LINKAGES BETWEEN THE TEXAS SUPREME COURT
AND PUBLIC OPINION

DISSERTATION

Presented to the Graduate Council of the
University of North Texas in Partial
Fulfillment of the Requirements

For the Degree of

DOCTOR OF PHILOSOPHY

By

Ruth Ann Vaughan Ragland, B.A., M.A.
Denton, Texas
May, 1995
LINKAGES BETWEEN THE TEXAS SUPREME COURT
AND PUBLIC OPINION

DISSERTATION

Presented to the Graduate Council of the
University of North Texas in Partial
Fulfillment of the Requirements

For the Degree of

DOCTOR OF PHILOSOPHY

By

Ruth Ann Vaughan Ragland, B.A., M.A.

Denton, Texas

May, 1995

This investigation sought to identify linkages between the Texas Supreme Court and public opinion through 1) a matching of written decisions with scientifically conducted public opinion polls; 2) direct mention of public opinion and its synonyms in Texas justices’ decisions; 3) comparison of these mentions over time; and 4) comparison of 10 personal attributes of justices with matched decisions.

The study moved the unit of analysis from the U.S. Supreme Court to the state court level by using classification schemes and attribute models previously applied to the U.S. Supreme Court. It determined that linkages exist between the Texas Supreme Court’s written decisions and public opinion from 1978 to July 1994.

The majority of Texas Supreme Court decisions matched with public opinion poll results agreed with public opinion. Justices also mentioned public opinion in their written decisions, although not frequently. Two of the 10 attribute variables, age and tenure, offered explanation for justices’ propensity to agree with public opinion.

Investigation of linkages between the Texas Supreme Court justices and public opinion has potential for replication in other states. It offers a virtually unmined territory for future inquiry.
TABLE OF CONTENTS

LIST OF TABLES .............................................................. vi
LIST OF ILLUSTRATIONS ................................................... vii

Chapter

I. INTRODUCTION ............................................................. 1
   Replication of Existing Research 2
   Hypotheses 6
   Individual Justices 8
   Data Sources 11
   Methodology 12
   Why the Texas Supreme Court? 13
   Chapter Summary 20
   Chapter References 22

II. LITERATURE REVIEW ...................................................... 26
    The Judicial Myth 26
    The Influence of Public Opinion on Judicial Behavior 31
    Judicial Behavior that Defies Public Opinion 43
    State Supreme Courts and Public Opinion 47
    Summary 50
    Chapter References 51

III. TEXAS SUPREME COURT DECISIONS AND PUBLIC OPINION .... 58
    Poll Results and Court Decisions 59
    Issue Categories 61
    Traditionalistic, Individualistic and Moralistic Influences 65
    A Comparison 69
    Mentions of Public Opinion in Written Decisions 74
    Comparison of Direct Mentions Over Time 77
    Concurrences and Dissents 82
    Chapter Summary 83
    Chapter References 85
## LIST OF TABLES

<table>
<thead>
<tr>
<th>Table</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>3.3. References to Public Opinion in Texas Supreme Court Decisions, 1960-1994</td>
<td>76</td>
</tr>
<tr>
<td>4.1. Party, Age and Tenure, Gender and Ethnicity of Texas Supreme Court Justices, 1978-1994</td>
<td>101</td>
</tr>
<tr>
<td>4.3. Education of Texas Supreme Court Justices, 1978-1994</td>
<td>105</td>
</tr>
<tr>
<td>4.4. Results of Regression Analysis</td>
<td>131</td>
</tr>
<tr>
<td>4.5. Attributes of Texas Supreme Court Justices Compared With U.S. Supreme Court Justices</td>
<td>134</td>
</tr>
</tbody>
</table>
LIST OF ILLUSTRATIONS

<table>
<thead>
<tr>
<th>Table</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>3.1.A. Broadcast Stations</td>
<td>79</td>
</tr>
<tr>
<td>3.1.B. Public Opinion Mentions</td>
<td>79</td>
</tr>
<tr>
<td>4.1A. Party Representation in Texas House of Representatives</td>
<td>113</td>
</tr>
<tr>
<td>4.1.B. Party Representation in Texas Senate, 1979-1994</td>
<td>113</td>
</tr>
</tbody>
</table>
CHAPTER I

INTRODUCTION

In novelist Allen Drury's book, *Decision*, fictional U.S. Supreme Court justices agonize over a death penalty appeal by a man convicted of killing the daughter of one justice and maiming the daughter of another in a terrorist bombing (Drury 1983). “I'd like to assess public opinion a little more closely,” said one justice as they talked among themselves before the chief justice assigned the case.

