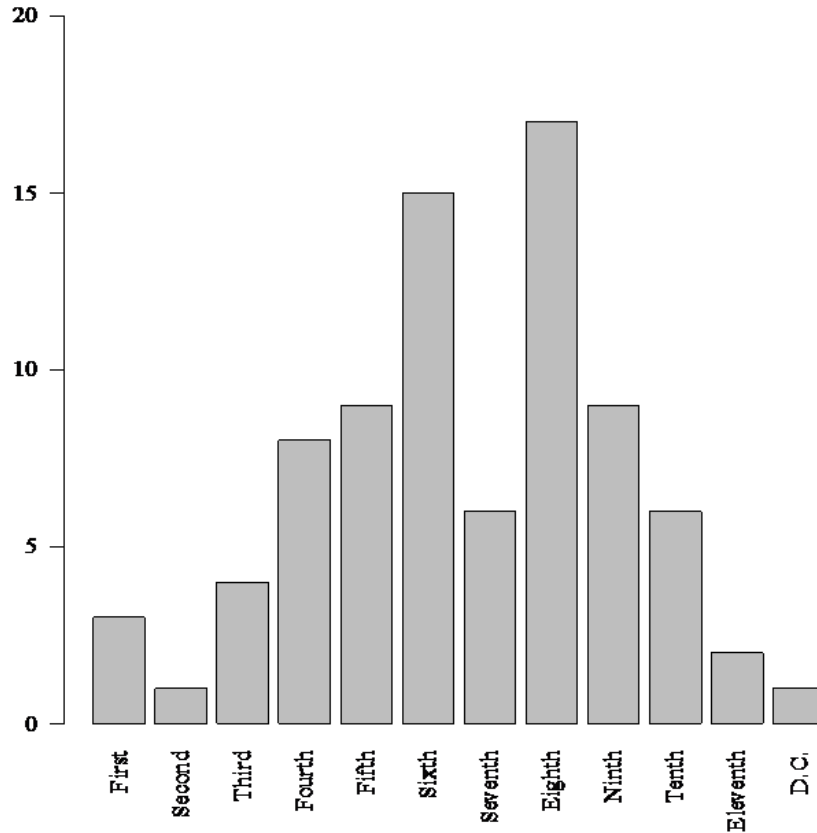


Figure 5.2 shows the total number of abortion cases heard by each circuit during this period. There are notable differences in the number of abortion cases across circuits, which are primarily explained by the distribution of states that different circuits oversee.

Figure 5-2: Abortion Cases by Circuit



While all circuits did hear at least one abortion case over the period of the data, the number of cases heard was not evenly distributed: the Sixth and Eighth Circuits, for example, heard far more cases than the Second, Eleventh, and D.C. Circuits. This is unsurprising as these cases deal with laws that restrict abortions, and such laws are more likely to be passed by conservative states. The Second Circuit, which is comprised of Connecticut, New York, and Vermont, heard one case during this time period.⁸ The amount of litigation seen by each circuit is not something the circuit has any control over: it is entirely a function of what laws states pass

⁸ That is not to say these courts heard no cases concerning abortion. For example, the Second Circuit decided *State of New York v. Sullivan*, 889 F.2d 401 (2nd Cir. 1989), a major case which was ultimately heard by the Supreme Court. But this case dealt with a federal regulation that the state of New York was challenging.

and who sues the state because of them. Table 5-1 below breaks this down further, to show how many of these cases resulted in a law being upheld or overturned in each circuit.

Table 5-1: Circuit Cases and Rulings

<i>Circuit</i>	<i>Overturns</i>	<i>Upholds</i>	<i>Total</i>	<i>Percent Overturned</i>
<i>First</i>	3	0	3	100.00%
<i>Second</i>	0	0	0	0.00%
<i>Third</i>	3	1	4	75.00%
<i>Fourth</i>	3	5	8	37.50%
<i>Fifth</i>	5	4	9	55.55%
<i>Sixth</i>	6	9	15	40.00%
<i>Seventh</i>	2	4	6	33.33%
<i>Eighth</i>	8	9	17	47.06%
<i>Ninth</i>	5	4	9	55.55%
<i>Tenth</i>	4	2	6	66.66%
<i>Eleventh</i>	0	2	2	0.00%
<i>D.C.</i>	0	1	1	0.00%
<i>Total</i>	39	42	81	48.12%

The Sixth and Eighth Circuits, which heard the most cases, overturned some laws, and upheld others. There are no large outliers of decisions (either upholds or overturns), though that may be due, in part, to the low number of observations.

2. States

Figure 5-3: Cases Across States

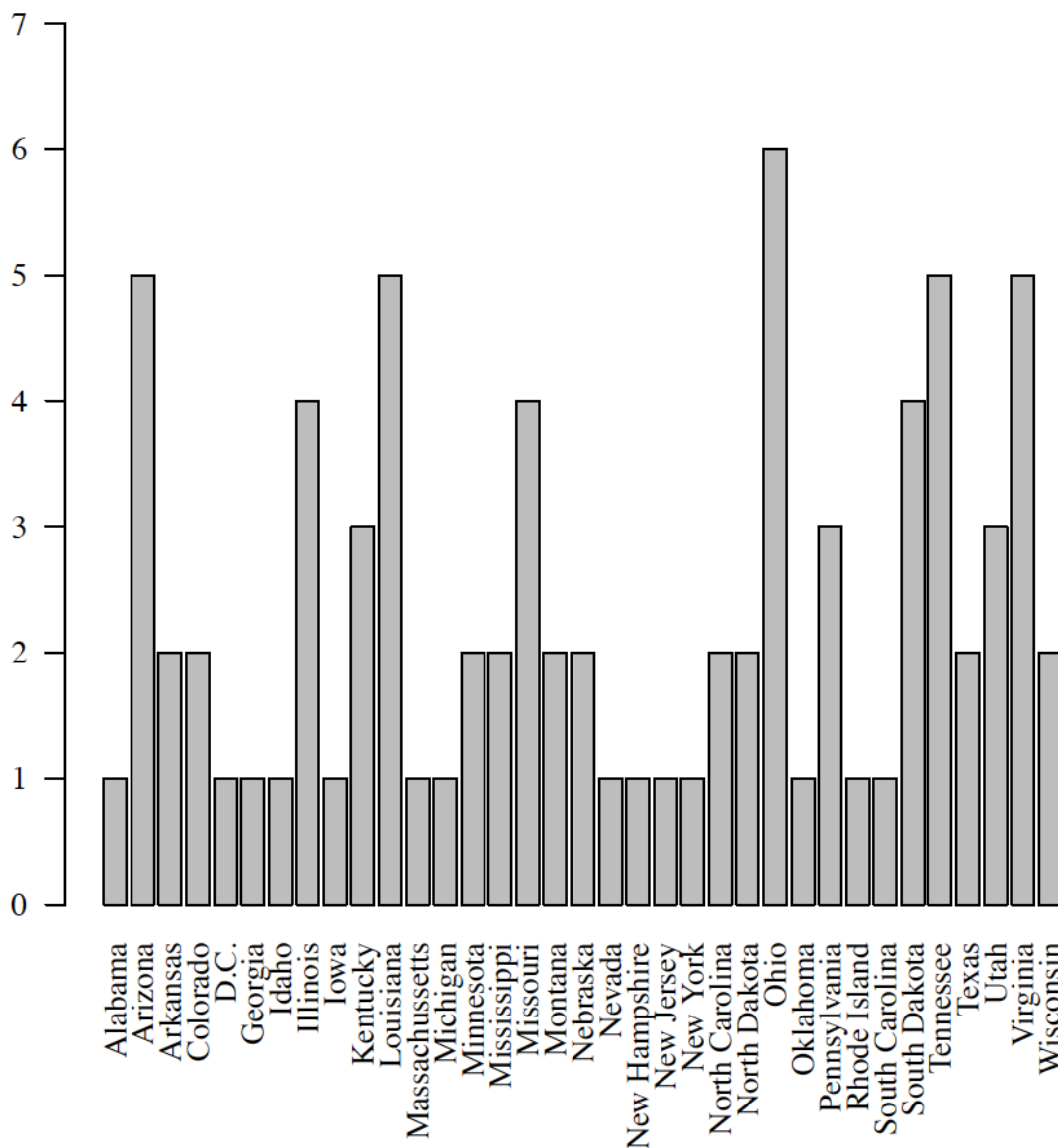


Figure 5-3 shows the distribution of cases across states. As expected, a small subset of states is primarily responsible for most of the litigation activity on abortion. For example, Ohio was the defendant in six lawsuits during this time period, and Virginia, Tennessee, Louisiana, and Arizona were the defendant in five. In some ways, this is not surprising. Ohio and Tennessee are both conservative states in the relatively moderate Sixth Circuit. It would make

sense for a conservative state in a moderate but conservative leaning circuit to pass abortion legislation, with the small but not zero chance it will be struck down. On the other hand, Louisiana is a conservative state in the conservative Fifth Circuit. It has experienced a lot of litigation compared to Texas and Mississippi, two states in the Fifth Circuit that were party to just two lawsuits. Empirically evaluating these differences is the subject of later chapters.

Any given state's success rates in litigation was generally quite mixed. Ohio, for example, had state law overturned in three cases, and upheld in three others. Louisiana and Arizona each had state law overturned in three cases, and upheld in two others. In fact, in almost all situations where a state was a defendant in more than one lawsuit, they had at least one "win" and one "loss" (exceptions were Texas and North Dakota, both of which had two abortion laws upheld; and Mississippi and Nebraska, which each had two overturned). This is interesting: it indicates that states have a less than perfect record predicting how courts will rule on abortion cases. Such a failure to accurately predict how the court will rule suggests that, as the theory in Chapter 3 and findings in Chapter 4 contemplate, looking at factors like legislative professionalism and doctrinal uncertainty—which may drive this finding that a state cannot predict with perfect accuracy what an appellate court will do—is a useful approach.

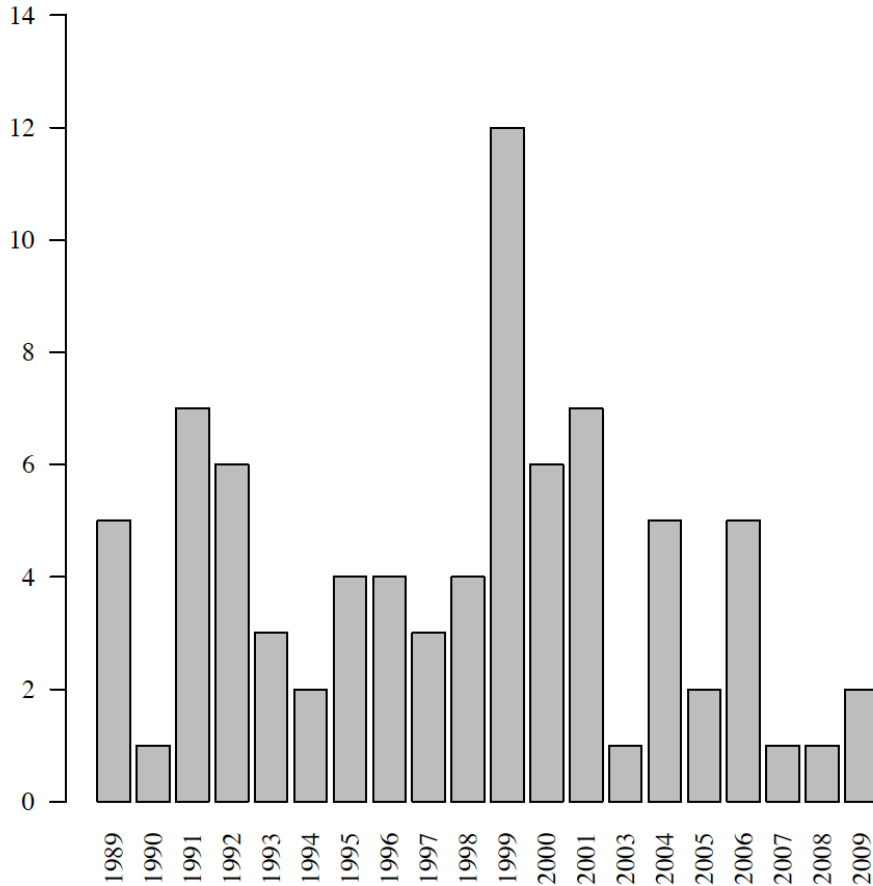
There were several states that did not participate in any lawsuits at all: 15 states did not have any abortion restriction litigation during this time period. This is not to suggest that no abortion related bills were introduced in the legislature during this time period (as the next chapter will show, this is far from the case), but simply that none made it to appellate court litigation. It is entirely possible—or even probable, depending on the specific state—that bills were introduced, but never made it to the governor's desk.

The states that did not have any appellate litigation came from several circuits, but it is worth noting that every state in the Fifth, Sixth, and Eighth circuits had at least one lawsuit during this time period (and several had more than one). As will be discussed later, these circuits, along with the Fourth Circuit, tend to rank among the more conservative circuits. It makes sense that these circuits would hear more abortion restriction cases, because conservative states in these districts would be eager to take advantage of a favorable court that would be likely to uphold their laws.

3. Time and Trends

Next, I briefly look at cases over the time period for which I collected data. Figure 5-4 shows the number of cases each year between 1989 and 2010. During these years, abortion litigation has been a relatively constant feature on appellate court dockets. For each year, except 2010 (which had no cases), at least one circuit has heard an abortion case, and often there is more than one. The fact that abortion cases are widespread across the country suggests two things. The first is that states continued to push new abortion regulations. Given the political benefits for doing so, this is not shocking. The other point that stands out is that there remains ongoing uncertainty over the legality of certain abortion policies. The persistent introduction of bills that end up in litigation suggests that states are uncertain as to what is permissible and what is not, but also that the appellate courts remain a key source of information for states.

Figure 5-4: Cases by Year



As the table above shows, abortion litigation has been a constant feature on appellate court dockets. For each year except 2010, at least one circuit has heard an abortion case, and often there is more than one. The prevalence of abortion litigation shows the ongoing uncertainty over the legality of certain abortion policies, and how the appellate courts remain a key source of information for states on what is permissible and what is not.

It is also clear that abortion litigation peaked in the late 1990s/early 2000s. Many of the cases around this time concerned the issue of intact dilation and extraction, a specific abortion policy more commonly referred to as “partial birth abortion.” In the late 1990s, partial birth abortion was at the forefront of the abortion debate, as state legislatures and Congress passed a variety of laws aimed at banning these procedures.

The constitutionality of these policies was unclear, at least in part because the “undue burden” standard announced in *Casey* in 1992 was difficult for courts to apply, and because the statutes tended to use different definitions for what partial birth abortion meant in medical practice. Some banned specific procedures, others banned broader categories of abortions, and some lacked constitutionally necessary exceptions for the mother’s health. In 2007, the Supreme Court upheld a similar federal statute that had passed in 2003. It, of course, is not in this dataset because it was passed by Congress, not a state legislature.

B. Discussions of State Legislatures

Finally, in this last section, I conduct a brief qualitative analysis of the abortion opinions in this dataset. To do so, I searched for the word “legislature” and “legislator,” “senate,” and “assembly” in the full set of relevant cases and read these portions of the cases to get a sense of how the courts describe the relationship between state legislatures and appellate courts. Many mentioned the legislature relatively briefly, simply stating that the legislature passed the law at issue. But in some, the court considered the legislature’s motives and choices more deeply. These cases I read in full. These discussions fall into two primary categories: discussions of legislative purpose and goals, and the role of legislatures as policymakers.

I summarize my insights from these discussions here because they provide initial insight into the relationship between these two institutions. Of course, the central question of the dissertation focuses on the opposite side of the equation—namely, how state legislatures think about federal appellate courts—but it is worth considering, at least briefly, the court’s view of their relationship with state legislatures. These opinions are, of course, public documents, and it is entirely likely that they are read by legislators or their staff. They provide considerable information about how the court itself views its relationship with state legislatures.

1. Legislative Intent

Several courts commented on a legislature's purpose behind enacting a particular statute. For example, in *Jane L. v. Bangerter*, 102 F.3d 1112 (10th Cir. 1996), the Tenth Circuit discussed Utah's intent to undermine *Roe v. Wade*. "As we pointed out in *Jane L.* IV 61 F.3d at 1495, the Utah's legislatures intent in passing the abortion provisions was to provide a vehicle by which to challenge *Roe v. Wade*, as demonstrated by the legislature's establishment of an abortion litigation trust account. In so doing, the State made a deliberate decision to disregard controlling Supreme Court precedent." This shows the court's willingness to consider not just the text of the statute, but the underlying intent and motivations of the legislature.

While making these judgments, courts analyzed both and the text of the laws at issue, as well as legislative history. For example, in *PPMN v. Minnesota*, 910 F.2d 479 (8th Cir. 1990), the Eighth Circuit examined Senate floor debates and statements made in committee hearings to understand how the legislature intended to regulate the disposal of fetal tissue. Similarly, the Eighth Circuit panel in *Carhart v. Stenberg* examined the text of the statute and legislative debates and concluded that the legislature had made an error in drafting, because "the legislature was aiming at the D&X procedure, but the language of the statute included a definition which encompassed the D&E procedure as well." Here, the court is noting that the legislature attempted to ban one abortion procedure, but inadvertently drafted a statute that banned a different abortion procedure (which under Supreme Court precedent, they could not do). This requires a remarkable effort by the court to consider the legislature's specific intentions.

Courts also made assumptions about the motivations underlying the legislature's choices. For example, in *Women's Medical Professional Corp. v. Voinovich*, 130 F.3d 187, Ohio drafted a law banning several specific abortion procedures. However, the Sixth Circuit looked beyond the

text the Ohio legislature drafted in order to understand their true intent. The Sixth Circuit stated “We assume that the Ohio General Assembly would prefer a ban on the use of the D&X procedure post-viability as opposed to no ban at all,” citing the legislature’s stated intent as written in the legislative history. They then found that the problematic portion of the bill was not severable, and struck the provision down.

Similarly, in Rhode Island, the legislature passed a law aimed at banning partial birth abortion that was challenged as being unconstitutionally vague. The First Circuit discussed at length the Rhode Island legislature’s intent:

“It appears that the Rhode Island Legislature’s purpose and intent was to ban the partial birth abortion procedure for all fetuses, non-viable and viable, as the Act draws no line between viability and nonviability. Would the Legislature have passed the Act banning the partial birth abortion procedure absent its application to a nonviable fetus? There is doubt on that score, in light of the fact that the “quick child” statute, banning all abortion procedures on a viable fetus (save to preserve the life of the mother), still stands on the books” (*RI Med v. Whitehouse*, 239 F.3d 104, 104 (1st Cir. 2001)).

Additionally, they discussed the law’s severability clause, which would allow parts of the statute to remain in effect even if other parts were found unconstitutional, as “probative” of legislature intent. *Whitehouse* at 106. These analyses show the depth of a circuit court’s willingness to discuss the intentions of the legislature.

These discussions occurred across the circuit courts, and across the ideological spectrum. As discussed above, this occurred in cases where the court ultimately found a law constitutional, and cases where a law was struck down. On the whole, the courts treat legislatures as sophisticated actors, making strategic and considered choices about how they draft laws. This is important to note, because legislatures have access to this information, as it is part of publicly issued opinions. Legislatures who have the capacity to gather and read these opinions will have greater insight into how to craft laws that will be upheld by their circuits.

2. Legislature as Policymaker

There are repeated discussions in these cases about how it is the state legislature's role, not the court's, to "make policy." For example, Judge Boggs of the Sixth Circuit, a Reagan appointee with a fairly conservative GHP score of .339, critiqued the Sixth Circuit for "setting up a maze that legislatures can in fact never successfully negotiate (despite the Court's apparent invitation to them to try)."⁹ *Women's Medical Professional v. Voinovich*, 130 F.3d 187, 212 (6th Cir. 1997). His dissent focuses on the role of the federal courts to provide "clear guidance to state legislatures as to where they permissibly can impose abortion regulations" and specifically critiques post-Casey jurisprudence as "reminiscent of the classic recurring football drama of Charlie Brown and Lucy in the Peanuts comic strip. Lucy repeatedly assures Charlie Brown that he can kick the football, if only this time he gets it just right. Charlie Brown keeps trying, but Lucy never fails to pull the ball away at the last moment. Here, our court's judgment is that Ohio's legislators, like poor Charlie Brown, have fallen flat on their backs." *Voinovich* at 219.

Or, in *PPLM v. Bellotti*, 868 F.2d 459 (1st Cir. 1989), the First Circuit critiques Planned Parenthood for asking the court to "dismantle" Massachusetts' scheme of regulating minor's abortions. "The defect [in the challenged abortion law] would be remedied not by the federal court imposing its will but by the Massachusetts legislature itself, which took just a step in amending s 12S in 1980." Although the First Circuit is a relatively moderate circuit, the panel that made this decision was not: Judge Coffin and Bownes both have liberal GHP scores (-0.361 and -0.03 respectively). Judge (later Justice) Breyer dissented.

3. Legislative Uncertainty?

⁹ I discuss the GHP scores in depth in Chapter 6. They are a measure of court ideology, with higher scores representing conservative ideology.

Though the courts do not comment on the concept of legislative uncertainty specifically, it does play a role throughout several cases, when legislatures make multiple attempts to get their abortion policies to conform with federal appellate court jurisprudence. Part of the reason why this is difficult for the legislature to do, and requires a repeated process of legislating-litigating-legislating again, may be because of the concept of doctrinal uncertainty discussed in the theory chapter.

For example, in *PPATL v. Miller*, 934 F.2d 1462, the court noted that while an appeal was pending before them, “the Georgia legislature amended the Act in an attempt to harmonize it with the district court’s ruling [holding it unconstitutional].” *PPAZ v. Lawall*, 180 F.3d 1022 presented a similar situation. The Arizona legislature passed a parental consent law in 1989 that was ruled unconstitutionally vague, and then repealed it in 1996 and replaced it with a law with a more specific judicial bypass provision. This law was ultimately overturned as well because it lacked a medical emergency exception, but shows the legislature’s attempt to incorporate information from previous court decisions into their legislating—as well as the difficulty in incorporating that information successfully. An almost identical situation arose in Montana, with a parental notification law. *Wicklund v. Salvagni*, 93 F.3d 567 (1996).

Similarly, in *PPMEK v. Dempsey*, 167 F.3d 458 (8th Cir. 1999) the Eighth Circuit outlined the Missouri legislature’s multi-year attempts beginning in 1996 to prohibit abortion services from receiving funds. These efforts were held unconstitutional. Ultimately, in 1999, the legislature constructed a multi-tiered funding approach where Tier II would take effect only if Tier I was found unconstitutional, and Tier III would take effect only if both Tiers I and II were found unconstitutional. The court presents this history without comment, and goes on to discuss the constitutional merits of the case. But it is a clear example of the dialogue between the two

institutions: this issue was not settled instantly, but over several years of legislating, court cases, appeals, and decisions. It is also an example of legislative uncertainty about what the courts might do. If the Missouri legislature could perfectly predict the Eighth Circuit's rulings on their abortion funding schemes, there would be no need for multiple rounds of legislation and litigation.

C. Conclusion

This chapter builds on the work in Chapter 4, which examined how state legislatures discuss federal courts of appeals. Here, I look at how federal courts of appeals handle cases from state legislatures, and how they discuss state legislatures in their opinions. Considering how the court handles such cases provides further insight into the dynamic relationship between these two institutions.

There are two key insights. First, abortion cases and overturns are fairly evenly distributed across years, states, and circuits. This is important to establish before moving to the analyses in Chapters 7 and 8. If it was the case that that certain years, states, or circuits had unusual patterns it would require deeper investigation, and an analysis that considers all 50 states and all 12 circuits may not be appropriate. As it stands, however, this is not the case, and the analyses in the chapters that follow do consider all states and all circuits.

Second, this chapter shows that federal appellate courts see state legislatures as strategic actors. In written opinions, they mention the states' role as policymakers, and note when a state's intentions and the text of a bill seem to be out of alignment. These comments are important because these rulings can easily be read by legislators, and they show that there is important information states can access that can help them predict outcomes in future, similar cases.

Chapter 6

Measurement

Before embarking on the core quantitative analysis for this dissertation, I begin by summarizing each of the key variables and how they are measured. I begin first by discussing the need to consider both abortion bills and policies, and why these two closely related concepts must be seen as distinct for this analysis. I then construct measures for the key independent variables—court ideology and court uncertainty—before discussing the remaining covariates.

A. Dependent Variables: Bills and Policies

The main questions and analysis of this project center around legislative policymaking: I am interested in whether the actions of the federal courts impact the choices state legislatures make. The main policy output of a legislature is, of course, laws. And the difference between the resources that go into a law that is merely introduced and one that is ultimately enacted is significant: as discussed previously, it is low cost to introduce a bill, whereas actually passing a bill requires time, energy, and resources. Therefore, this is where we should expect to see strategic behavior and consideration of other political actors.

Additionally, I examine not only bills, but policies. I do this—as discussed in detail later—by examining each bill and identifying the individual policies it is comprised of. This is important because it is possible for a single bill to contain several abortion restrictions.

In summary, I construct the dependent variables as follows:

- 1) Bills enacted: a count of how many abortion bills were ultimately enacted in a state's annual legislative session.
- 2) Policies enacted: a count of how many abortion policies were ultimately enacted in a state's annual legislative session.

This data comes from LexisNexis, a legal research database. Lexis allows a search of bills and legislative histories across all state legislatures and provides a brief synopsis of the bill that describes the key components (for example, whether it bans abortion after a certain gestational age, restrictions on who can provide abortions, limits on funding abortion, etc.). To gather this data, I searched for “abortion” and then, after reading the synopsis of the bill, discarded any irrelevant bills. Irrelevant bills were simply bills that mentioned the word abortion in a different context than a bill directly relating to the abortion procedure.¹⁰ Each relevant bill was then coded by two research assistants to record the state, year, bill number, bill topic, last action, and last action date. Last action includes, for example, “introduced,” “to committee,” “public hearing held,” “died in committee,” “passed by House/Senate,” and “signed by governor.” In total, there were over 6,000 relevant bills.

This data as originally collected contains bills, not policies. However, looking at simple counts or volume of legislation could be problematic because it's possible that legislators introduce omnibus bills that encompass a variety of abortion restriction provisions. Using just a count of bills introduced, that omnibus bill would be counted as one bill, but a legislature that introduced each provision as a separate bill would be counted as several bills—even though the

¹⁰ For example, Indiana's SB 222 (2008), which amended a health care law to “provide that contraception is not subject to or governed by the abortion statutes;” or VT HB 622 (2007), which included abortion as a medical procedure “likely to cause an irreversible outcome,” along with electroconvulsive therapy, organ transplants, and sterilizations.

substance of the policy changes in the state is the same. I avoid this concern by examining the synopsis and text of the legislation and considering it provision-by-provision.

To create a list of abortion restrictions, I began by drawing on Kastellec's (2018) categorization of state abortion policies. He classifies state policies into one of seven categories: bans on public funding, waiting periods, spousal consent provisions, spousal notification provisions, parental consent, parental notification, and partial-birth abortion. Kastellec's categorization offers a good place to start, but because it focuses on issues that have been litigated thoroughly, leaves out some newer "innovations" in abortion restrictions that may have been introduced in legislatures during this time period but not passed and become law. Therefore, I consulted Guttmacher's "State Legislation Tracker"¹¹ and Planned Parenthood's "Federal and State Bans and Restrictions on Abortion"¹² to create the following list that covers the breadth of abortion policies in the states:

Public funding: The state restricts disbursement of public funds to abortion providers.

Spousal involvement: Patients must inform or receive consent from their husbands before obtaining an abortion.

Parental involvement: Minors must inform or receive consent from their parents to obtain an abortion.

Partial birth abortion: The state prohibits the procedure colloquially known as "partial-birth" abortion, which is a surgical procedure that removes an intact fetus from the uterus. The medical terms, which are occasionally used by legislatures, are "dilation and evacuation" (D&E) and "dilation and extraction" abortion ("D&X").

Gestational limits: The state prohibits abortions after a specified point in pregnancy (usually with some exceptions to protect the patient's life or health). The most common of these are colloquially known as "heartbeat bills" or "20 week bans."

Medication abortion: The state bans the "off label" use of medication abortion and/or requires a clinician to be present when the medication is administered (effectively banning the use of telemedicine for abortion provision).

¹¹ <https://www.guttmacher.org/state-policy>

¹² <https://www.plannedparenthoodaction.org/issues/abortion/federal-and-state-bans-and-restrictions-abortion>

Counseling, waiting periods, and informed consent: The state requires a person seeking an abortion to be counseled or receive specific (often state-produced) information about risks, fetal pain, and/or long-term effects of the procedure. There may also be a requirement to wait a specified period of time between counseling on abortion and the procedure itself.

Targeted restrictions of abortion providers (TRAP): The state imposes requirements on the clinic's physical structure, for example the width of hallways or the number of sinks.

Physician/hospital requirements: The state requires that physicians providing abortions have admitting privileges at hospitals or requires all abortions to be provided in a hospital.

Criminal/civil penalties: The state imposes some sort of criminal or civil penalty on a person who provides an abortion, seeks an abortion, or discusses abortion. This is generally a fine, but may include prison time.

Freedom of conscience: The state explicitly states that physicians, pharmacists, etc. who oppose abortion can refuse to perform it.

Gender/race/genetics: The state bans seeking abortion because of the fetus's gender, race, or other genetic characteristic.

Reporting/recordkeeping: The state requires abortion providers to keep records in a certain way, or to report certain information (such as the patient's reason for the abortion and whether there were any complications) to the state. Such bills often seem in theory to be an innocuous administrative policy, but in practice are generally used by abortion rights opponents to single out abortion providers for special surveillance other health providers are not subjected to, and ask questions that are intrusive into patient privacy and can risk patient confidentiality.

The bill synopsis generally provided enough information to determine the policy. For example, a synopsis might state:

“Prescribes duties of physicians 24 hours prior to performing an abortion so that a patient may give her "informed consent"; requires the Health Department to publish and distribute printed materials to be given to women considering abortion and prescribes their contents”

This would be coded as “Counseling, waiting periods, and informed consent.” Some synopses show that the bill contained several policies. For example, consider the following synopsis:

“Provides that only a physician may perform an abortion; requires any abortion be performed in a hospital or only by a physician with admitting privileges to a hospital; provides if not done in a hospital, anesthesia must be given by a licensed

anesthesiologist or licensed certified nurse anesthetist; requires certain reporting requirements of abortion or reproductive health centers and for license suspension for failure to report”

This contains several policies, and would be coded “physician/hospital requirements,” “reporting,” and “penalty.” In about 20% of bills, the synopsis was insufficient or vague and we needed to consult the text of the bill, easily found by searching for the bill number on Lexis.

I provide and discuss descriptive statistics for the dependent variable in Chapter 7.

B. Judicial Ideology and Uncertainty

As discussed previously, the questions at the heart of this dissertation will largely depend on conceptualizing the ideological relationship (or distance) between the state and the circuit it is in. Ideology is important because judges are political actors. It is clear that judges are not fully constrained by legal or other institutional factors (Segal & Spaeth 2002, Martin et al. 2004). Their life tenure and lack of political consequences for their decisions mean they are relatively free (at least, far more free than the political branches) to do what they want. Particularly when the law is unclear, judges act on their ideologies (Sunstein 2007). Ideology is also important for observers—like state policymakers—who can use this information to anticipate court behavior.

It is on some level obvious that the circuits have different ideologies: politicians and litigants alike know that the Ninth Circuit is liberal and the Fifth Circuit conservative.¹³ For practitioners, this is a simple political truth. Yet it is difficult to find a robust empirical measure for this observation. For one thing, measuring the ideology of one judge is difficult enough—is ideology behavior? How does it vary over time? Is it one dimensional? Then, aggregating these individual measures into a court-level measure is a separately thorny problem, particularly for

¹³ <https://www.nytimes.com/2010/04/25/us/25sf ninth.html>

the appellate courts, which decide cases in random three judge panels, so a simple average or median may not capture the variety in different panel compositions.

There are several measures for Supreme Court ideology (for example, Martin Quinn 2002; Bailey 2016) but while they have proven to be enormously valuable in a variety of contexts, all have their weaknesses, and many do not apply well to the circuit court context: for example, the Segal-Cover scores that use newspaper editorials to measure the ideology of Supreme Court nominees would not be feasible here due to the lack of similar coverage for circuit court judges. Similarly, measures that rely on coding individual votes in cases as liberal or conservative are difficult to apply in the circuit context, where it is not the whole court hearing a case, but only a three-judge panel.

The coarsest measure of political ideology in the judicial branch is to simply look at the party of the appointing president. For circuits, we can look at the percentage of judges appointed by Democrats and Republicans as a proxy for their ideology. For example, 69% of seats on the Fifth Circuit were filled by Republicans, while only 43% of the seats on the Ninth Circuit were filled by Republicans, so we might expect the Ninth Circuit to issue more liberal decisions. But while this rough measure could be informative in this more extreme case, it doesn't allow for nuanced determinations between circuits that are less polarized. To use a simple example from the Supreme Court, appointing party would tell us that Sandra Day O'Connor and her successor, Samuel Alito, are ideological equals. But they, of course, are not: to take just one example, Justice O'Connor upheld the essential holding of *Roe v. Wade* in her opinion in *Planned Parenthood v. Casey*, while Justice Alito overturned *Roe* entirely in *Dobbs*. More specific to this context, the Fifth and Sixth Circuits have exactly the same percentage of Republican appointees,

yet the Sixth Circuit is perceived to be a more moderate court than the Fifth when the outcome measured is the ideology of cases themselves.¹⁴

Appointing party measures are also static, which is problematic when we consider both that judges serve for a long period of time and often shift ideologically over time. As one extreme example, Justice Sonia Sotomayor was first appointed to the federal bench by George H.W. Bush, a Republican, when she became a district court judge in 1991. Several years later, she was appointed to the Second Circuit by Bill Clinton, a Democrat, and finally, elevated to the Supreme Court by Barack Obama, another Democrat. Considering only the party of the appointing President would result in very different assessments of her ideology over time, but in reality, she has always been liberal. On the other hand, Justice David Souter was appointed to both the First Circuit and Supreme Court by George H.W. Bush and was purported to be a conservative, but by the end of his career, he tended to vote with the liberal wing of the court.

A dynamic measure is useful because it accounts for changes over time. Looking again at simple appointment data for the circuit courts shows that some circuits have seen noticeable shifts. The proportion of Republicans appointed to the Fifth Circuits has increased over the past 30 years (in 1984 it was evenly split between Democrats and Republicans, whereas now it is more heavily Republican), while the Ninth Circuit's partisan composition has stayed relatively constant. Since 1980, a few circuits have entirely "flipped" which party appointed the majority of seats: the Eighth, Sixth, and Second all fall into this category. Additionally, some courts have had shorter periods in which their partisan compositions changed dramatically. For example, in 1992 10 of 13 Second Circuit judges were appointed by Democrats, but by 2000 that ratio had

¹⁴ <http://visualfa.org/circuit-court-map/>

entirely switched. Today it is almost evenly split, with 5 appointed by Republicans and 6 by Democrats. These shifts can dramatically alter the ideology of the circuit over time.

Other measures look at how often circuit courts are reversed by the Supreme Court in order to determine their ideology; political donations (Bonica and Sen 2016); and clerk hiring (Bonica et al. 2017). These measures are more nuanced than partisanship. They all, however, present one issue that is the same: circuit ideology is more complicated than aggregating individual ideology. Circuits may develop their own legal cultures, habits, and precedents that influence the judges on their bench. Studies on panel effects, for example, show that the way a judge votes on a decision of a three-judge panel differs from what we would expect if that judge decided the case alone (Kastellec 2010, Farhang and Wawro 2004). Judges are influenced by their peers: for example, in cases that address the rights of women or minorities, the addition of a single woman or minority judge increases the likelihood of a more liberal panel decision. Therefore, any measure of circuit court ideology must at minimum account for the fact that appellate court decisions are made by panels.

Here, my focus is on not just ideology but “doctrinal uncertainty”—the idea that in some state-circuit relationships, the state has a difficult time predicting what the circuit’s preferences are and what it will do, while in others it is easier to accurately predict. For example, using partisanship of appointing president as a proxy might tell us something about the partisanship of a circuit, but doesn’t give a measure of how easy or hard it might be for a litigant to predict a case outcome. A measure that looks at the rate of dissents and concurrences, like the one used by Hettinger (2006), gets closer, because a circuit with more dissents might create more uncertainty for litigants and policymakers, as it indicates a lack of coherence or uniformity in how judges think about cases.

1. Measuring Ideology

I construct two measures for circuit court ideology. First, I use existing measures of circuit court judge ideology to assess how liberal or conservative a court as a whole is in a given year. Second, I conduct content analysis of newspaper articles that describe the ideology of courts (not just individual judges) because many legislators likely get their information about court ideology from the press. As discussed in more detail below, these two measures are complementary.

I leverage existing measures of circuit court ideology in order to generate a relatively precise quantitative measure of how liberal or conservative a court is. The Giles, Hettinger, and Peppers (GHP) scores effectively capture this phenomenon by using the first dimension of Poole and Rosenthal's NOMINATE Common Space scores for the president and home state senators who were responsible for initially appointing the judge. The NOMINATE scores explain roll call voting in the House and Senate by placing members of Congress on two dimensions based on their voting patterns. The first dimension is the liberal-conservative ideological spectrum. The second dimension, which is related to cross-cutting, salient issues at specific times in history (such as slavery or civil rights), is not used here. This results in a score for each judge ranging from -1 (liberal) to 1 (conservative).

The GHP scores rest on three key assumptions: (1) that the Common Space scores provide a valid estimate of president and senator ideological preferences, (2) that presidents and senators seek to appoint judges who reflect their policy preferences, and (3) that the norm of senatorial courtesy prevails. I believe these assumptions to be valid. First, the Common Space scores reduce ideology to a spatial model of legislator's voting decisions, relying on roll call votes to create scores for each legislator. It uses legislators who have served in both chambers,

Presidents who have served in the legislature, and stated presidential vote intentions in order to create comparable scores for presidents. This measure has been validated over decades of political science research, and while it has shortcomings, compares favorably to older, more temporally constrained measures such as Americans for Democratic Action and American Conservative Union scores, which were created by interest groups to distinguish between liberal and conservative legislators (Caughey & Schickler 2016).

Second, it is generally accepted that presidents are strategic when appointing judges and justices at all levels (Moraski & Shipan; Binder & Maltzmann 2009). The ability to shape the judicial bench both means that a president’s preferred policies are more likely to survive if challenged in court and that their legacy will last after their term ends. Third, for the time period studied here, the norm of senatorial courtesy was strong. Senators of the president’s party generally recommend candidates for judgeships associated with their states, and senators of the opposite party have a consultative role. I would be less comfortable with this assumption in recent years, but there is no evidence it had been significantly curtailed or eroded by 2010.