“God knows,” said another later, “but we have reached a situation in the country on this issue where we are in danger of running head-on into a majority of public opinion” (Drury 1983, 453). When the split decision was handed down, the justice who wrote for the majority denied “influence of popular outcry and public pressure” (Drury 1983, 470).

Are real Supreme Court justices swayed by public opinion as they render decisions as arbiters of the law? The influence of public opinion on judicial decision-making is a developing area of research that primarily has concerned the U.S. Supreme Court, leaving state supreme courts practically untouched.

In an effort to address the neglected area of state supreme courts and public opinion, this study focuses on the Texas Supreme Court and seeks to determine linkages between it and public opinion through 1) a matching of written Court decisions with results from scientifically conducted public
opinion polls; 2) identification of direct mentions of public opinion and its synonyms in Texas justices' decisions; 3) a comparison of mentions of public opinion over time; and 4) a comparison of 10 personal attributes of justices with matched decisions.

The period of study is 1978 to July 1994, a time frame in which public opinion polls were regularly conducted in Texas. Public opinion poll questions asked during that time were matched with Court decisions addressing the same issues. Each matching poll question and court decision pair was designated as a case. These cases then were used to investigate the collective Court's agreement with public opinion. The cases also were used to examine personal attributes of individual justices as related to their responsiveness to public opinion. In a separate analysis, mentions of public opinion and its synonyms by justices in their written decisions also were identified and examined.

Replication of Existing Research

This research explores linkages between the Texas Supreme Court and public opinion by replicating the approach of Marshall's 1989 study of the U.S. Supreme Court. Marshall matched U.S. Supreme Court decisions with questions from scientific nationwide public opinion polls from the mid-1930s through 1986 to identify linkages. He found that 63% of 130 matched cases were consistent with poll results. These were classified as "majoritarian." The remaining 37% that were inconsistent with poll results were classified as "countermajoritarian" (Marshall 1989, 78-79).
Marshall also found that 142 majority, concurring, dissenting or per curiam decisions since the New Deal have mentioned the words "public opinion." Texas justices' acknowledgement of public opinion in their written decisions likewise is analyzed (Marshall 1989, 192).

The present study also assesses 10 background characteristics of Texas justices against the matching decisions and poll questions in an effort to explain individual behavior. The attribute variables are similar to those identified and tested in studies of the U.S. Supreme Court (Pritchett 1948; Schubert 1965 and 1975; Tate 1981 and 1992; Tate and Handberg 1991; and Ulmer 1986) and U.S. Courts of Appeals (Goldman 1966 and 1975). They are partisanship, gender and ethnicity, age and tenure, prestige of legal education, prelaw education, legal education, judicial experience, prosecutorial experience, and prior elective office other than judicial or prosecutorial.

Tate (1981) used personal attributes to evaluate liberal and conservative voting behaviors from 1946 to 1978 against seven background characteristics of the justices. They are judge's party identification, appointing president, prestige of prelaw education, appointed from elective office, appointment region, extensiveness of judicial experience, and type of prosecutorial experience. He found that these characteristics accounted for 72% to 87% of the variance in their split-decision voting on economics and civil rights and liberties issues over the time period (Tate 1981, 355).

Tate found that the most liberal justice on civil rights and liberties issues had judicial experience but no prosecutorial experience, was a non-Southern Democrat, and an appointee of Lyndon Johnson's. The most conservative justice on civil rights and liberties issues had no judicial
experience but had prosecutorial experience and was a Republican or Independent, a southerner, and an appointee of Harry Truman (Tate 1981, 362).

The most liberal justice on economic issues had judicial experience but no prosecutorial experience, had attended a high prestige law school, had been appointed from elective office, and was a Democrat not appointed by Harry Truman or Richard Nixon. The most conservative justice on economic issues had prosecutorial experience but no judicial experience, had attended an average prestige undergraduate school, was not appointed from elective office, and was a Republican or independent appointed by Truman (Tate 1981, 362).

In adapting Tate’s personal attributes models to the present study, Marshall’s classifications of “majoritarian” and “countermajoritarian” are equated with Tate’s use of the terms “liberal” and “conservative.” Mills’ theory of elites (1956) serves as a bridge between the concepts. This theory is discussed in Chapter 4.