Because the GHP scores are unique to each judge, I need to construct a measure of circuit ideology. As an initial look at the face validity of the scores, I simply average the scores for each judge who appears on the bench from 1989-2010. Ranked in order of most liberal to most conservative, we see:

Table 6-1: GHP Scores

Circuit	GHP score	Ideology
First	-0.008	Liberal
Second	-0.001	Liberal
Third	0.026	Moderate

Fourth	0.027	Moderate
Fifth	0.066	Moderate
Sixth	0.105	Conservative
Seventh	0.114	Conservative
Eighth	0.121	Conservative
Ninth	0.141	Conservative
DC	0.153	Conservative
Sixth	0.184	Conservative
Fifth	0.208	Conservative

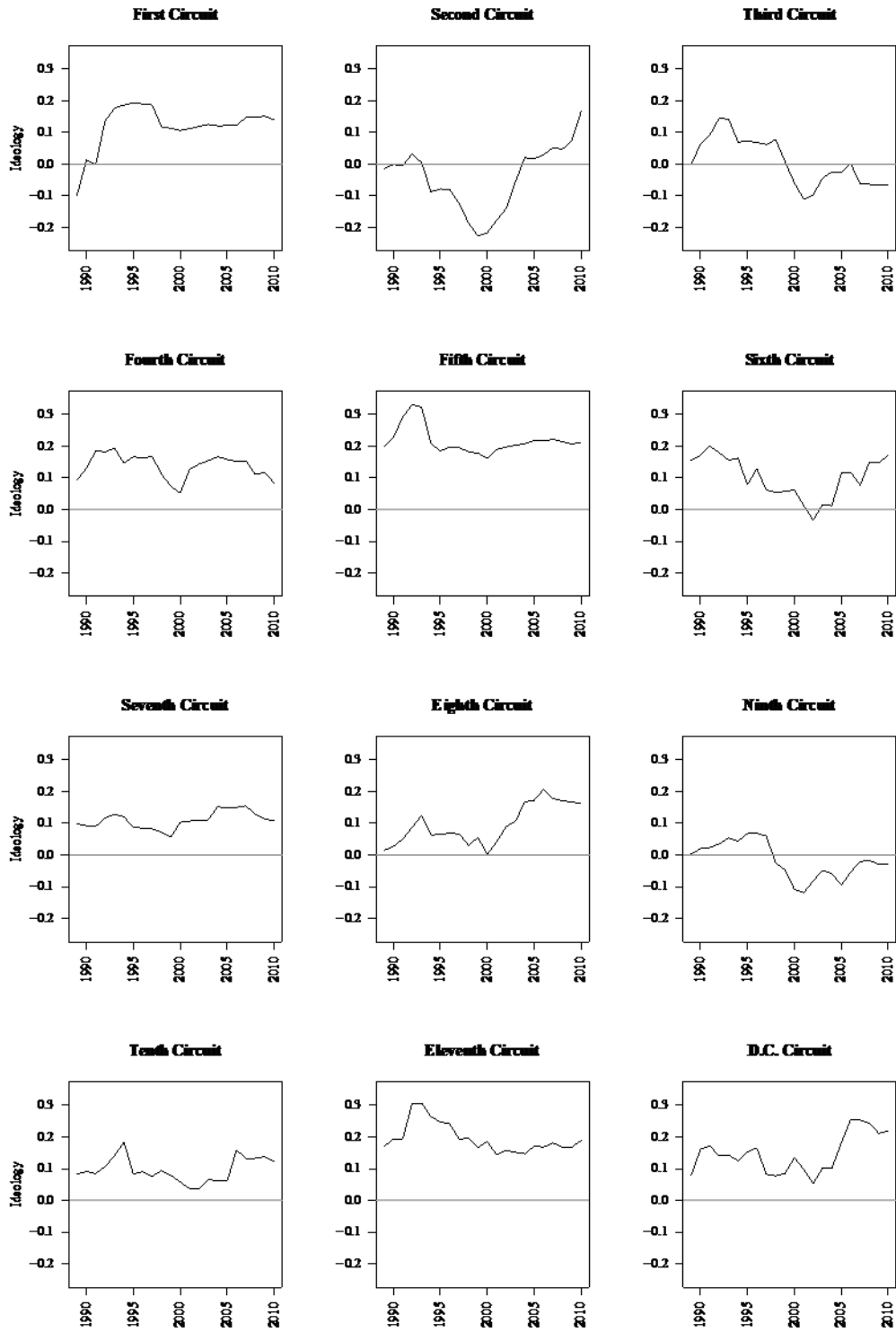
This generally accords with popular views on court ideology: the Ninth and Second circuits are generally perceived to be the most liberal, while the Fifth is one of the most conservative. However, two issues become clear. First, because the ideology of a court can change significantly based on one retirement and new appointment, particularly for a small circuit with few judges, it is more precise to construct these circuit ideologies by year, rather than over the entire 20 year time period. Second, an average of every judge in the circuit obscures the importance of random panels in circuit court decision making. Unlike the Supreme Court, it is not the case that the most median member of the court holds particular sway over decisions as a “swing vote.” Rather, it is the median member of each individual three-judge panel that holds that power.

Therefore, I construct the Circuit Ideology variable to account for the impact of panels. I begin with each circuit-year group of judges, and for each circuit-year I generate 1,000 random draws of three judges that are on the circuit that year. The mean scores of each of those draws is

then averaged to provide the “true” population mean of a three-judge panel. This process results in an ideological score ranging from -1 (liberal) to 1 (conservative) for each circuit, for each year from 1989-2010. Constructing the ideology score for each circuit in this way provides a more accurate picture of what any given case might expect to see in the court while allowing for yearly changes in the makeup of the judges. It results in scores that, like the averages discussed above, make intuitive sense: the Ninth Circuit and Second Circuit are more liberal, while the Fifth and Fourth Circuits are more conservative.

Figure 6-1, below, shows the distribution of these scores over time. Constructing the Circuit Ideology variable this way allows me to account for changes over time that may affect legislative strategy. For example, while the Second Circuit is more liberal than the Fourth Circuit overall, there are some years in which this is not the case: for example in 2010, the Fourth Circuit was slightly more liberal. Additionally, the Ninth Circuit became steadily more liberal over time, while the ideology of the Fifth Circuit does not change much. It also captures the fact that, particularly for smaller courts like the First Circuit, which has six judges, retirements and new appointments can make a substantial difference: when the Carter appointee Hugh H. Bownes (GHP score of -0.303) was replaced by the far more conservative George H.W. Bush appointee David Souter (GHP score of .411), the Circuit as a whole shifted from a liberal score of -.097 to a more moderate score of 0.017. This nuanced measure allows me to capture these changes and be sensitive to the fact that the courts are dynamic institutions.

Figure 6-1: Circuit Ideology Over Time



The GHP scores and resulting Circuit Ideology measure are useful measures because they quantify judicial ideology in a way that is reliable and comparable to other institutions. But it is unlikely that legislators think about judges individually—it’s more likely that they just have a general sense of what the court as a whole tends to do. Therefore, as a second measure, I use content analysis of news articles about the circuit courts that characterize them as liberal, conservative, or moderate. Although this is not an ideal measure if what we are interested in is the *actual* ideology of the court, this measure is useful because central to my theory is how legislators *perceive* the ideology of the court. It is unlikely state legislators have a nuanced view of the ideology of specific judges on their circuits (unless perhaps the judge is particularly famous) beyond broad ideas like “the Fifth Circuit is conservative,” “the Ninth Circuit has that famous liberal Judge Reinhardt.”

To construct this measure, I conducted a search for each circuit in LexisNexis to identify each article where the circuit name was within 20 words of “liberal” or “conservative” from This yielded between 200-800 articles per circuit, roughly depending on the size of the circuit: the First Circuit, for example, had fewer articles than the larger Second and Ninth Circuits, which hear more cases in more populous areas of the country. The news articles included pieces from large national papers like the New York Times and Washington Post, as well as smaller, more ideologically focused outlets like the National Review and the American Prospect. It also includes some regional papers, such as the Western Free Press, but about 80% of the overall articles gathered are from national news sources.

I then created ideology scores that quantify the overall tone of the article: is it more or less liberal or conservative? The core idea behind this measure, which I call the Lexis Score,

leverages the sentiment scores frequently used in political communication research (Young & Soroka 2012). The logic is simply that by comparing the ratio of positive to negative words (or in this case, liberal to conservative words), we can create a score that describes the overall sentiment of a text. If a text has an equal amount of each, it will have a score of 0. If it is entirely liberal, it will have a sentiment score of -1. If it is entirely conservative, it will have a sentiment score of 1.

To be sure, this is a rough measure. More computationally and theoretically advanced natural language processing methods could account for sentence structure, develop a more complex dictionary, and consider a wider corpus of text data. However, a rough measure is appropriate here: it allows me to create three categories that likely map on to how legislatures perceive appellate courts. More complex measures might refine this, but we cannot assume a more precise measure actually is what legislators take away from coverage.

The table below shows the average of the original GHP scores, the Circuit Ideology measure created from the GHP scores, and the Lexis scores to allow for comparison between the two measures. All three are scaled -1 to 1, with negative numbers being more liberal, and positive numbers being more conservative.

Figure 6-2: Comparison of Ideology Scores

Circuit	GHP Score	Circuit Ideology	Lexis Score
First	0.026	0.119	0.151
Second	-0.001	-0.043	-0.106
Third	0.027	0.008	0.167
Fourth	0.114	0.138	0.528
Fifth	0.208	0.217	0.599
Sixth	0.184	0.102	0.362
Seventh	0.065	0.110	0.351
Eighth	0.106	0.096	0.334
Ninth	-0.008	-0.016	-0.154
Tenth	0.121	0.096	0.107

Eleventh	0.141	0.196	0.457
Twelfth	0.153	0.147	0.306

These scores generally align with each other, and with what we would expect. For both measures, the Second and Ninth Circuits are the most liberal, whereas the Fifth is the most conservative. This tracks with general perceptions of the courts. The main difference in the two measures is the range they cover. The GHP scores are more clustered around 0, whereas the Lexis scores are more dispersed toward the end of the scales. Moreover, scores are highly correlated with one another. The GHP scores correlate with the Circuit Ideology variable at 0.816 and with the Lexis Scores at 0.808. Notably, the Circuit Ideology and Lexis Scores are more strongly correlated at 0.877. Analyses conducted later in this dissertation will use the Circuit Ideology and Lexis Scores measures.

2. Measuring Uncertainty

Second, I measure doctrinal uncertainty in the circuit courts by considering the rate of dissents and concurrences—together considered “independent opinions.” By “uncertainty,” I mean simply how difficult it is for a litigant to predict the outcome of a court’s decision. As discussed in Chapter 2, in addition to a court varying on an ideological dimension, it can also vary on a certainty dimension. As already mentioned, unlike the Supreme Court, where all cases are heard by all nine Justices, circuit court cases are heard by panels of three judges, drawn randomly from the full bench. Because of the way panels are selected, the specific panel makeup makes a large difference in the outcome of a case. It is more difficult for litigants to predict the outcome of a case if it is difficult for them to predict what ideological makeup their panel will have.

Certainty is distinct from ideology. Ideology is the pattern of beliefs, values, and ideas that govern a court's decision making. At the most basic level, ideology has to do with where a court falls on the liberal-conservative spectrum. But certainty has more to do with predictability and clarity. Uncertainty has to do with how possible it is for a state legislature to accurately pinpoint that location. Essentially, uncertainty can be understood as the standard deviation of the court's ideology: for a circuit that is easy to predict, there will not be much variance around the mean ideology, and therefore a small standard deviation, whereas for a circuit that is difficult to predict, the variance will be large.

I examine "independent opinions" and dissents because these signal doctrinal disagreement on the court. For a judge to be willing to issue in independent opinion, he or she must invest time and resources in crafting an opinion publicly disagreeing with their colleagues. A dissent can articulate alternative legal approaches, reveal weaknesses in the majority's legal logic, and act as a signal to litigants who may pursue future litigation on similar issues. Dissents often go beyond the facts of a specific case, but rather show that "the appellate bench is not of one mind" (Cotropia 2010). Concurrences, too, show that while a judge may have agreed with the ultimate outcome of a case, they had significant enough objections to the legal reasoning that it warranted a public comment.

Existing work has looked to dissents to conceptualize concepts similar to my understanding of uncertainty. Wahlbeck et al. (1999) note that dissents indicate that a justice is ideologically distant from the majority. And Sunstein (2015) argues that the Supreme Court post-1941 generated more legal uncertainty (in terms of understanding what the law actually is) because it went from operating by consensus to "something closer to separate law offices, with a large number of dissenting opinions and concurrences."

A potential criticism of this method of measuring uncertainty is that dissents are simply a tool used by judges—they aren't revealing a judge's ideological preferences so much as they are revealing a judge's strategy (so, a judge may not dissent in a case they vehemently disagree with if they feel it will ultimately backfire or be unsuccessful). Lindquist et al. (2004) find this is not a concern. They find no evidence of strategic dissent in circuit court decisions and argue that the decision to dissent is better explained by the attitudinal model. Another concern is the notion that a legislature may not be concerned about dissents at all—because a dissent does not actually carry legal weight, a legislature has no reason to fear dissents it finds disagreeable. I do not argue here that a legislature cares specifically about the dissent rate or independent opinion rate, or indeed, whether there is a dissent or independent opinion in a given case at all. Instead, I argue that the existence of these opinions at all offer signals to the legislature that legal doctrine on a court is unsettled, and potentially unpredictable.

While a dissent is not law, and indeed has been said to describe “what the law is not,” *State v. Perry*, 510 N.W.2d 722, 724 (Wis. Ct. App. 1993), dissents and concurrences do offer valuable information. They can hone in on facts or legal principles left unexamined in a majority opinion, offer different understandings of key cases, or raise additional legal questions that the majority opinion did not answer. If judges on a circuit hearing the same cases disagree with each other so strongly they are willing to invest resources into publish opinions to that effect, it will be hard for a policymaker to predict what any given panel will do. Such circumstances are the case independent of ideology.

Consider a hypothetical court comprised of four members, two of whom are conservative, and two liberal. Overall, this is a “moderate” court—it is relatively balanced in terms of ideology. On a random panel that draws the two conservatives and a liberal, we would expect a

conservative decision. On a random panel that draws the two liberals and a conservative, we would expect a liberal decision. Without knowing the panel composition in advance (which is, of course, impossible), it will be difficult for a legislator to predict the outcome of a case.

Then, consider a second court, comprised of five members with the same ideologies, but perhaps two of the conservatives frequently disagree with each other. One is an originalist, who interprets the Constitution based on what the text would have meant at the time it was drafted, and the other is a textualist, who interprets the text based on its ordinary meaning. In every case they hear together, they struggle over how narrowly to craft the opinion, and what the precise holding of the case should be. In this case, the conservative side will still win, but the opinion might be vaguer and more ambiguous, and the concurrences and dissents will throw even more doubt on what the law is and how it applies in future cases. This is a more “unpredictable” court than the first one.

To construct the *Dissent Rate* and *Independent Opinion Rate* variables, I gathered data on independent opinions by searching in LexisNexis for the word “court,” and a particular circuit (it was necessary to include the word “court” because LexisNexis does not allow for blank searches). The word “court” will appear in the caption of all opinions, so it is an easy way to determine how many cases were heard by a particular court, without inadvertently losing any cases. I then narrowed the search by year to determine the total number of cases each circuit decided in each year from 1989-2010. Then, to determine how many dissents and concurrences were published, I searched separately for “J., dissenting” and “J., concurring” because these terms will be in each case where there is a dissent or concurrence. The way Lexis formats opinion, a majority opinion followed by a dissent will indicate the dissent by stating, for

example, “Posner, J., dissenting.” The total number of dissents and concurrences added together is the total number of independent opinions.

The table below shows the dissent rate and independent opinion rate for each circuit, calculated for 1989-2010. Of course, this data glosses over two key points: first, a judge is more likely to write a dissenting opinion in a salient case, because it is more likely to have policy consequences, and therefore make it more worthwhile for the judge to invest the effort of dissenting. Additionally, more complex cases are more likely to generate independent opinions because the more legally complex an issue is, the more potential grounds for interpretive disagreements among judges (Hettinger 2004).

Table 6-2: Independent Opinion Rate by Circuit

Circuit	Dissent Rate	Independent Opinion Rate
First	3.06%	7.79%
Second	1.63%	3.84%
Third	1.83%	3.43%
Fourth	1.99%	3.64%
Fifth	1.51%	2.41%
Sixth	1.70%	3.99%
Seventh	1.87%	4.82%
Eighth	1.53%	3.72%
Ninth	1.40%	3.25%
Tenth	2.07%	5.07%
Eleventh	1.13%	2.60%
DC	2.09%	5.48%

The table shows that dissent rates are similar across circuits, all around 1% or 2%. Independent opinion rates, which include concurrences, vary more, from the Fifth Circuit’s low of 2.41% to the First Circuit’s 7.79%. To determine if there is sufficient variability across circuits to use this as a measure, I use a one-way ANOVA for both the dissent rate and the independent opinion rate against the circuit (and controlling for year). The results below show that there are statistically significant differences among dissent rates and independent opinion rates.

Table 6-3: Dissent Rate ANOVA

	<i>DF</i>	<i>Sum Sq.</i>	<i>Mean Sq</i>	<i>F value</i>	<i>Pr(>F)</i>
<i>Circuit</i>	10	3.913	0.3913	608.8	<2e-16 ***
<i>Year</i>	1	0.0380	0.3799	591.2	<2e-16 ***
<i>Residuals</i>	2745	1.764	0.0006		

p < 0 = ***; 0.001 = **, 0.01 = *

Table 6-4: Independent Opinion Rate ANOVA

	<i>DF</i>	<i>Sum Sq.</i>	<i>Mean Sq</i>	<i>F value</i>	<i>Pr(>F)</i>
<i>Circuit</i>	10	15.726	1.5726	607.8	<2e-16 ***
<i>Year</i>	1	1.992	1.9916	769.8	<2e-16 ***
<i>Residuals</i>	2745	7.102	0.0026		

p < 0 = ***; 0.001 = **, 0.01 = *

3. Incorporating Professionalism

While all legislatures and share this same basic incentive to take in information from the federal courts in order to make policy, it is also important to consider under what conditions particular policymaking institutions or individuals might be more or less attentive to federal court doctrine. In particular, legislative professionalism almost certainly plays a role in the

relationship of interest here: more professionalized legislatures will likely have more resources to gather, understand, and disseminate information about federal court doctrine. A state that has a professionalized legislature with a robust judiciary committee may well be better able to research the contours of federal doctrine, and draft bills accordingly. Highly professionalized states tend to have larger and higher paid staffs, who have the time and ability to conduct legal research for their legislator, or legislative research divisions that conduct research all legislators can rely on.

This is also potentially an area of interesting variation, as states in the same circuit may not have the same level of professionalism. For example, consider Vermont and New York, and assume they have similar preferences regarding abortion policy. The National Conference on State Legislatures categorizes Vermont as a less professionalized legislature with low pay and small staffs, while New York is a full-time, well-paid professionalized legislature with a large staff, and they are both in the 2nd Circuit. This means that the New York state legislature has more capacity and expertise necessary to follow legal developments in the 2nd Circuit, such as the ideology of newly appointed judges, and relevant judicial opinions. This increased knowledge allows the legislators to more accurately forecast how the 2nd Circuit might handle an abortion related restriction. So, knowing that the 2nd Circuit is comprised of many liberal judges, New York would be unlikely to pass an abortion restriction bill because it is likely to get struck down. All else equal, Vermont would be more likely to pass such a bill because Vermont does not have the knowledge New York does.

Miller et al. (2015) and Armaly (2019) explore the role of professionalism in two papers closely related to my central inquiry, considering, respectively, state interactions with the United States Supreme Court, and state interactions with the state's highest court. Though they both measure legislative professionalism by using the Squire index, their results are divergent,

suggesting the role of legislative professionalism in state legislative behavior is not fully understood.

Miller et al. theorize that professionalized state legislatures have the resources and incentives to create policy that is new and innovative, and therefore exists in a constitutional “gray area” where courts have not fully explored the legal boundaries of the policy. They offer, for example, a new housing law passed by New York’s highly professionalized legislature that required landlords to permit the installation of cable television wiring on their property, and limited the fee charged to a company for the installation. The Supreme Court ruled that this was an unlawful taking of property under the Fifth and Fourteenth Amendments. Their analysis of state laws from 1979 through 2006 finds that professionalized state legislatures are *more* likely to be overturned by the Supreme Court (though they do not account for whether these laws were particularly innovative, as they argue the New York housing law was).

On the other hand, Armaly argues highly professionalized legislatures can make legislation that is “litigation proof,” and therefore less likely to be overturned (his focus is on state highest courts). Miller et al. dismiss arguments of this kind as unlikely, arguing that it requires legislators to perceive that passing constitutional laws is a valuable endeavor that outweighs other, competing motivations they might have. They find this unpersuasive because there is no evidence state legislators would be punished for passing an unconstitutional law. To support this proposition, they cite the fact that around 65% of citizens have either a great deal or a fair amount of trust in their state governments. However, citizen trust in an institution as a whole is not a suitable proxy for understanding how the fate of a specific bill or policy will be understood—and overlooks other costs a legislature might incur from passing unconstitutional legislation.

Both Miller et al. and Armaly offer some guidance for my approach, by suggesting two possible mechanisms through which professionalism impacts a legislature's ability to strategically incorporate doctrine, neither tests the specific question I am examining. Both Miller et al. and Armaly are looking at the highest level of courts in the state and federal system, which set their own agenda and exercise discretion to choose which cases they want to hear, whereas the federal appellate courts are required to hear all cases brought to them. This is a key difference: because appellate courts have no discretion to decline a case, it is far more likely that a case will be heard at the appellate level. Legislators, especially when passing highly salient legislation, can assume that a case will be heard at the appellate level, but they cannot assume it will be heard by the Supreme Court.

That aside, I adopt a theory of state policymaking that incorporates legislative professionalism much like Armaly's does: legislative professionalism means access to resources, which means that policy-motivated legislators will have more capacity to create policy that will ultimately be enacted. Drafting laws is complicated: "hard technical work has to be done before even the best lawmaking idea can be made into a clear and enforceable statute" (Jones 1952). Less professionalized legislatures simply have less capacity to do so effectively.

When testing the hypotheses outlined above, I expect that legislative professionalism will play an important role in how capable a legislature is at locating where the court is on the ideological scale.

C. Covariates

Covariates include state-level characteristics that may independently impact how states develop and pass policy, such as political characteristics unique to the state, for example public opinion and partisanship of the legislature and governor, and legislative professionalism, which

is discussed more later. Additionally, I include median income in the state and the effect of regional policy diffusion, which are associated generally with a likelihood of a state legislature enacting a specific kind of policy (Gamm & Kousser 2010, Kreitzer 2015).

Because this model focuses on abortion policy specifically, I include control variables drawn from Kreitzer's (2015) study of state abortion politics, which examines how partisan control of state government and the public's moral preferences shape state policy. Kreitzer finds that the proportion of a state's population that are religiously adherent and the proportion of Democratic women in a state legislature, are both associated with differences in adopting abortion related policy (Kreitzer 2015). Therefore, I include these as controls as well. Kreitzer's religious adherence measure is calculated as the percent of the state population that is a member of a church. This data comes from the Glenmary Institute's Association of Religion Data Archives and is collected for 1990, 2000, and 2010. Kreitzer linearly interpolated the values for the missing years.

Controlling for public opinion is also crucial. Because abortion is such a salient issue, it is inevitable that public opinion plays a role in the choices state legislators make to introduce or pass bills. I use two abortion-specific state opinion measures to do this. First, Norrander (2001) measures responses to a question on the Senate National Election Study: "Do you think abortion should be legal under all circumstances, certain circumstances, or never legal under any circumstances?" and pools them to create state estimates. This is on a Likert scale from 1-5, higher values indicating a more conservative opinion. This measure does not vary over time. However, there is little evidence that abortion attitudes fluctuate much over time (Jelen and Wilcox 2004, Pacheco 2014). Additionally, this measure has been used in a variety of political

science articles that cover a similar time period to the one studied here (Camobreco & Barnello 2008, Dennis 2011).

To account for the possible downsides of the Norrander measure, I also use a more dynamic measure of public opinion. Several scholars have used multilevel regression with poststratification (MRP) to estimate public opinion in states based on survey data gathered from national surveys that have questions about abortion (Kastellec 2018; Lax and Phillips 2012). Pacheco (2014) uses data from the General Social Survey and National Election Survey's question on abortion, which are very similar to the one Norrander uses: they ask if the individual favors legalized abortion regardless of the situation, or if they feel abortion should always be permitted. This does not focus on specific policies—there are other measures that do, for example Kastellec (2018)—but it does allow for variation over time. Pacheco finds that public opinion does not change much over time, and does not vary much in response to current events.

Finally, a variety of scholars have developed measures for state professionalism. Squire (2007), for example, uses Congress as a baseline, and constructs an index using time in session, salary, and staff size relative to Congress to quantify legislative professionalism. States vary dramatically along these factors: for example, California has a full-time legislature and legislators make \$114,877 annually while in South Dakota the legislature meets part time and legislators make just \$11,892. As I will discuss in more depth later, legislative professionalism is critical here because it contributes to how accurately a state legislature can understand circuit court doctrine and predict how their circuit might judge a particular policy.

Generally, legislative professionalism is measured as an aggregate index, usually incorporating characteristics such as legislative staff, legislative expenditures, time spent in session, and legislator compensation. However, some studies find that it's just one of these

components that drives specific policy outcomes. For example, Lax and Phillips find that more professionalized states have greater congruence between public opinion and policy (Lax and Phillips 2012), and Gamm and Kousser (2012) find that while session length has no relationship between the introduction of district focused bills at the expense of state bills, legislative salary does.

I use two measures of legislative professionalism. First, I construct a simple categorical variable (high/moderate/low professionalism) using the National Conference of State Legislatures' classifications of legislative professionalism. Second, I use Bowen and Greene's measure, which incorporates three components that together comprise legislative professionalism: legislative salaries, legislature expenditures, and session length. In their 2014 paper, they evaluate the merit of aggregating these components into a single index. They find that while there are occasions where disaggregating the components and analyzing their effects individually is essential, there is enough commonality between the components to make using a unidimensional index a valid choice. Here, using an indexed measure is appropriate because the theory does not suggest one of the three components of legislative professionalism would have a stronger causal relationship than the others.

D. Conclusion

This chapter provides an introduction to the variables used in the quantitative analyses that follow. Most importantly, I construct new measures for three concepts: bill and policy passage, which is the dependent variable of interest; the Circuit Ideology measure and Lexis Scores, which offer two ways of conceptualizing a circuit court's political ideology, and Dissent Rate and Independent Opinion Rate, which measure uncertainty of a court's doctrine. In the chapters that follow, I use these variables in the central empirical analyses. Chapter 7 describes

the dataset I use to construct the dependent variables, and provides descriptive statistics. And finally, in Chapter 8 I present a series of regression models aimed at answering the questions driving this dissertation.

Chapter 7

Abortion Bills and Policies: Descriptive Statistics

The previous chapter considers the relationship between federal circuits and state legislatures by looking at the abortion cases heard in the circuit courts. In this chapter, I will look at abortion restriction bills that were introduced and passed in state legislatures from 1989 to 2010. The chapter outlines both the abortion bills, as well as the policies they are comprised of, in order to account for the fact that some bills may contain many policies. I also show the distribution of bills across states, years, and circuits as well as passage rates.

Overall, these data show first that abortion is, as expected, a common item on the policy agenda. There are isolated situations where a large number of abortion bills are introduced in a particular state or a particular year, but on the whole, most states see abortion bills introduced in most years. The main difference over time is in abortion policies: I find that different policies are more popular during different periods of the dataset. These findings form the foundation of the empirical analysis in Chapter 8 that answers the key questions posed by this dissertation.

A. Conceptualizing “Abortion-Related” Bills

1. Restrictions Versus Pro-Active Bills

There were 2,763 bills introduced during the twenty-year window of data that I evaluate here (1990-2010). Despite the large number of bills that are introduced every year, few ever become law: only 203 ever made it out of a legislature. This includes the 181 bills signed into law,

12 vetoes that were overridden, and 10 that passed both houses but failed to move forward (perhaps because the session ended or different versions across the chambers could not be reconciled). Low passage rates are not unexpected or unique to the abortion context: in both Congress and state legislatures, the proportion of bills that become law is relatively low. However, as we will see, there are noteworthy differences across time and states.

Abortion restrictions are far more common than “pro-active” policies that aim either to support people seeking abortion (by providing information or access to abortion for rape victims), allow funding for abortion in certain cases (generally rape, incest, or health of the mother), or repeal restrictions (such as a Rhode Island bill that repealed a requirement that physicians notify the husband of a married woman seeking an abortion).

2. Pro-Active Bills

There are 131 bills that I classify as “pro-active.” As an example of these, New York introduced a bill called the “Reproductive Health Act” that explicitly provided for abortion as a fundamental right (NY AB 11484) and Hawaii passed a law in 2005 that allowed for abortions to be provided in clinic offices (rather than hospitals). But the majority of pro-active bills make smaller changes: consider a set of similar bills introduced in West Virginia (WV HB 2238) and Rhode Island (RI 2007 SB 699) which changed state laws to require rape victims be provided with information regarding emergency contraception and abortion, or bills introduced in Virginia (VA 2004 SB 456) and Michigan (MI HB 6050) that provide that abortion laws do not apply to contraception.

As Figure 7-1 below shows, the vast majority of these were introduced in Rhode Island. Additionally, as shown in Figure 7-2, about half of were introduced in 2005. After a closer

examination of the political context in Rhode Island in 2006, and in 2006 more generally, there are no clear reasons why this might be the case.

Figure 7-1: Bills by State

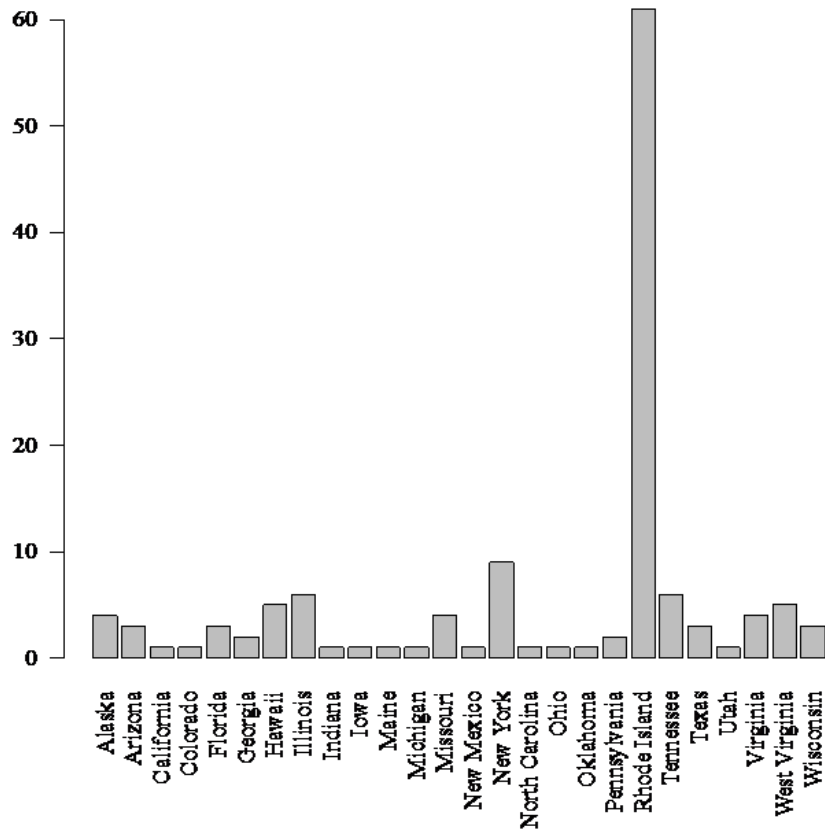
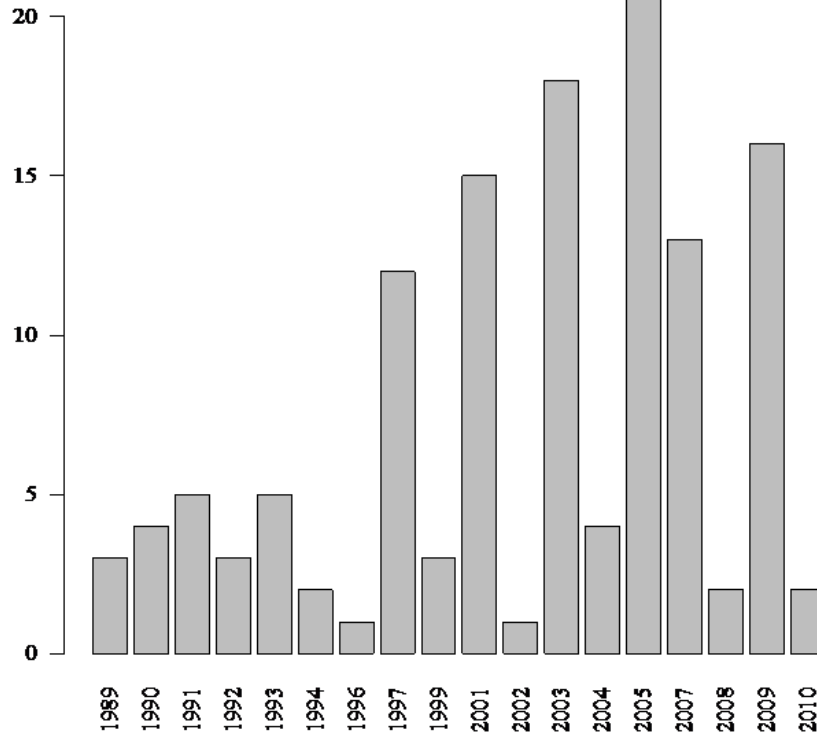


Figure 7-2: Bills by Year



Overwhelmingly, these bills do not tend to pass. In fact, there were only four years where any proactive bills passed at all. This, of course, is at least in part because it is unlikely any bill that is introduced will pass. It is also likely because bills that make it easier to access abortion are generally met with considerable opposition.

In the following analyses, I drop these pro-active bills. While they do tell an important story about abortion politics in the United States, my focus in the coming analyses is restricted to abortion restrictions. Key to the theory and analysis here is the fact that the bills that ultimately pass are almost invariably litigated. While this is true for abortion restrictions, I do not believe it

is true for pro-active bills. Anti-choice organizations generally focus on advancing and defending restrictive laws, rather than opposing these pro-active bills, which generally make small scale changes that make it slightly easier to obtain abortions rather than fundamentally altering the policy landscape in the way some restrictions do.

B. Abortion Restrictions: Bills

1. Bill Introductions by Year

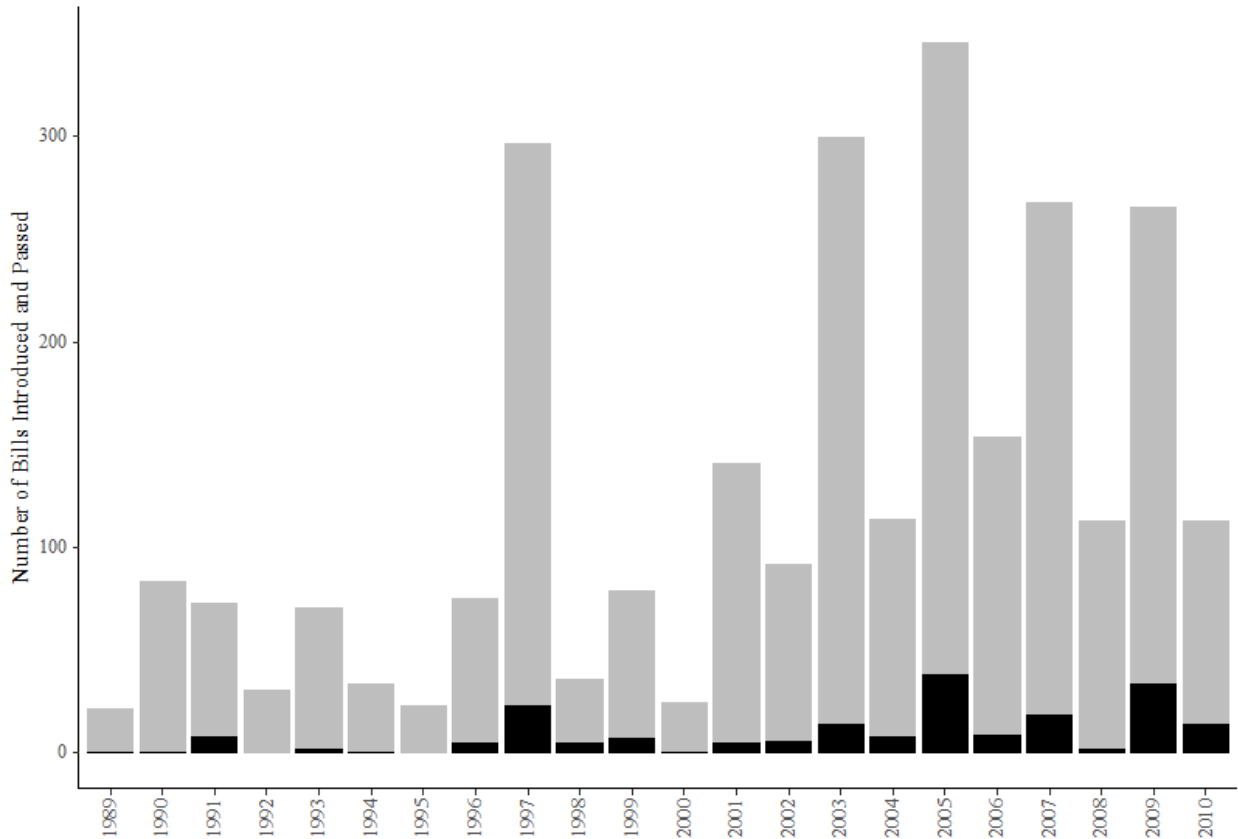
Figure 7-3 shows the number of bills introduced each year (in gray) and the number of bills that pass each year (in black). There are some clear trends for the number of bills introduced, starting with the increase in the number of bills introduced from 2001 onwards. From 1990 through 2000, an average of 70.8 bills were introduced each year. After 2000, that number jumps to 190.7. The almost threefold increase may be attributable to the election of President Bush, who ended the American Bar Association's role in helping screen judicial nominees, "trading quality for ideology" and "transforming the nation's federal appeals courts" with conservative nominees.¹⁵ After Chief Justice John Roberts was confirmed to the Supreme Court in 2005, the court became arguably the most conservative it had been in decades.

In 2003 and 2005, more abortion-related bills were passed than any other year (300 and 346, respectively), and there was a reasonable success rate of passage (11.65% and 12.76%). According to Lexis Nexis, the average passage rate of the over 100,000 bills that are introduced every year in state legislatures is about 20%. Given the controversy surrounding abortion restrictions in the time window I am looking at, an almost 13% passage rate seems relatively high. Despite the number of bills going up from 2001 onwards, the overall passage rate of bills is actually

¹⁵ <https://abcnews.go.com/US/story?id=93753&page=1>; <https://www.nytimes.com/2008/10/29/us/29judges.html>

lower post 2000 than before (5.84% vs. 7.13% of all bills). This holds true even if we ignore 1997 (which has a notably higher number of bills introduced as well as a large number of bills that passed (6.43%)). Some potential explanations may be found in the policies that are included in each bill (for 1997, partial birth abortion is particularly relevant), which I discuss in a later section.