Marshall, too, presents personal attribute models to explain why U.S. Supreme Court justices make rulings consistent with public opinion polls in some instances but inconsistent in others. He tested five models, including a justice’s political socialization, the appointment process, on-the-court roles, length of tenure, and political realignments (Marshall 1989, 104). He then combined the individual variables to produce a profile of the most majoritarian and countermajoritarian justice.

In his political socialization model, he tested pre-Court socialization variables including a justice’s political party, ideology, and personal, career or
political experiences. In the appointment process model, he looked at justices chosen by a president of the opposing party and justices who received unanimous or near-unanimous Senate confirmation. The judicial roles model considered the chief justice role, ambition of justices in their moves from associate to chief justice or to off-the-Court prominent positions, and reputation of justices (Merskey and Blaustein 1972 and 1978).\(^1\)

Variables considered in the length of tenure model were voting in early and late court tenure, voting in the first and second half of tenure, and voting of justices serving longer than 20 years. In the realignment model, pre-New Deal appointees were compared with post-New Deal appointees, and justices' majoritarian behavior was compared before and after party turnovers in the presidency.

Marshall found when he combined his five models that politically moderate justices, chief justices, justices from prestigious law schools, and justices who had served as close presidential advisers were more majoritarian than other justices. The appointment model, the length-of-tenure model and the political realignment model indicated no support. Limited support was found for the socialization model and the on-the-court roles model (Marshall 1989, 124).

The present study uses discoveries by Marshall (1989) and Tate (1981) in their separate inquiries as the guiding research for exploring linkages between public opinion and the collective Texas Supreme Court and individual justices' decisions. Marshall's and Tate's investigations that use the U.S. Supreme Court as the unit of analysis spawned the 13 hypotheses tested in

---

\(^1\) Justices Burger, Blackmun, Powell, Rehnquist, O'Connor and Stevens were not included in this reputational ranking.
this state-level study. The hypotheses are presented here, and the rationale for their inclusion is discussed as each is examined in Chapter 4.

Hypotheses

Hypothesis 1: The majority of Texas Supreme Court decisions on issues addressed in public opinion polls correspond to public opinion between 1978 and July 1994.

Public opinion is operationalized as survey poll responses of scientifically conducted polls in Texas prior to the Court’s decisions. Public opinion poll questions were organized by year and issue. The questions then were compared with signed written opinions and per curiam opinions for matching within a six-year period. The six-year period provides a lag time to account for up to one year for a case to reach the state Supreme Court and five years for public opinion to register on the Court’s decision (Mishler and Sheehan 1993, 96).

Mishler and Sheehan say the five-year lag “probably reflects both the time it takes for a change in public opinion to be reflected in presidential elections and the time required before a newly elected president has a Court vacancy to fill” (Mishler and Sheehan 1993, 96). They also observe that even if no membership change occurs, “it is likely to take the justices several years to perceive, interpret, and react to fundamental changes in the public mood” (Mishler and Sheehan 1993, 96).

Matches were made if the state Supreme Court’s decision directly answered the poll question or if the wording of one or more poll items closely

---

2 Jim Hutchinson, Texas Office of Court Administration, and Michael Murphy, Clerk’s Office of the Texas Supreme Court, Austin, Texas, Telephone Interviews, July 18, 1994.
matched an issue raised in a Texas Supreme Court decision. Adopting Marshall’s (1989) classifications, those decisions in agreement with the poll results were coded as "majoritarian." Those decisions not in agreement with the poll results were coded as "countermajoritarian."

Multiple court decisions addressing a single poll question during the appropriate time frame were counted as one case. If the court decisions were in agreement with public opinion, they were classified as "majoritarian." If the decisions were not in agreement with public opinion, they were classified as "countermajoritarian." Coding rules for the matches, which are an adaptation of Marshall’s (1989), and the subsequent results of the research are discussed in Chapter 3.

**Hypothesis 2:** Texas Supreme Court justices recognize public opinion through use of the direct mention of the words “public opinion” or its synonyms in their written decisions.

A Lexis computer database was used for word searches to identify direct mentions of public opinion or its synonyms in the justices’ written decisions, which also included both concurrences and dissents. After the words “public opinion” or synonyms were located, surrounding text was read to confirm that the usage represented “the shared opinions of a collection of individuals on a common concern” (Yeric and Todd 1989, 5).

The synonyms for public opinion, accepted in appropriate context, are popular will, will of the people, will of the majority, popular discussion, sovereign will, will of the voters, public intent, open debate, public debate, prevailing sentiment, debate on public issues, public outrage, public outcry,
public attention, public attitude, intention of the people, popular belief, and public clamor.