Figure 7-3: Bills Introduced and Passed by Year



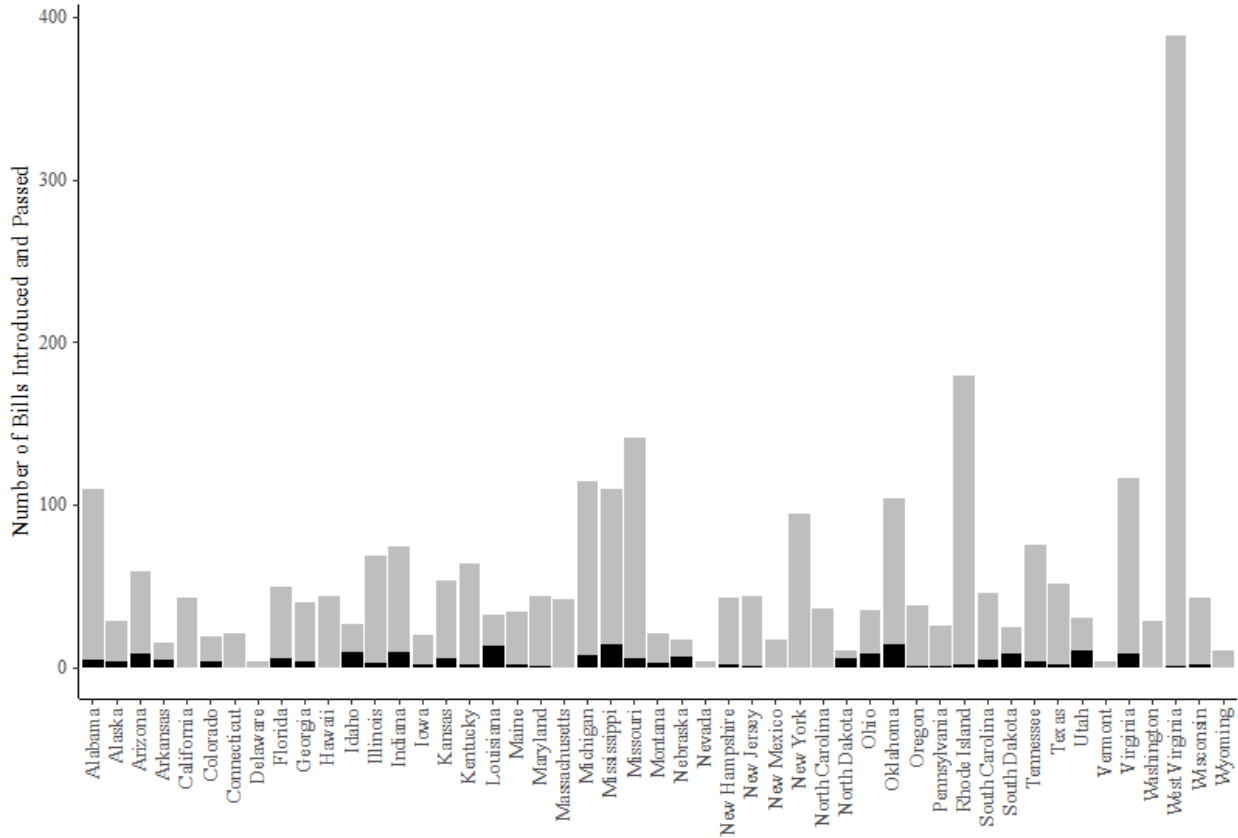
Notably, of the 2,757 bills in the dataset, 1,886 of them were introduced in odd numbered years. This indicates that bills are significantly more likely to be introduced in off-election cycle years. This aligns with general trends among states, where the majority of bills are introduced in odd numbered years. However, the ratio we see here is notably high. While this data does not show why that is the case, some potential explanations immediately jump out. In a two year session, it might make more sense for legislators to introduce bills at the beginning of their terms in order to

campaign promises or give the bills more time to succeed. Another potential explanation is that perhaps new members of the state legislature are more likely to introduce a bill that has very little hope of passing. As they are seated in the year after an election, these sessions are the most likely time they may want to signal their anti-abortion bona fides. While these data do not include any details on the legislator who introduced the bill, it would be a relatively straightforward task for future research to investigate.

2. Bill Introductions by State

Moving beyond years, I also look at the number of bills introduced by state in Figure 7-4. Immediately, it is clear that the legislatures in West Virginia and Rhode Island are far more active than other states, with 392 and 239 bills introduced, respectively. While Rhode Island might be surprising given its ideological makeup, it is important to note that these are just bills introduced, not passed—and in fact, only 2 of the 239 bills introduced in Rhode Island ever became law.

Figure 7-4: Bills Introduced and Passed by State



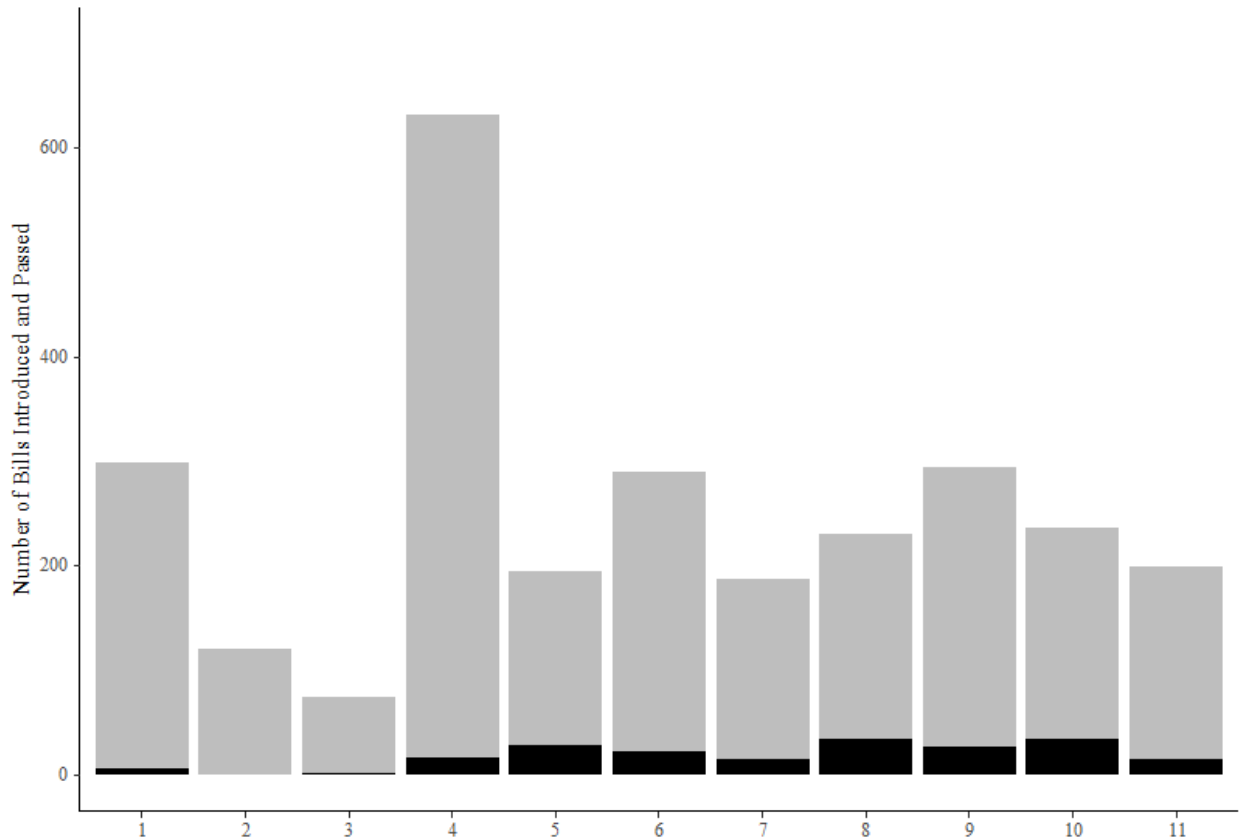
Some states, however, have relatively strong track records of passing abortion restrictions. North Dakota, for example, has a 54.5% passage rate, and Nebraska has a 41.17% passage rate. Idaho, Louisiana, and South Dakota, too, have passage rates higher than average: 37.04%, 39.4%, and 36%, respectively.

3. Bill Introductions by Circuit

As a final exploration of the distribution of bills and passage rates, I look at the relationship between these and the federal circuit that each bill falls under in Figure 7-5. Here we can see that there is a relatively similar number of bills in each circuit with the exception of a few. Each circuit sees an average of 131.28 bills during my time window, with the Fourth at 616 and the Third at 72. For context, the Fourth Circuit contains Maryland, North Carolina, South Carolina, Virginia, and West Virginia and clearly large number of bills in those states are coming from West Virginia

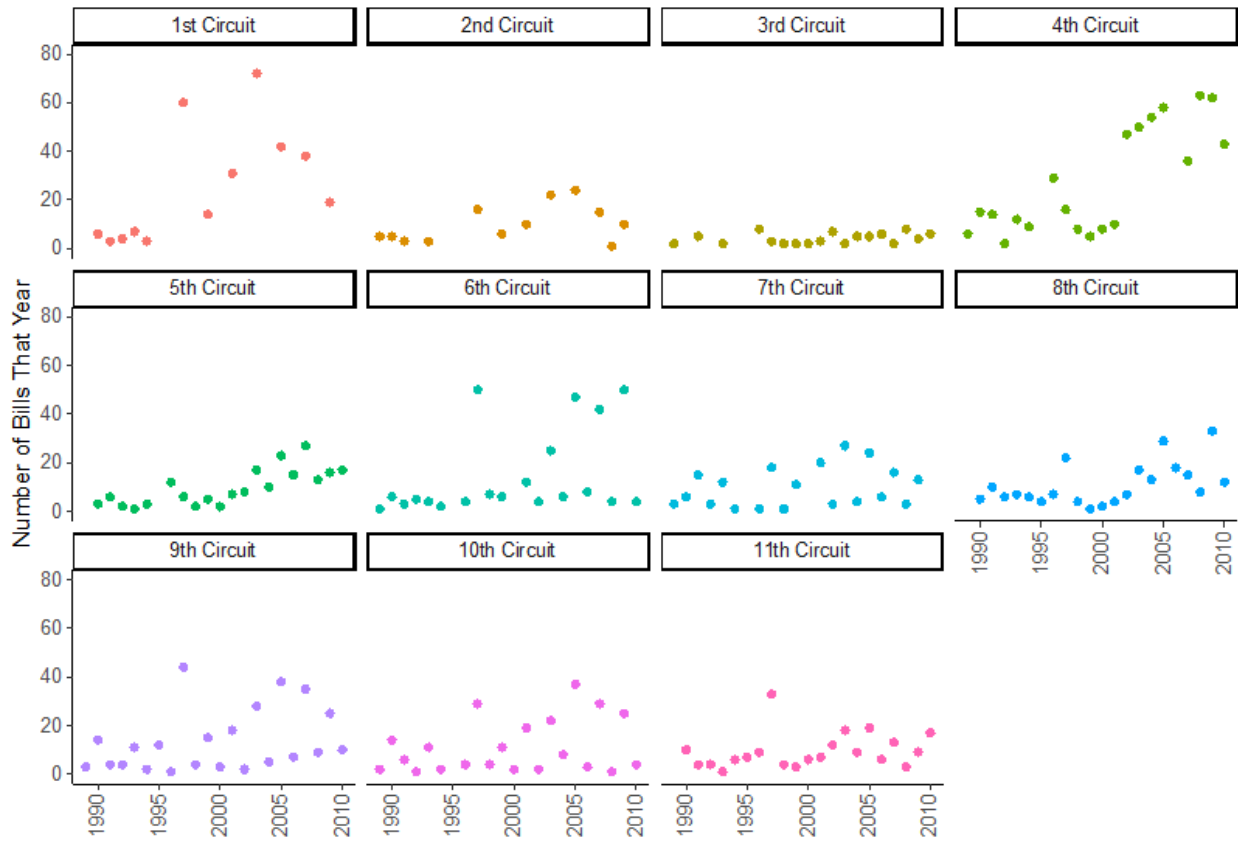
(~61%). The Third Circuit, on the other hand, is comprised of Delaware, New Jersey, and Pennsylvania. These states are, unsurprisingly, less likely to have abortion regulation introduced given their generally liberal leaning legislatures.

Figure 7-5: Bill Introduction and Passage by Circuit



I also look at bill introduction in each circuit by year in Figure 7-6 below. Considering bill introduction by circuit allows me to see if there are any interesting or potentially complicating distributions of data. Some circuits, like the Third, Fifth and Seventh, see fairly regular numbers of bills introduced per year in their states. Others, like the First and Fourth experienced large changes in the number of bills year over year: some years about 60 bills were introduced, while other years it was under 10. This is an indication of some level of strategic behavior on the part of the legislature, but it is difficult to say what, exactly, is driving this.

Figure 7-6: Bill Introduction in Circuits by Year



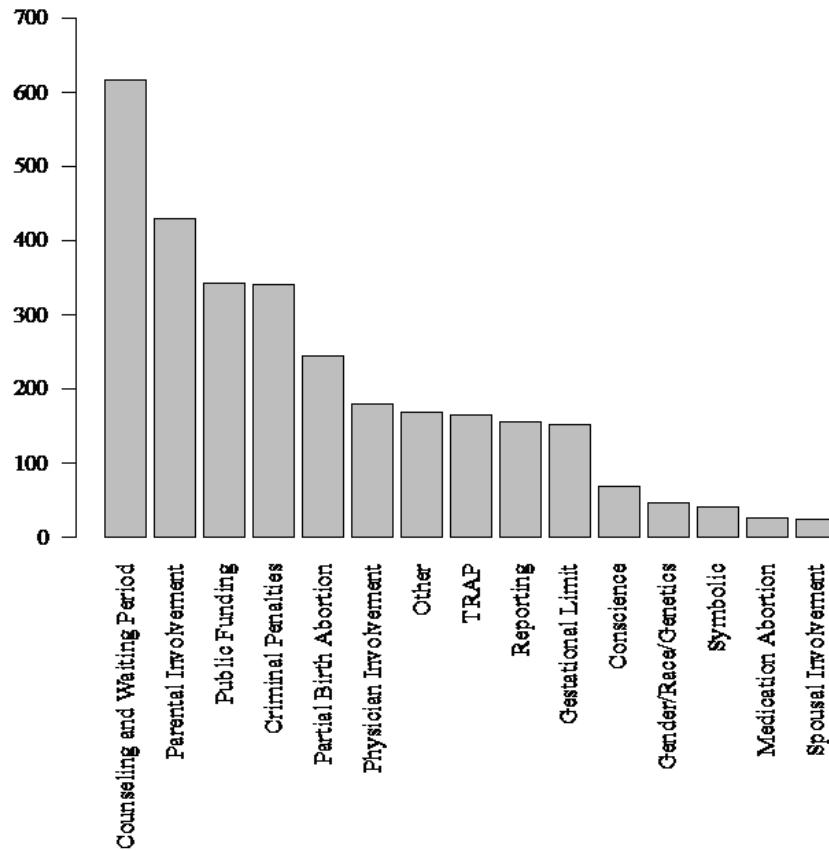
The distribution of bills that I have outlined above shows that there appear to be meaningful differences across years, states, and circuits. This is, in and of itself, an indication that states are strategic. States in the conservative Fourth Circuit, for example, introduced many more bills than states in the more liberal Second Circuit.

C. Beyond Bills: Restrictive Policies

Most of the 2,757 abortion-related bills introduced at the state level are focused on one of the thirteen policies identified in Chapter 6, although a little over 9% contain multiple policies (240). Figure 7-7 below shows the distribution of policies across all bills. Immediately evident is that counseling and waiting periods were, by far, the most common policy that legislatures introduced (616). Parental involvement (430), restricting public funds from going to abortion

providers (342), and penalties (340) follow. The most common policy that was bundled with others was “penalties,” which covers both civil and criminal consequences for individuals seeking or providing abortions (58).

Figure 7-7: Policy Introduction



That waiting periods are the most common policy introduced is not surprising. They are generally viewed more favorably by the public than other restrictions. The Kaiser Family Foundation found 67% of the public supports policies imposing a 24 hour wait between an initial meeting with a health care provider and an abortion procedure.¹⁶ These policies are not outright bans—indeed, they don’t limit abortion at all—although the goal is clearly to reduce abortion

¹⁶ <https://www.kff.org/womens-health-policy/poll-finding/kff-health-tracking-poll-views-knowledge-abortion-2022/>

procedures by placing an obstacle to obtaining them. These bills also often have a component that requires the doctor to provide certain state-mandated information about risks or side effects of abortion. Similarly, a large majority of Americans support requiring a minor to obtain parental consent before obtaining an abortion.¹⁷

1. Changes Over Time

I also look at how policy introduction has changed over time. Figure 7-8 below shows the percentage of all bills introduced for each year that contains the respective policy. For instance, we can see that in 2000, counseling and waiting period bills accounted for 44% of all bills introduced that year. Some bills have more than one policy. In those cases, each policy appears in its respective graphic for that year. Beyond simply helping to describe the underlying data for the analyses that follow, Figure 7-8 also highlights the interesting trends in abortion regulation throughout my time frame. We can see that gestational time limits were notably popular in the early 1990's but quickly fell out of fashion whereas medication abortion limits did not even start to show up until the 2000's.

¹⁷ <https://news.gallup.com/poll/20203/americans-favor-parental-involvement-teen-abortion-decisions.aspx>

Figure 7-8: Policies by Year

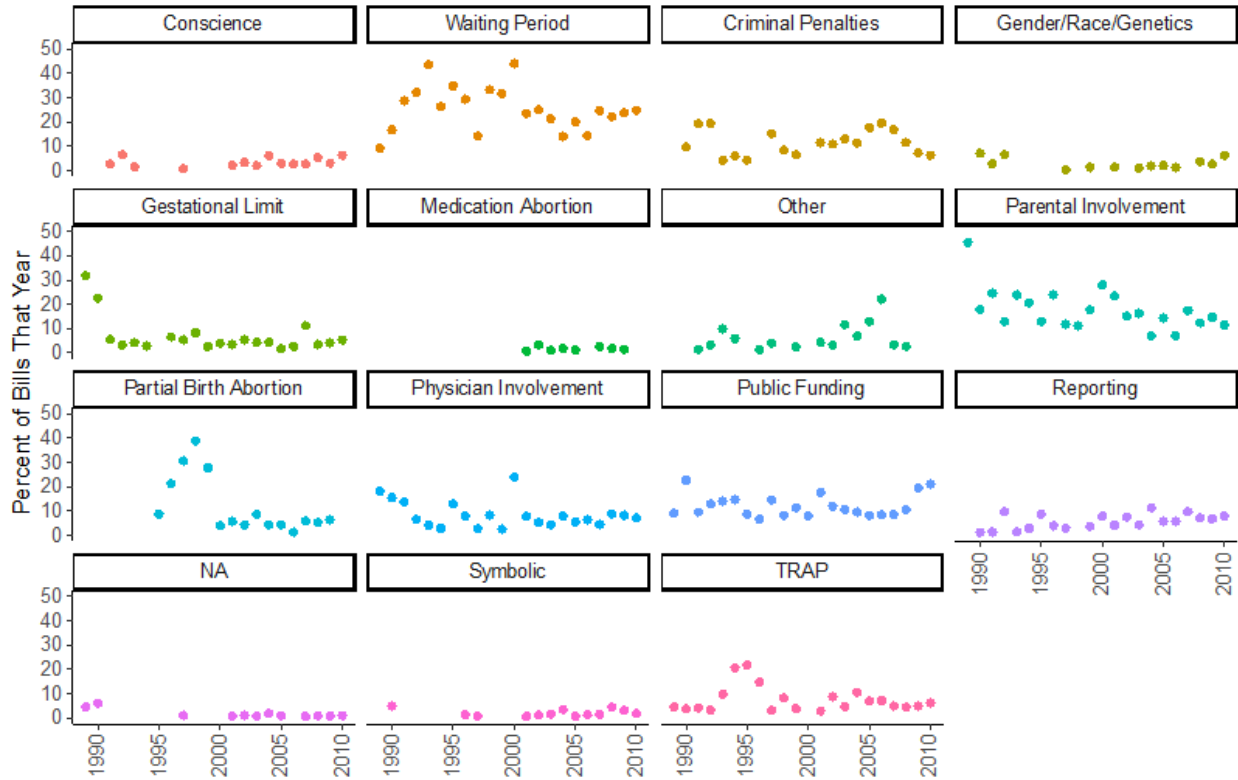


Figure 7-8 highlights an important component of the abortion regulation policy world. Differences in policy introduction over time suggests that state legislators are being deliberate about what policies they choose to pursue, perhaps in response to societal moments, through learning from other states and interest groups, and responding to dynamics within their own legislative bodies. It is not the case that legislators are introducing the same bills year after year. They are acting strategically to incorporate specific policies.

For example, while we can see that some policies have been popular ways to restrict abortions throughout the 20 years in the dataset (Gender/Race/Genetics laws were introduced almost every year, as were parental involvement laws), it is also clear that time plays a role in what policies are frequently pursued by legislatures. Some policies saw spikes and dips over time: introduction of public funding legislation, for example, varied widely over time, as did

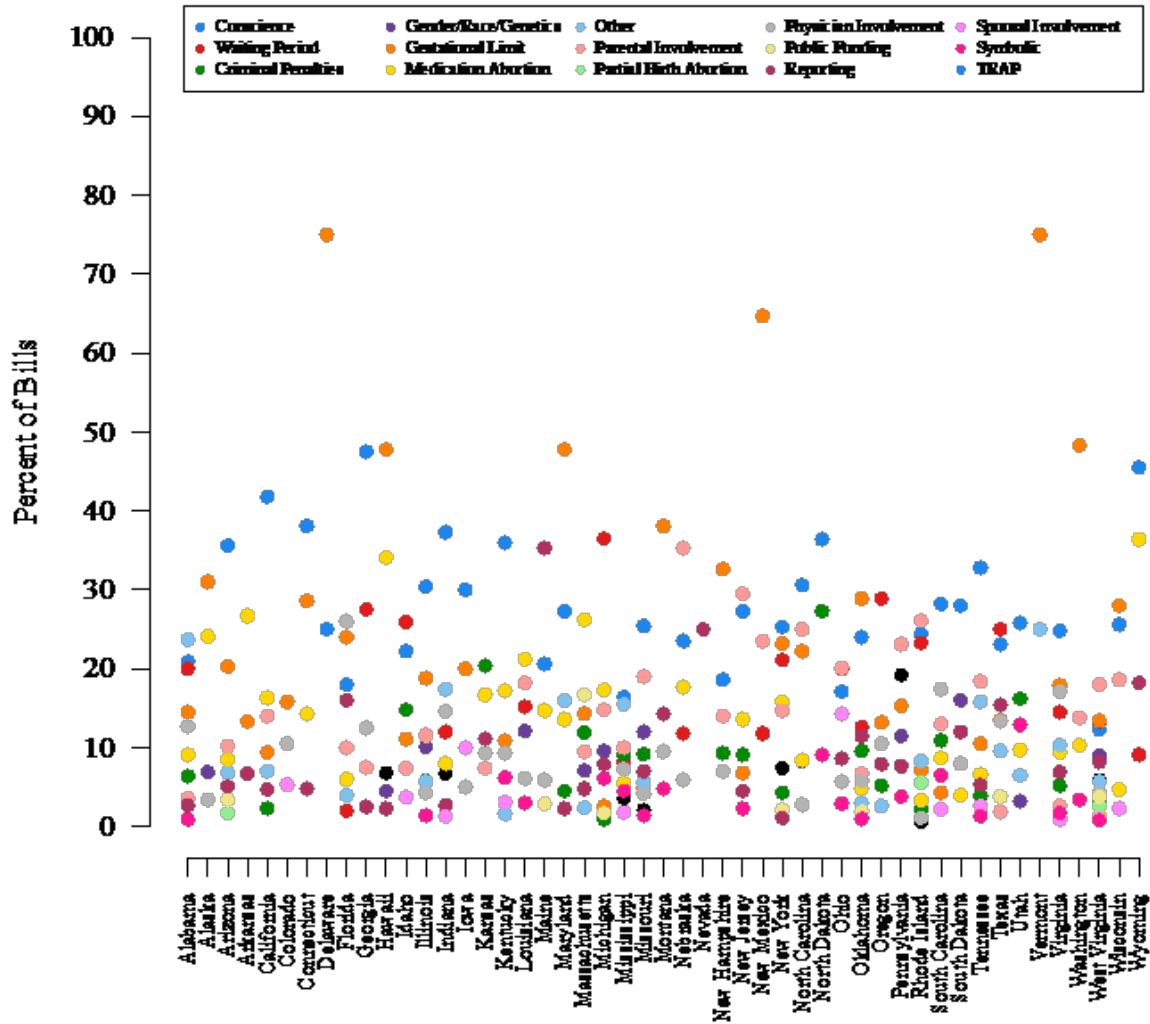
physician involvement laws. Others saw large spikes before returning to a smaller amount of bills. Partial birth abortion is perhaps the most obvious example of this: in the mid-1990s, almost half of all abortion bills introduced contained a partial birth abortion provision.

2. Policies Introduced by State

Next, I consider which policies are introduced in which states, in order to determine if there is any reason to be concerned that specific policies are only being introduced in particular states. An uneven distribution of policies could be problematic for considering the relationship between state legislatures and circuits: if states are not introducing a variety of bills and courts not hearing a variety of cases, it is not really fair to claim that the findings in the next chapter can be generalized to abortion restrictions broadly. For example, if South Carolina only introduces waiting period bills, then the relationship between South Carolina and the Fourth Circuit is not about abortion restrictions, but about waiting periods.

Figure 7-9 below shows this concern is unwarranted: a variety of bills are introduced across the states. This figure shows, for each state, the percentage of bills with a specific policy. It shows that in some states, gestational limit policies are introduced in a majority of abortion restriction bills. It also shows that, in most states, TRAP laws are introduced in about 30%-50% of bills. This indicates that some policies are more common than others, but it is not the case that individual states focus on one policy to the exclusion of others.

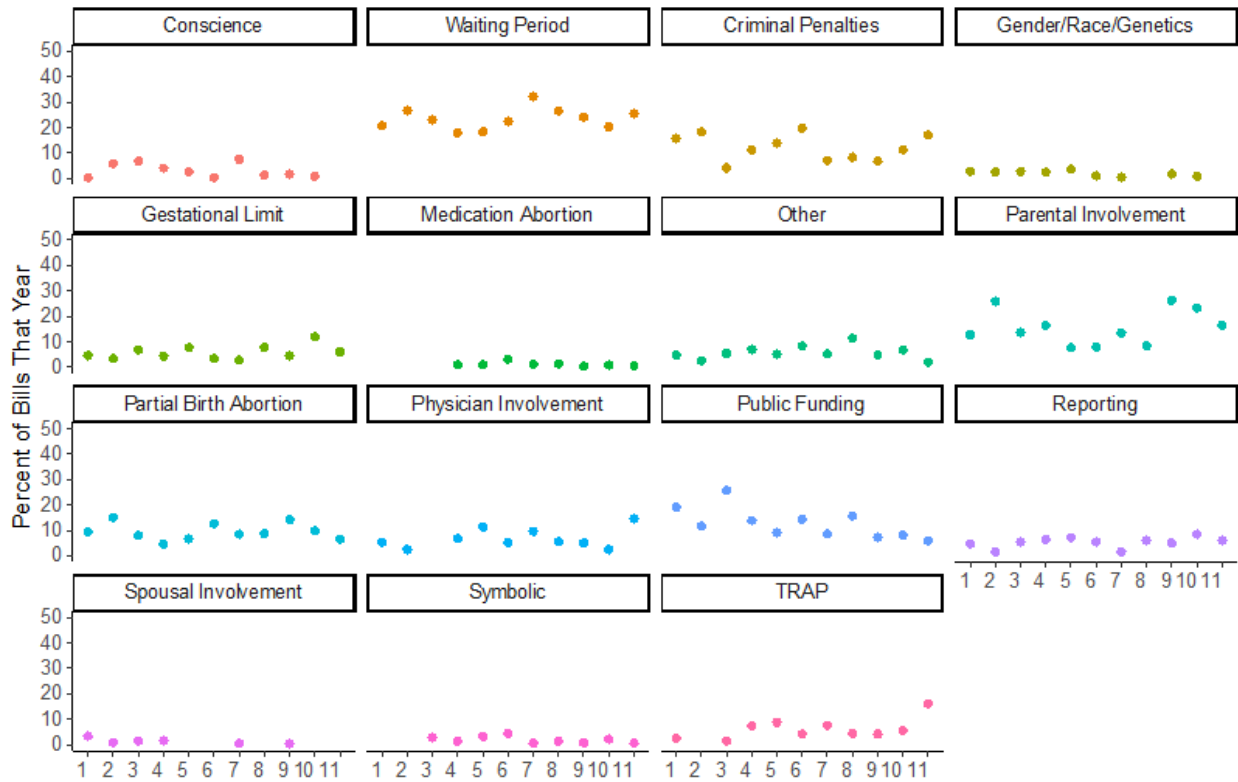
Figure 7-9: Policies by State



3. Policies Introduced by Circuit

Finally, I consider the types of policies introduced across the circuits. Figure 7-10 shows the percent of bills each year that contain a specific policy. Similar to the above, it is clear that while some policies (waiting periods and public funding, for example) are in a larger percentage of bills than medication abortion restrictions or conscience clauses, on the whole, each circuit hears a mix of bills.

Figure 7-10: Policies by Circuit

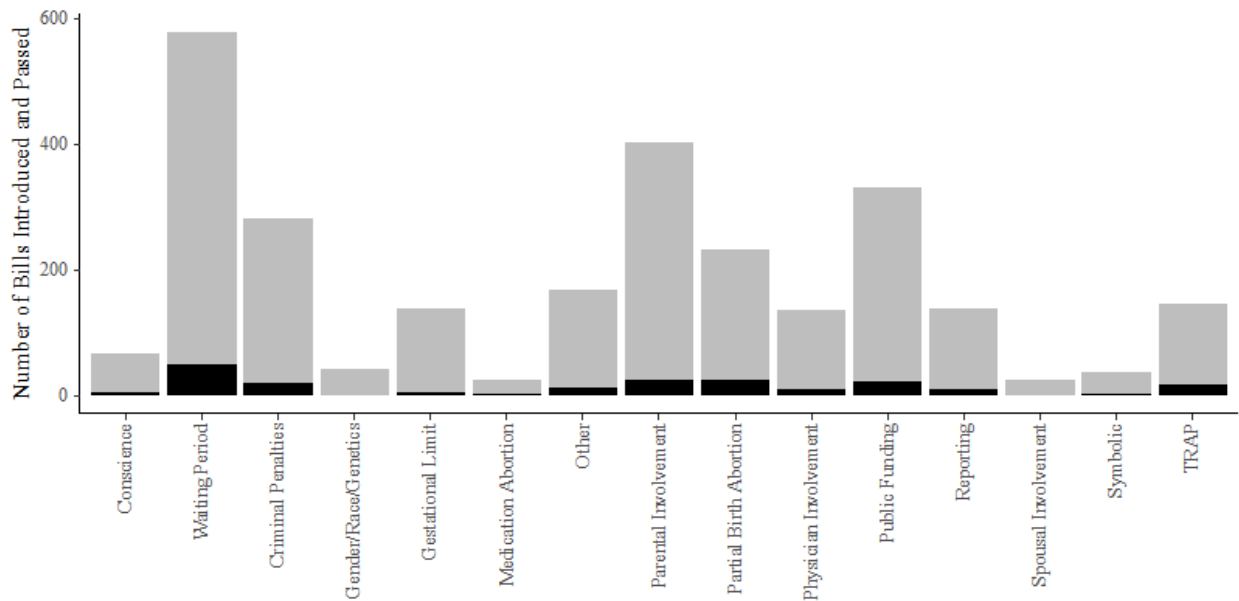


D. Policy Passage

As was discussed with bills, understanding when, where, and what policies are actually being passed by states is important to the fundamental question that this project seeks to understand, namely the relationship between ideology and law passage. To that end, I recreate Figure 7-3, which looks at bills passed, but this time examine only policies that passed. Figure All policies introduced are shown in gray, and policies passed are shown in black. This figure shows (as the above discussions also indicate) that there are some kinds of policies that are introduced far more than others: waiting periods, parental involvement, and public funding provisions, for example, are all introduced at much higher volumes than medication abortion, TRAP, or gestational limits, for example.

Importantly, it also shows that some kinds of policies become law more than others: while some spousal involvement bills were introduced during this time period, none passed. Similarly, only one symbolic bill and one medication abortion bill passed. On the other hand, waiting period, parental involvement, partial birth abortion, and public funding policies all passed at relatively similar rates. This is interesting, because far more waiting period policies were introduced than any other kind of bill.

Figure 7-11: Introduced and Passed by Year



E. Conclusion

My intention in this chapter was straightforward: first, to introduce the dataset I will further analyze in the following chapter, and second, to conduct initial, descriptive statistical analyses that allow me to begin to understand how abortion policymaking functions at the state level. In this chapter, I first distinguish between pro-active bills and abortion restrictions, and describe why I choose to focus only on abortion restrictions. Next, I explore bill introduction

and passage, and find that bills are more likely to be introduced in odd numbered years. As expected, it is rare for any given bill to pass. Finally, I disaggregate bills into policies and find that there are differences over time: for example, waiting periods were very common in the 1990s, and medication abortion policies did not appear until the 2000s. However in general, states introduce a variety of policies, and circuits hear cases concerning a variety of policies.

I build on this analysis in the following chapter, where I use a variety of quantitative tests to examine whether bill passage and policy passage are, as I anticipate, influenced by the federal circuit courts.

Chapter 8

Considering Distance and Uncertainty

The previous chapter laid out in some detail the underlying data for the quantitative analysis of all abortion-related bills introduced in the state legislatures from 1989-2010. In this chapter, I build on these initial descriptions of the data in order to answer the central questions posed by this dissertation. The goal here is to determine if—controlling for other factors that we know influence the chances of a bill being passed—a state’s relationship with its circuit court has an influence on abortion policymaking. In the analyses that follow, I treat both bill passage and policy passage as my primary dependent variables.

A. The Role of Ideological Distance

A central goal of this dissertation is to evaluate if the ideological distance between circuit and state affects the passage of anti-abortion legislation and policies. I conceptualize distance as a measure of the gap between the political ideology of a state and the political ideology of a circuit. This is somewhat complex in that while measures of both exist, they are generally on different scales. In this section, I describe how I measure ideology for both states and circuits, and compute a measure that represents the distance between them.

1. State Ideology

I begin by grappling with how to determine the political ideology of a state. This concept is deceptively complex: it could refer to the ideology of the state’s governor or other politicians,

the ideology of voters, or a variety of other definitions. Here, what is important is the public opinion incentives that state legislators are responding to when introducing and voting on legislation. Therefore, I focus on the ideology of voters in the state. I use congressional election returns as a proxy for state ideology. These data come from the MIT Election Lab.¹⁸ For each election, I combine the number of votes Democratic U.S. congressional candidates received and divided that by the total number of votes cast for that election. This is the “Democratic share” of votes for that state for that election. Numbers over .5 indicate a more liberal state; numbers under .5 indicate a more conservative one. For example, Democrats received 2,177,618 votes in Michigan in 2000 whereas Republicans got 1,786,980 votes. This results in a Democratic vote share of 0.549, or a somewhat liberal lean.

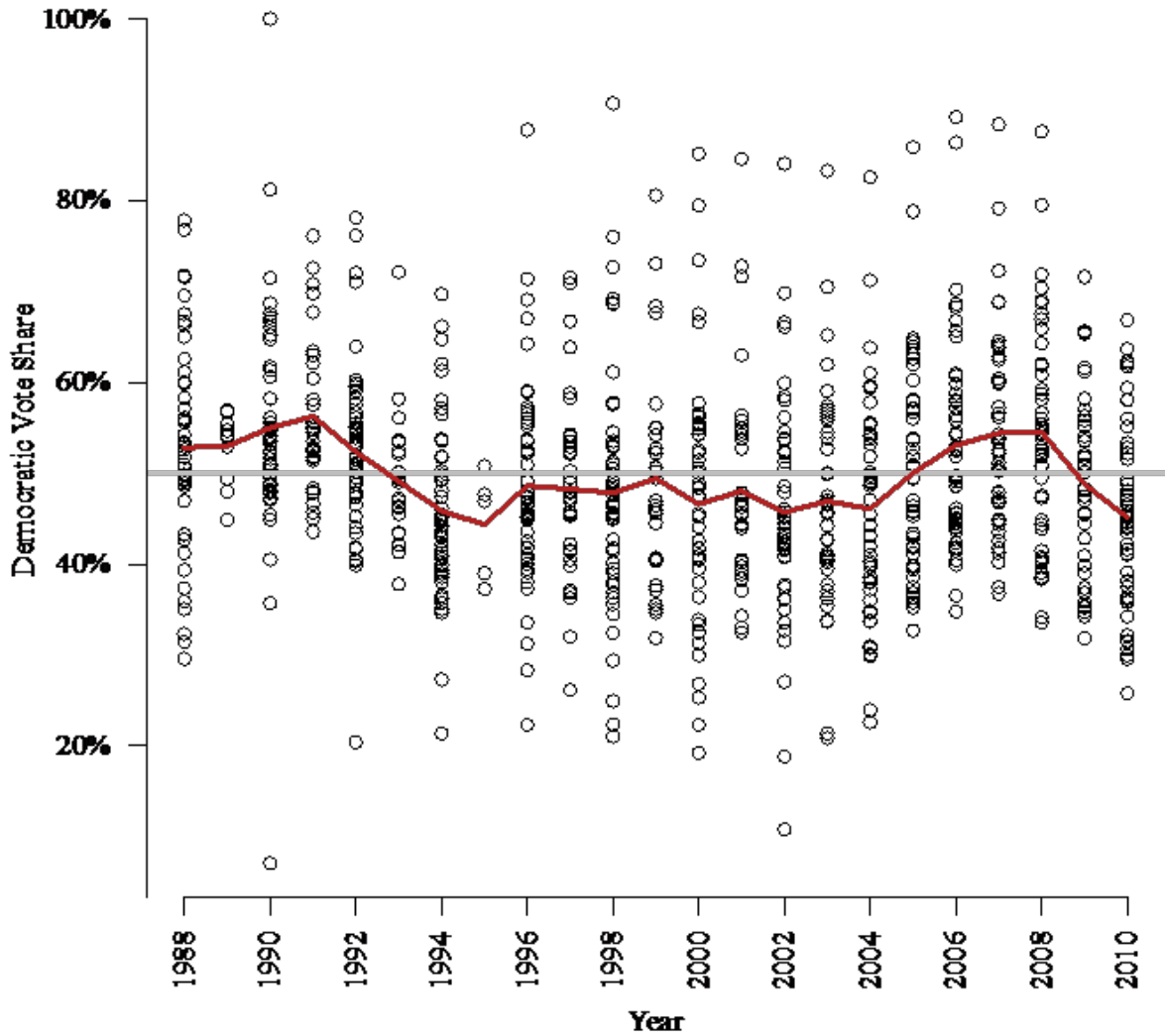
While this is relatively straightforward, because it focuses on election years, it is not as precise for bills introduced in off-election years (which, as noted above, account for a large majority of all bills). Moreover, using previous year election returns can miss potentially impactful events, for example a bill introduced at the federal level to restrict abortion, such as the Partial Birth Abortion Ban Act of 1993, or a Supreme Court like *Casey*. I therefore take the average of the election before and the election after each off year. For instance, to calculate the ideology for Alaska in 1991, I calculate the mean of Alaska’s Democratic share in 1990 (48.07%) and their 1992 share (47.78%), to yield a share of 47.93%. This is an appropriate approach as the off-year scores likely reflect changes happening in the electorate between elections and is a reasonable proxy for the state’s overall leaning.

For the whole dataset, the mean Democratic vote share is 0.532, suggesting an overall slightly liberal lean of election returns during the time period I consider. However, looking at the

¹⁸ <https://electionlab.mit.edu/data>

distribution of vote share over time, a different story emerges. Figure 8-1 below shows the yearly mean for Democratic vote share (shown in red) with individual state results as black dots. This distribution highlights the fact that the mean shifts slightly above and below 0.5 (which would be an ideology exactly in the middle of liberal and conservative) over time. On average, states are somewhat conservative across this twenty-year period, with fluctuations into more liberal averages in the early 1990s and late 2000s. This distribution of ideology comports with what we would expect given the results of presidential elections at that time.