Results of the Lexis search are analyzed in Chapter 3.

Hypothesis 3: Direct mentions of the words “public opinion” or its synonyms will be more frequent from 1978 to 1994 than in earlier periods.

Technological advances in mass media provide voluminous numbers of political messages to the public, setting the agenda for multiple issues around which public opinion can coalesce (McCombs and Shaw, 1977). Mass media are the primary means by which the public is linked with institutions and individuals of government (Berelson, Lazarfeld and McPhee 1954; Clark and Fredin 1978; Conway, Stevens and Smith 1975; Graeber 1984; Hennessy 1985; Kennamer 1992). Because of the increased importance of media and politics, it is, therefore, expected that public opinion will be more salient on a greater number of issues addressed by the Texas Supreme Court from 1978 to 1994 than in earlier periods.

Using the cases identified in the Lexis search referred to in Hypothesis 2, direct mentions of public opinion from 1978 to 1994 were tallied by year and grouped in time frames for comparison with each other. In addition, the Texas data were compared with Marshall's (1989) findings for the U.S. Supreme Court. These data are examined in Chapter 3.

Individual Justices

Just as the collective Texas Supreme Court can deliver a majoritarian or countermajoritarian decision, so, too, can a vote by an individual justice agree or disagree with results of public opinion polls. Investigation
of Hypotheses 4-13 seeks to link personal attributes of justices to their majoritarian or countermajoritarian voting propensities.

A majoritarian justice is one who wrote an opinion classified as majoritarian, a justice who concurred in that decision, and one who did not dissent. A justice who dissented in a majoritarian case was coded as countermajoritarian.

A countermajoritarian justice is one who wrote an opinion classified as countermajoritarian, a justice who concurred in that decision, and one who did not dissent. A justice who dissented in a countermajoritarian case was coded as majoritarian.

A justice listed as not participating was not counted. *Per curiam* opinions were treated as unanimous decisions.

Variables coded for each justice were grouped in five categories. They are 1) Partisanship: Democrat, Republican, or other; 2) Gender and Ethnicity; 3) Age and Tenure; 4) Education: prestige of legal education, prelaw education and legal education; and 5) Career Characteristics: judicial experience, prosecutorial experience and prior elective office other than judicial or prosecutorial.

The hypotheses considered and discussed in Chapter 4 are:

*Hypothesis 4:* Texas Supreme Court justices who identify with the Democratic Party are more majoritarian than those who identify with the Republican Party.
Hypothesis 5: Justices who are nonwhite and/or female are more majoritarian than their white, male counterparts.

Hypothesis 6: Justices elected or appointed to the Texas Supreme Court before age 50 are more majoritarian than justices who began their service at age 50 or more.

Hypothesis 7: Justices serving two terms or less on the Texas Supreme Court are more majoritarian than those serving more than two terms.

Hypothesis 8: Justices who received their legal education from the University of Texas at Austin are more majoritarian than justices who received their legal education at other Texas law schools.

Hypothesis 9: Justices who received their prelaw education from an institution in Texas are more majoritarian than justices who received their prelaw education from non-Texas institutions.

Hypothesis 10: Justices who received their legal education from an institution located in Texas are more majoritarian than justices who received their legal education from non-Texas institutions.

Hypothesis 11: Justices with prior judicial experience are more majoritarian than those elected with no judicial experience.
Hypothesis 12: Justices who have previously held non-judicial, non-prosecutorial elective office are more majoritarian than those who have not held such offices.

Hypothesis 13: Justices without prior prosecutorial experience are more majoritarian than those with prosecutorial experience.

Data Sources

Data for investigation of 13 hypotheses were statewide public opinion poll results, written Texas Supreme Court decisions, and attribute variable information. Most of the polls used in the study were conducted by Sam Houston State University Criminal Justice Center, Huntsville, Texas, from 1978 to 1983, and The Texas Poll, based at Texas A&M University in College Station, Texas, from 1984 through July 1994. Other polls included are the Texas Monthly Poll, conducted sporadically by Texas Monthly magazine, and The University of Texas at Austin Graduate School of Business' poll on "Concerns, Issues, Attitudes" in 1982.

Texas Supreme Court decisions were read from the Texas Supreme Court Journal, which publishes full opinions each week after they are handed down in the Court's regular session. Data for attribute variables were taken from the Texas Judicial Council's Annual Report, which provides names and tenure of state Supreme Court justices; the Texas Legal Directory and biographical directories (e.g., Who's Who in American Politics and The American Bench), which supply background information on individual justices; the Texas Judicial Council staff, who provided political party
identifications not listed in the *Annual Report* or the *Texas Legal Directory*; and the Lexis computer database, which includes Texas Supreme Court decisions from 1886 to present.