Figure 8-1: Democratic Vote Share by Year



2. Circuit Ideology

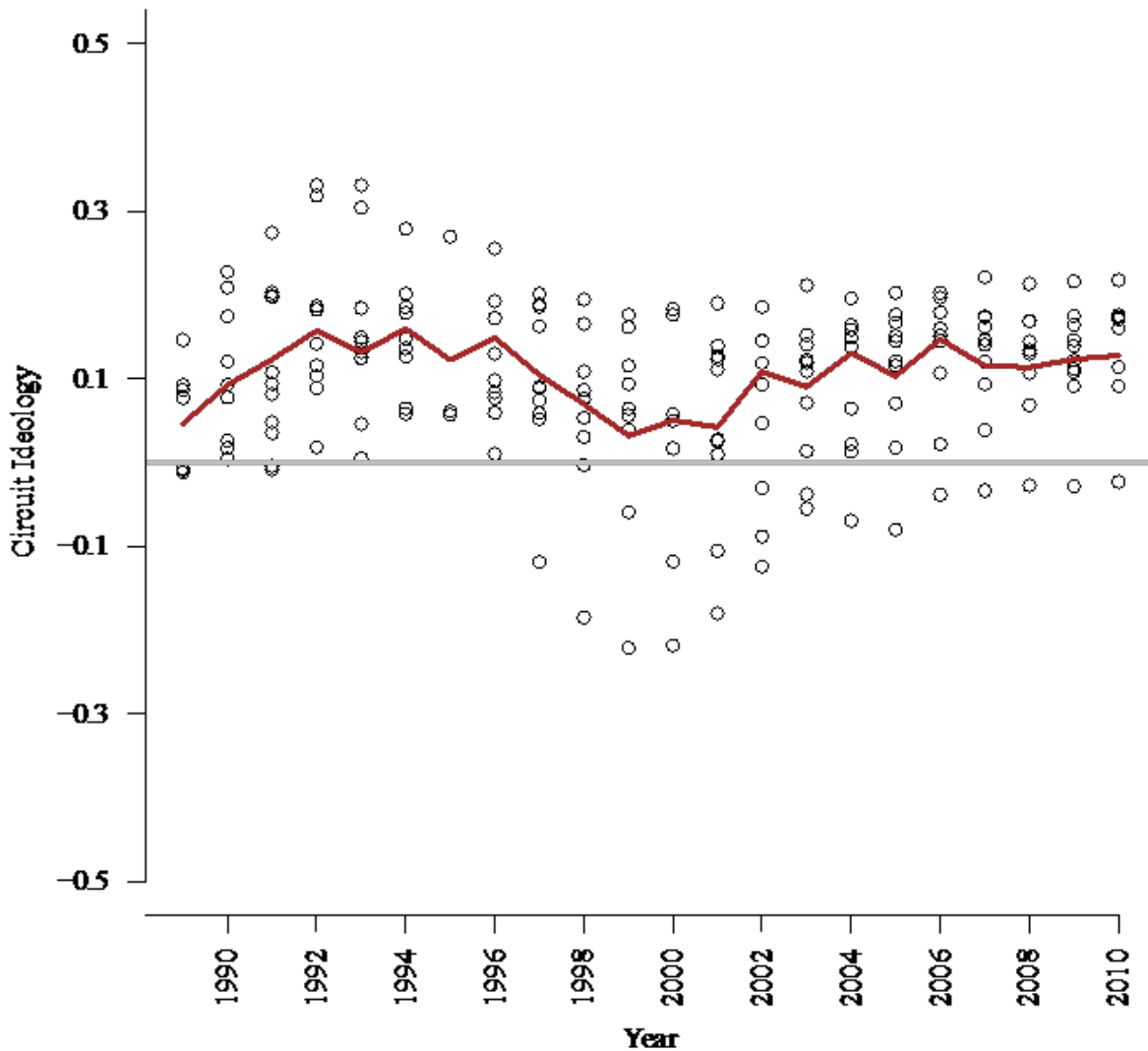
To account for the ideology of each circuit, I use the GHP Circuit Ideology measure I develop and describe in Chapter 6.¹⁹ Again, this is a useful and important distinction from other

¹⁹ Recall that this approach takes the existing GHP scores, which measure the ideology of each circuit court judge, and creates a circuit-level measure by randomly generating 1,000 panels per year and averaging the medians of those panels.

measures that exist for the courts because it takes into account the nature of circuit case hearing, namely that each case is heard by a 3-judge panel that is *randomly* drawn from the available judges. Note that this measure, as initially constructed, is the inverse of Democratic vote share measure discussed above: conservative courts are represented positive numbers whereas liberal courts are negative numbers.

Figure 8-2 below shows the mean circuit ideology score (in red), and individual circuits as black dots. In general, all courts lean conservative. In fact, there are some years where only one (the Ninth) or two (the Ninth and Second) circuits are on the liberal side of the scale, while the others are all varying degrees of conservative. The mean fluctuates slightly over time, becoming less conservative in the late 1990s and early 2000s, but still never crossing the 0.0 threshold into the liberal side of the scale. There are no sudden changes, which is expected, given that new judges are frequently resigning and being appointed over time.

Figure 8-2: Circuit Ideology over Time



3. Distance and Bill Passage

It is initially unclear if the measures for state and circuit ideology are readily comparable. Note that the circuit ideology is a much more constrained measure than the state ideology is. One potential way to deal with this is to rescale both variables from -1 to 1 with -1 representing the most liberal and 1 the most conservative. That means that a state-year with a score of -1 for

Democratic vote share was the most liberal state-year for the dataset and a circuit-year with a 1 is the most conservative within the dataset and so on. Note here that the rescaled variable reverses the Democratic vote share such that more Democratic votes is now represented by negative numbers to align with the circuit ideology scale. Comparing ideologies in this way is not without complications, of course. The most conservative court-year is still relatively moderate on the scale (0.33), meaning a shift to 1 represents a somewhat substantial change in the size of the ideology measure. That being said, using distance in this way is a good approach to capturing the relative positioning of both states and circuits. Examining distance is useful as my central argument is about the perceptions of circuit ideology in states, which the distance measure provides by showing the *relative* positioning of both states and circuits—and, crucially, the difference between them.

Figure 8-3 below show the distribution of circuit ideology and democratic vote share, first for introduced bills and then for passed bills. Unsurprisingly, most of the data comes from states where conservatives won more of the vote, which can be seen from the heavy clustering of data on the right side of both figures—i.e., most bills come from conservative states. However, there are some interesting dynamics here that are worth mentioning. While most of the bills come from conservative states (those with a positive Democratic vote share—recall that this is rescaled and reversed), there are still a considerable number that are to the left of the vertical zero line. That means these are liberal states that are introducing abortion restriction bills. However, what is most important here is bill passage, and only a handful of bills that were passed in Democratic states in liberal circuits (see the bottom left quadrant on the second graph).

Figure 8-3: Bills

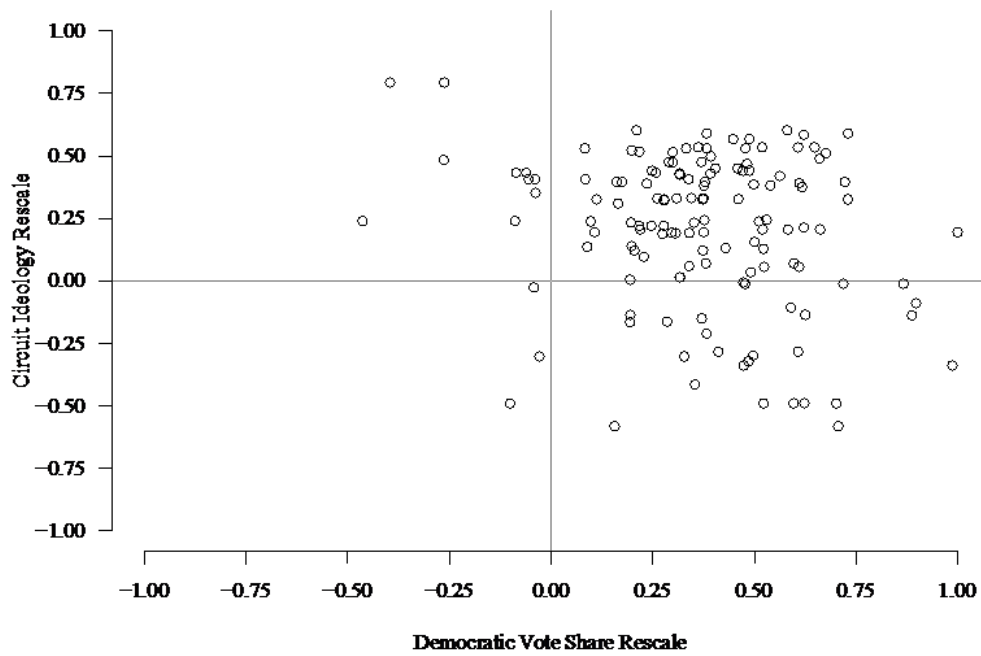
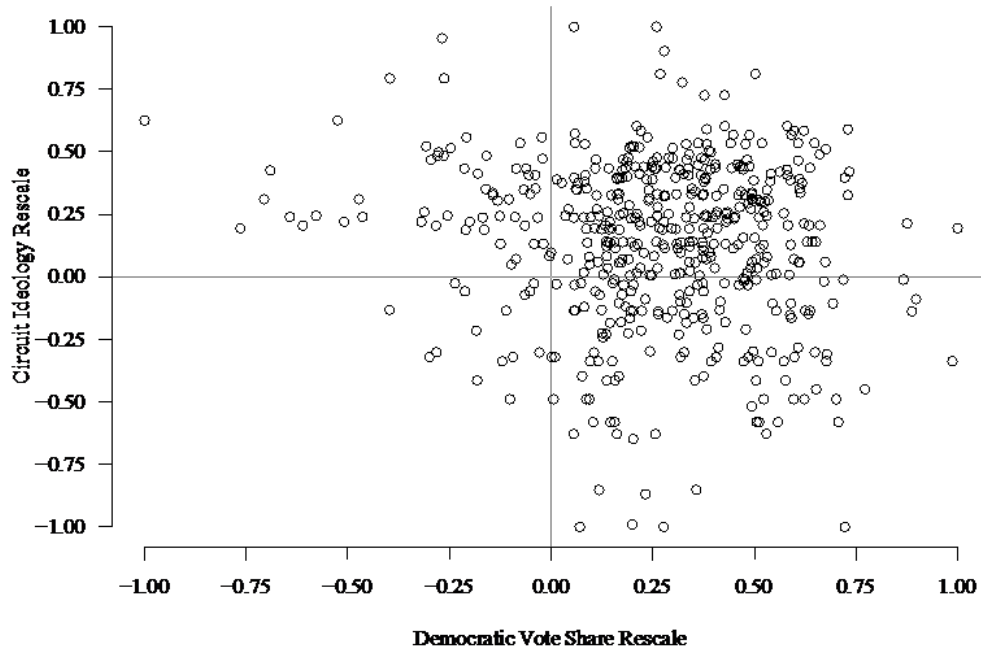


Figure 8-3 generally supports what the theory previously outlined would predict. As an initial matter, these figures offer a visual representation of the predictable fact that far more bills are introduced than are passed. Additionally, it is entirely predictable that liberal states would both introduce and pass fewer abortion restrictions. It is simply less likely that legislators in liberal states would want to introduce or pass abortion restrictions, because such restrictions likely contradict both the individual legislator's policy beliefs and the desires of their constituents.

However, it is revealing and initially surprising that there are far more bills introduced in liberal states that are supervised by conservative circuits. For example, the left side of Figure 8-3 shows bills introduced in states that are more liberal than the median. The upper half shows bills introduced in circuits more conservative than the median, while the bottom half shows bills introduced in states that are more conservative than the median. The upper left quadrant shows far more bills than the lower left, demonstrating more bills are introduced by liberal states in conservative circuits than liberal states in liberal circuits. A similar relationship is evident in the second panel of Figure 8-3: there are also far more bills passed in liberal states in conservative circuits than there are for liberal states located in liberal circuits.

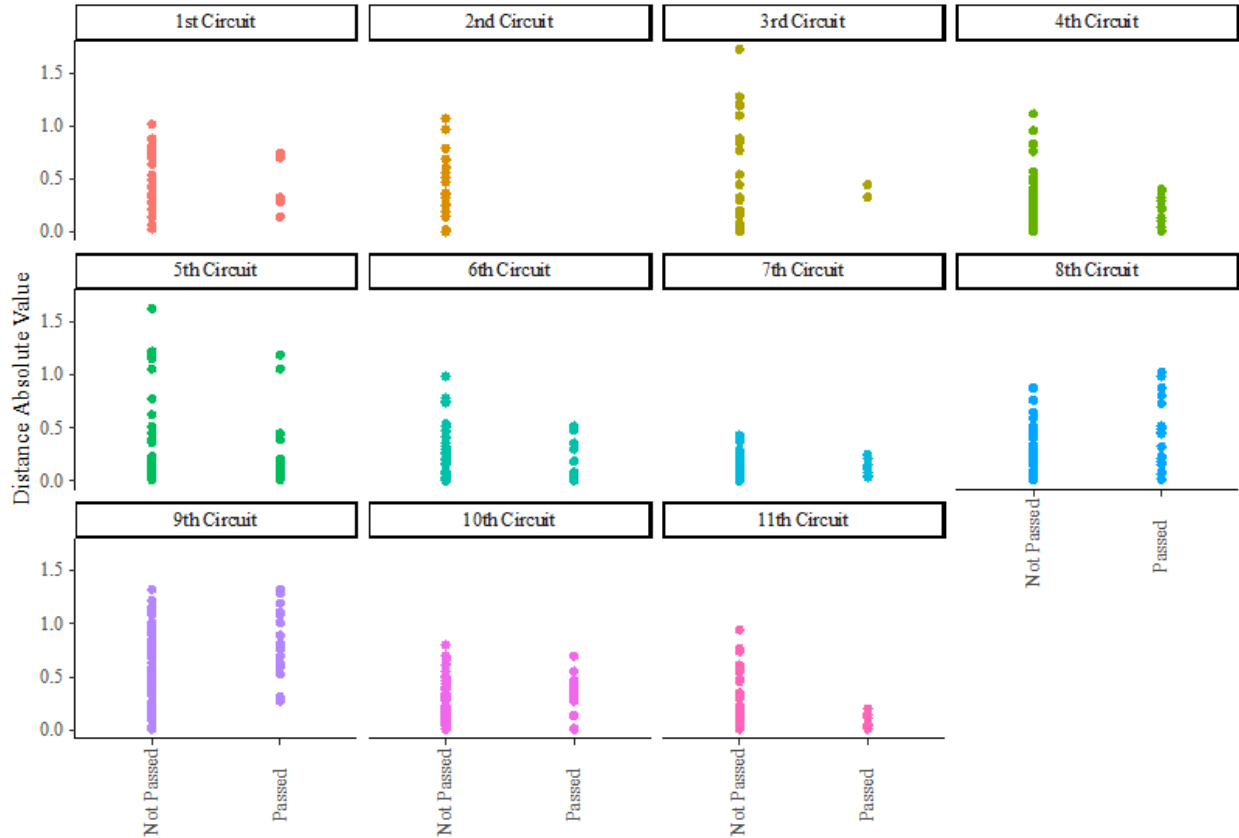
These figures also show that, as I would expect, vastly more abortion restrictions are introduced and passed in conservative states located in conservative circuits. Again, this makes intuitive sense: these legislators (and legislatures) have personal and political incentives to pass abortion restrictions, and a high likelihood that they will be upheld by conservative circuits. It also shows that while some bills are introduced in very liberal circuits (those between -0.75 and -1.0), those bills did not ultimately pass.

Next, I use these two measures to calculate the distance between them. Distance is the absolute value of the state-year's rescaled Democratic vote share minus the circuit's ideology. Scores closest to 0 indicate relative closeness, those close to 2 indicate relative distance. For example, a state-year with a rescaled ideology of 0.2 and a matching circuit-year with 0.1 ideology would result in a 0.1 distance, indicating relative closeness. A state ideology of -0.6 and circuit ideology of -0.2 would be 0.4 and so on. As a few examples, in 2009, New York and the Second Circuit have a distance of .007, which is extremely close. Pennsylvania and the Third Circuit are also quite close in 2007, with a distance of .05. On the other side of the spectrum, Florida and the Tenth Circuit in 1994 are the most distant pair in the dataset with a score of 1.3.

With the Distance measure now created, I now turn to analyzing the role of ideological distance between states and circuit courts in how many bills become law. Similar analyses for policy passage found similar results. The figures show, for each circuit, a point representing each bill that did not pass (on the left) and that did pass (on the right). The Y axis shows distance from 0-2.

For each circuit we can see how many bills were passed in state-years (recall that the Distance measure varies over time) where the state was ideologically close to its circuit, and in state-years where it was less close. What we would expect to see in Figure 8-4 if states are taking seriously the ideological distance between themselves and their Circuit is clustering of passed bills towards the bottom of the y-axis (where the ideological distance between the state and circuit is lower).

Figure 8-4: Bills Passed by Circuit



For the most part, that is precisely what we see. The Eleventh Circuit, for instance, has numerous *introduced* bills across the distance spectrum, but almost all of the ones that *passed* are near the 0 point—indicating minimal distance between the state and its circuit. Similarly, the Fourth, Sixth, and Seventh Circuits present comparable results. While there are bills introduced in legislatures that are very ideologically far from and close to their circuit, the bills that ultimately pass are generally bills introduced by legislatures that are ideologically close to their circuit.

This accords with the theory I developed in Chapter 3: while there may be low costs and many benefits to introducing a bill regardless of how the circuit would treat it, legislatures are more likely to invest time and effort into passing bills they believe will be upheld—which is supported by the finding that Figure 8-4 shows that bills that passed are bills where the

ideological distance from the circuit tended to be lower. Of course, it is not universal: in the Second Circuit, no abortion restrictions were passed at all, whereas the Tenth saw almost the same number passed as introduced. Moreover, circuits like the Eighth and Ninth saw bills passing in legislatures where there was high ideological distance between the state and the circuit they are a part of. Still, there is a general pattern of bill passage consistent with my theory.

The findings of this section demonstrate two key things. First, they largely align with my predictions: while these figures cannot indicate whether state legislators are actually considering circuit ideology when policymaking, they show that in at least some circuits, the likelihood of passing a bill is higher when the circuit and state are ideologically aligned.

B. Analysis

Here, I test the hypotheses I present in Chapter 3. Recall, I began with three hypotheses, addressing distance and uncertainty:

H1: State legislatures that are ideologically distant from their federal courts of appeals will pass fewer abortion restrictions.

H2: State legislatures that are certain they are ideologically distant from their federal court of appeals will pass fewer abortion restrictions.

The analysis proceeds in three sections. First, I construct a basic model focusing on the role of distance. Next, I create a categorical variable for distance, to focus on the most conservative states, because this is where I expect to see an impact of federal courts. Finally, in the last model, I return to considering distance as a continuous variable, and incorporate the role of uncertainty.

1. Distance

In this set of models, bill passage is the dependent variable. The base model regresses bill passage on distance. The “Base with Controls” model introduces a series of controls (which are discussed in Chapter 6 but not shown here for readability). These include year, public opinion on abortion in the state, religious adherence in the state, the proportion of females in the state, the state’s income level, if a neighboring state adopted restrictions, if the state has a Democratic governor, and the independent opinion rate of the circuit. The third model includes the controls and Bowen and Greene’s measure of legislative professionalism. I include this separately from the rest of the controls to focus on the effect of professionalism, as the findings in Chapter 4 indicated this may be an important component.

I present the results in Table 8-1. In all three models, distance is positively associated with a bill passing. The effect does decrease when the controls are added, but it is still significant. This is in direct contrast to what my theory would predict. However, the findings on professionalism support the theory. Higher professionalism is associated with a lower likelihood of passing a bill. This makes intuitive sense: this regression considers all states, and many large, liberal states are highly professionalized. A liberal legislature will be unlikely to pass abortion restrictions in any situation.

Table 8-1: Bill Passage and Distance

	Base	Base with Controls	Base, Controls, Professionalism
(Intercept)	-3.404*** (0.418)	-4.208* (1.920)	-2.654 (2.034)
Distance	1.189*** (0.255)	0.972*** (0.255)	1.061*** (0.252)
Professional Legislature			-0.523* (0.209)
Num.Obs.	2757	2757	2757
AIC	1361.9	1337.1	1332.9
BIC	1432.9	1455.6	1457.3
Log.Lik.	-668.940	-648.564	-645.467
F	8.126	6.483	6.803
RMSE	0.25	0.25	0.25

+ p < 0.1, * p < 0.05, ** p < 0.01, *** p < 0.001

This analysis casts doubt on H1, which suggested that as ideological distance between state and circuit increased, fewer bills would be paid. This shows the opposite. However, while this initial analysis is a useful place to begin, modeling distance in this way is unlikely to be the most appropriate way of understanding the mechanisms at play here. It does not take into account the interaction between distance and uncertainty. Additionally, a focus on conservative states is more appropriate because they are the states actually incentivized to introduce and pass abortion bills. Therefore, in the next two sections, I focus on conservative states and explore alternate ways of conceptualizing distance and uncertainty.

2. Distance as a Categorical Variable

I next turn to a different way of conceptualizing distance. All things being equal, I expect that conservative states pass the most abortion restriction bills and that the more conservative the state is, the more bills they will pass. Further, in a perfect information environment, conservative states in conservative circuits ought to pass more bills than similar states in less conservative circuits. I test that theory by simply looking at whether or not conservative states pass more abortion restrictions, conditioned on the ideology of the circuit that they are in. To do so, I categorize states and circuits by their respective ideologies in the year of bill passage. I cut the data into thirds for both circuit ideology and state ideology to create three categories: liberal, moderate, and conservative. This is a blunt approach to be sure but can provide some initial insights into the relationships at work.

I build a model using Poisson logistic regression that predicts bill passage (0-1) using categorical circuit ideology (liberal, moderate, conservative) and categorical state ideology (liberal, moderate, conservative) as predictors, as well as interacting the two together. I also build the same model but include the controls, which as above, include year, public opinion on abortion in the state, religious adherence in the state, the proportion of females in the state, the state's income level, if a neighboring state adopted restrictions, if the state has a democratic governor, and the independent opinion rate of the circuit. I present the results in Table 8-1.

As in the previous section, dependent variable is bills passed. Here, the results are mixed. Some relationships that I expect to be important are, indeed, important—but others are notably absent. For instance, in the base model of Table 8-1, being a conservative state is positively associated with bill passage (as we expect) and being a liberal state is negatively associated with passage, also as expected. This lends support to H1. But in the model where

controls are included, the conservative state is no longer significantly associated with bill passage (though being a liberal state is still negatively associated with passage).

Table 8-2: Bill Passage (Distance as Categorical Variable)

	Base	With Controls
(Intercept)	-2.887*** (0.236)	-222.967*** (63.580)
Conservative Circuit	0.351 (0.329)	-0.135 (0.344)
Liberal Circuit	0.029 (0.321)	-0.017 (0.337)
Conservative State	0.725* (0.300)	0.320 (0.316)
Liberal State	-1.080* (0.445)	-1.125* (0.462)
Con. Circuit X Con. State	-0.174 (0.405)	-0.035 (0.411)
Lib. Circuit X Con. State	0.133 (0.399)	0.161 (0.415)
Con. Circuit X Lib. State	0.604 (0.564)	1.123* (0.571)
Lib. Circuit X Lib. State	-0.789 (0.863)	-0.907 (0.876)
Num.Obs.	2757	2757
Log.Lik.	-691.639	-661.806
F	7.448	6.550
RMSE	0.26	0.25

+ p < 0.1, * p < 0.05, ** p < 0.01, *** p < 0.001

Further, and perhaps more troubling, in the model with controls included there is a positive relationship between the interaction of conservative circuits and liberal states, suggesting that liberal states in conservative circuits pass more bills than other combinations of states and circuits. This is entirely unexpected in the light of the theory I developed earlier: we would expect to see conservative states in conservative circuits passing the most bills, while liberal states in conservative circuits should not be expected to pass many bills, because liberal states have no incentive to pass abortion restrictions at all.

The underlying structure of dividing the data into thirds may be posing an issue here. Most of the circuits are conservative. Indeed, only 319 observations out of the 2,757 are circuits with ideology scores below 0 (liberal). Dividing the data into thirds means that these 319 liberal circuits are grouped in with around 600 observations on the more conservative side of zero. The distribution of this particular dataset may make a categorical approach less than feasible.

3. Three-Way Interaction

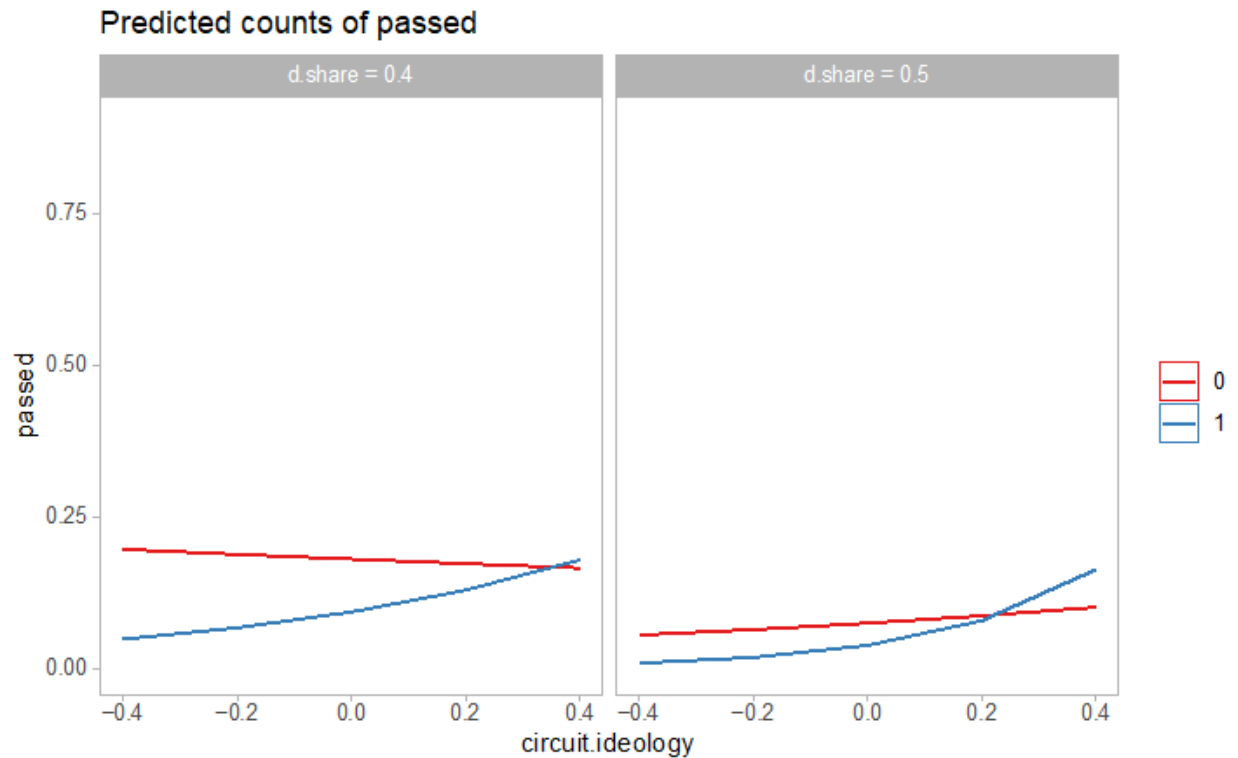
As a result, I turn to a different approach, returning to considering distance as a continuous variable. As I laid out above, I am primarily interested in two concepts: distance and uncertainty. Here, I again conceptualize distance as the degree to which a state and a circuit differ in their ideology, but don't create a separate variable. A somewhat conservative state ought to be, all things equal, more likely to pass a bill if they are in a circuit that is more conservative than the state is compared to a similar state in a circuit that is closer to them. Similarly, a very conservative state may be hesitant to pass a bill if they perceive the circuit to be less conservative than they are, putting the bill at risk.

However, all of that is predicated on the ability of the state to know the circuit's ideology. This is where uncertainty comes in. A state legislative body requires knowledge and resources to

be aware of the intricacies of circuit ideology. Not every state is setup in such a way as to allow for this. In this model, I use both Bowen and Greene's legislative uncertainty, as well as the NCLS's measures of state legislative professionalism. States that fall into the gold and lite-gold categories are coded as 0 for non-professional and all others are coded as 1 for professional. This is not a perfect measure, of course, but gets at the necessary components of certainty; namely knowledge and resources as represented by time spent on job and staff size. The results are similar for both measures of legislative professionalism.

This model predicts bill passage (binary) as a function of circuit ideology, state ideology, and legislative professionalism. I also interact all three variables with one another and show the results of the Poisson regression in Figure 8-6. The three-way interaction shows the two way interaction (state ideology and legislative professionalism) varying across the level of a third variable (circuit ideology) Here we see that state ideology is negatively associated with bill passage (as expected), but nothing else. That is fine, as what we are concerned with is the interaction terms.

Figure 8-5: Three-Way Interaction



While the confidence intervals are quite large, these findings lend some support to my argument that both distance and uncertainty matter for abortion restriction passage. Here, I show the relationship between professional (blue line) and less professional legislatures (red line) as they vary as circuit ideology becomes more conservative (along the x-axis).

The panel on the left shows conservative states. We see that, when circuits are liberal (shown on the left side of the graph) professional legislatures are less likely to pass abortion restrictions compared to less professional ones. This makes intuitive sense: they should be more informed that the bill is likely to be struck down. Moving across the x-axis, court ideology gets more conservative. And we can see that less professional legislatures do not change their rate of passage much, while more professional legislatures pass more and more bills as the court gets more conservative.

I argue these findings are a function of uncertainty, as conservative, but less professional legislatures are passing bills that have a reasonable chance of being overturned at a higher rate than their professional counterparts. However, it is also a function of distance, as we see very conservative professional legislatures not passing bills in circuits that are only moderately conservative. This analysis provides the strongest support for H1 and H2.

C. Conclusion

The main findings here provide some support for my theory. There is some support for both H1 and H2, but it is not strong. Figure 8-6 shows that professionalized and less professionalized legislatures do behave differently as ideology changes. Professionalized legislatures are less likely to pass abortion restrictions when the circuit is liberal, but more likely when the circuit is conservative. This is likely because they have access to information about whether or not the bill will be struck down.

However, these results are fairly weak. The lack of findings here is interesting when considered in the context of Chapter 4's strong findings that legislators frequently discuss and analyze circuit court decisions. While circuit court decisions appear to play some role, other factors are evidently more important. However, this should not be taken as an indication that circuit court ideology does not have an impact on state legislative policymaking, as even weak results indicate that there is a measurable relationship at play.

Chapter 9

Conclusion

This dissertation has set out to add nuance to our understanding of state legislative policymaking by examining how federal circuit courts affect a state legislature's ability to make policy. Specifically, I argue that to look only at state courts or the United States Supreme Court is to miss critical interactions and developments that shape state policy. In this final chapter, I first summarize the central argument and findings. I then discuss the contributions and implications of these findings. Finally, I offer several next steps that build upon the findings here and further develop our understanding of state policymaking.

A. Summary

This dissertation set out to explore an underexamined factor relating to state legislative policymaking: how might federal appellate courts influence state policymaking? The first three chapters formed the foundation of the analysis that followed: Chapter 1 introduced the project's central question; Chapter 2 situated it in the literature; and Chapter 3 developed a theory of state legislative decision-making that incorporates federal circuit court doctrine and ideology, and explained that abortion policy is an appropriate case study, because it is an issue states legislate on frequently, and is frequently heard in federal appellate courts.

Chapter 4 leveraged a newly collected dataset of state legislative history documents where state legislatures discuss federal courts. Relying on insights from process tracing to

structure the qualitative analysis, I found that legislators do, indeed, notice and discuss the federal courts: across the country, state legislators reference, critique, and analyze federal appellate court decisions. This also provided some initial indications that more highly resourced states are more capable of engaging in this kind of high-level research, analysis and discussion.

Chapter 5 then examined how federal appellate courts discuss state legislatures. This chapter analyzed all abortion cases that focused on state abortion laws decided by appellate courts from 1989-2010. Consideration of these cases showed, first, that appellate courts consider state legislatures to be independent policymakers, and often tried to discern their intent when interpreting a law. This demonstrates the back-and-forth dialogue between the two institutions. Second, this chapter established that each circuit has heard at least one abortion case, and showed that abortion litigation is not driven by any one state or circuit, supporting the use of abortion policy an appropriate case study.

Chapters 6, 7, and 8 provide the central quantitative analysis of the dissertation. Chapter 6 discusses key issues of measurement, describing how I created measures for circuit court ideology and uncertainty. Chapters 7 describes the collection of a dataset of all abortion bills introduced from 1989-2010, and provides initial descriptive statistics. Chapter 8 incorporates the role of court ideology and uncertainty, and finds that more abortion restrictions are introduced and passed in conservative circuits. When ideological distance between state and circuit is low, the state is more likely to invest resources in passing a bill.

B. Implications/Contributions

This dissertation makes two key contributions. First, it finds that federal appellate court doctrine has an impact on state policymaking. This is both a valuable academic contribution, and a useful tool for policymakers. Actors who wish to influence state policymaking should look

to federal doctrine to understand what is possible, and particularly in the case of less professionalized states, should seek to provide such information to legislators. But, as my findings in Chapter 8 indicate, it's not clear cut: while there appears to be an effect, it is not overwhelming. Other factors play a bigger role in state policymaking.

Second, it contributes to the literature on federalism more broadly. At a fundamental level, federalism outlines the differences between what state institutions can do and what federal institutions can do. This dissertation looks across those boundaries to consider how federal governments influence their state counterparts, even without direct authority over them. This pushes back against the idea that federalism means that all states have the same powers to pursue their policy goals: a state legislature's relationship with its circuit court governs at least some of what is possible.

C. Future Research

In this section, I suggest and discuss two potential extensions of this project. The first focuses on applying the questions asked here to a different branch of state government—namely, the state courts. How might the federal appellate courts influence policymaking in state courts? Although they do not have explicit authority over state courts, it is possible that they are still influenced by federal appellate court doctrine, much in the way this dissertation shows state legislatures are influenced. The second focuses on recent changes in abortion politics: what role to federal courts play now that *Dobbs v. Jackson Women's Health Organization* has overturned *Roe v. Wade*?

Both of these questions build on this dissertation, but take it in new directions, exploring either an alternate institution (in the case of state courts), or an alternate doctrinal framework (in

the case of abortion politics post-Dobbs). Each would add to our understanding of the role—often significant, and overlooked, I argue—federal appellate courts play in policymaking.

1. State Courts

This project deals only with state legislatures, leaving open the question of whether other branches of state government are influenced by federal appellate court doctrine. Future research exploring this in the context of state courts would be a natural next step. Specifically, studying a single issue area, as done in this dissertation, could be a fruitful way to begin. I suggest habeas corpus—specifically, federal review of state court convictions—as an ideal case study.

Federal courts do not often review state court decisions: the two court systems generally exist in two separate spheres of sovereignty, with little overlap. The writ of habeas corpus is a notable exception. It affords prisoners the right to file a civil petition in federal court to challenge the legitimacy of their detention. If the defendant wins the case and is granted habeas relief, generally they must be released from detention or prison. These petitions can be filed by individuals before they are convicted (as in the well-known Guantanamo Bay detainee cases) or after they are convicted in a state or federal court. Like abortion, habeas is common on federal circuit court dockets, but is (by its very definition) not heard in state courts. Habeas cases filed by state prisoners are among the most common cases federal courts hear (Seghetti 2007). The vast majority of these are postconviction petitions filed by prisoners convicted by state courts (King 2011).

Procedurally, a federal court hearing a habeas case reviews the state court decision and procedures in order to determine if a petitioner's federal constitutional rights were violated. This can only occur after a state prisoner has exhausted his or her state remedies, by pursuing any appeals and state postconviction review offered. When the case is heard by the federal court,

habeas review is subject to stringent constitutional and statutory guidelines and constraints. Until the 1960s, federal courts reviewed these claims “de novo,” with little deference given to the state courts. Since 1996, habeas review has been conducted through the lens of the Antiterrorism and Effective Death Penalty Act (AEDPA), which explicitly requires deference to state courts. A state court’s judgment cannot be disturbed unless the state court decision was “contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States.” (28 U.S.C. 2254(d)(1)).

An example may be useful to clarify the specific type of habeas case I have in mind. In *Higgins v. Renico*, 470 F.3d 624 (6th Cir. 2006), petitioner Higgins had been convicted of felony murder, armed robbery, and other charges in a Michigan state court. Throughout his appeal and state post-conviction proceedings, Higgins argued that his trial counsel had been constitutionally deficient for failing to cross-examine the prosecution’s key witness. That claim was rejected by the state courts, and Higgins filed a habeas petition in federal court. The Sixth Circuit ultimately disagreed with the state court, holding that the state court had “unreasonably applied” Supreme Court precedent—essentially, holding that the state court had decided the case incorrectly, and that Higgins’ Sixth Amendment right to effective counsel had, in fact, been violated. Because this case involved (1) a constitutional issue, (2) state court proceedings that decided the constitutional issue and (3) a federal appellate court decision that directly addressed the state court’s determination of the constitutional issue, it would offer many of the same features that make abortion restrictions a good case study.

A study of this kind could examine the nature of state court opinions, as influenced by federal appellate courts. There is evidence from the federal court system that when it is difficult for a district court to predict what the ideological makeup of a circuit court panel will be, a judge

is less likely to write opinions because they will want to avoid sending a signal to appellate court judges that they believe the case is salient. If the case is salient, the appellate court may take a closer look on appeal and be more likely to overturn the district court's decision (Boyd 2015). Similarly, when a district court is aware they are ideologically distant from the circuit court, they will be less likely to write an opinion, or if they do, they will take more time to write the opinion, for the same reason (Boyd 2015). Because the incentives and constraints of state courts and district courts are similar, it is likely the same logic holds true in the state context. State courts will also want to minimize the chance their decisions will be reversed, and maximize their own policy preferences and chances of promotion.

A theory and analysis that explores whether state courts issue fewer opinions, take more time to issue a decision, or issue decisions of higher quality could offer a way to test this relationship. A study of this kind would add to our understanding of both state court proceedings, and the role of federal court doctrine in shaping state court proceedings. Similar to their relationship with state legislatures, federal appellate courts have no direct authority over state courts. But, there may exist more indirect and subtle ways that they can exert influence over state courts.

2. The Future of Abortion Policy

On June 24, 2022, the Supreme Court decided *Dobbs v. Jackson Women's Health Organization*, holding that the Constitution does not guarantee a right to abortion. The case overruled both *Roe v. Wade* and *Planned Parenthood v. Casey*, and fundamentally changes the landscape of abortion politics in the United States. Any study of abortion politics would be remiss if it did not consider its implications.

Dobbs concerned a state law: in 2018, Mississippi passed a restriction banning abortions after 15 weeks of pregnancy. At the time it was passed, the ban violated both *Roe* and *Casey*, which largely prevented states from banning abortion before fetal viability (generally marked at around 24 weeks), as it would violate due process rights protected by the Fourteenth Amendment. But state legislators were looking past *Roe* and *Casey*: given that the makeup of the federal courts was becoming more conservative during the Trump administration, for the first time in decades, overturning these cases became a real possibility.

The Supreme Court overturned *Roe* and *Casey* and held that because the Constitution does not mention abortion, and because it is not a right “deeply rooted” in the nation’s history, it is not protected by the Fourteenth Amendment. Therefore, states have virtually unrestricted latitude to ban or otherwise restrict abortion as they see fit. This has caused considerable legal upheaval, as long-standing principles of constitutional interpretation have been turned on their heads.

It is no longer clear to state legislatures what might be upheld and what might be struck down. This has led to a drastic increase in policy activity surrounding this issue. 217 federal court cases have been filed since *Dobbs* was decided, and 63 of them have already had some activity in the federal courts of appeals. Note that this could include, for example, emergency orders or other procedural matters that are appealable before a final decision is rendered. This number does not show final decisions, but rather reflects the flurry of activity in the appellate courts since *Dobbs* was decided. This likely increases uncertainty for all legislatures. We should expect to see fewer abortion restrictions passing as a result.

Dobbs introduces another institutional dynamic as well: the role of state courts has expanded. Because the Fourteenth Amendment no longer protects the right to abortion, litigation

at the federal level is far less likely to be successful than it would have been just a year ago. This may well lessen the influence of federal appellate courts in abortion restrictions, as state courts (which may have more protections, such as rights to privacy or provisions that protect bodily integrity, abortion advocates can try to rely on). As discussed above, this dissertation does not address the relationship between state courts and federal appellate courts, but it will surely play a role in years to come.

As this dissertation shows through development of a new theory; a variety of analyses, both qualitative and quantitative; and an examination of under-investigated institutional relationships, abortion policymaking at the state level should not be fully understood without understanding the state's relationship with the federal courts. With increased attention on this issue, and policymaking efforts that may increase the role of state courts alongside their federal counterparts, the insights from this dissertation tell a story that centers on dialogue between institutions that we can expect to only increase as the implications of 2022 take shape. After *Dobbs*, understanding these dynamics is all the more important: this dissertation provides only a first step.

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