**Methodology**

*Econometrics Toolkit* computer software, a general purpose statistics and econometrics program (Greene 1992), was used to analyze the data for Hypotheses 4-13. The dependent variable was the percentage of each justice's decisions classified as majoritarian (Marshall 1989). The independent variables were the personal attributes.

Ordinary least squares multiple regression was used to describe the relationship between the dependent variable and the set of predictor variables. The dependent variable was regressed upon the independent variables to produce ordinary least squares parameter estimates. The regression provides the best linear prediction model and an estimate of prediction accuracy (Kennedy 1992). The ordinary least squares coefficients generate estimations of values of the parameters that minimize the sum of squared residuals that arise from the estimation procedure.

Statistical measures are obtained to indicate how accurate the prediction model is and how much of the variation in the dependent variable is accounted for by the joint influences of the independent variables. The initial model is evaluated using the $R^2$ value to indicate the percent of variation in the dependent variable that is explained by the independent variables operating jointly.
The F-ratio is used to test the regression model for overall goodness of fit and to evaluate the contribution of individual independent variables. Independent variables which do not make a significant contribution are eliminated, and the model is re-estimated.

Why the Texas Supreme Court?

This study moves the unit of analysis from the nation’s highest court to the highest state court, using classification schemes (Marshall 1989) and attribute models (Tate 1981; Ulmer 1986; and Tate and Handberg 1991) previously applied to the U.S. Supreme Court. The Texas Supreme Court was selected for study because of its similarities and differences with the U.S. Supreme Court.

First, the two courts are similar in that they serve large, diverse populations that potentially could generate a multiplicity of conflicts on a broad range of issues around which public opinion can form. Second, the courts have in common two of the three political cultures identified by Elazar (1972) that potentially impact their decisions - traditionalistic and individualistic.

Texas’ highest court also is different from the nation’s highest court. First, Texas Supreme Court justices, including the chief justice, are chosen by popular statewide election, while U.S. Supreme Court justices are selected by the president. Second, Texas justices serve six-year terms at the pleasure of

3 U.S. Supreme Court justices are from Washington, D.C., and the states of Illinois, Arizona, Virginia, California, New Hampshire, Virginia and Arizona, which combine to represent the three political culture’s Elazar (1972) identifies - Traditionalistic, Individualistic, and Moralistic.
the voters and must seek re-election if they desire additional time on the Court. U.S. Supreme Court justices serve lifetime appointments without fear of voter retribution on election day. These differences all have potential for explanation of judicial behavior at the state supreme court level. Finally, Texas justices hear only civil cases, which serves to limit the caseload, while the U.S. Supreme Court hears both civil and criminal cases.

Texas also is attractive for this study because independent, scientific statewide public opinion results on issues - as opposed to polls for political candidates or consumer product preferences - are available for study. Statewide polls by one or more independent organizations have been conducted fairly consistently since 1978.

Similarities

Diversity. A similarity shared by the U.S. Supreme Court and the Texas Supreme Court is the likelihood that both will preside over myriad conflicts rising from their large, ethnically diverse populations. Texas' population of almost 17 million ranks just behind New York and California (U.S. Department of Commerce, 1990). The U.S. population is almost 250 million.

Texas' ethnic makeup is more diverse than the national population. In Texas, 61% are Anglo, 26% Hispanic, 12% Black and about 1% Asian and other. The nation's population includes Anglo 71%, Black 12%, Hispanic 9%, Asian-Pacific Islanders 3%, and other 5% (U.S. Department of Commerce, 1990). "Texas' population is projected to continue to grow more rapidly and to be more diverse than the U.S. population as a whole, although both the
United States and Texas are projected to become increasingly ethnically diverse in the coming decades,” (Murdock, Hoque and Pecotte 1993, 303).

The diversity of issues which both public opinion polls and the Texas Supreme Court have addressed is demonstrated in Chapter 3. Majoritarian and countermajoritarian decisions are assigned to 12 issue categories, and they are compared with 13 categories Marshall (1989) identified at the U.S. Supreme Court level.

**Political Culture.** Texas, once a sovereign nation, clings to traditionalistic and individualistic political cultures, two of three types in the United States (Elazar 1972). The third type, of which Texas exhibits little, is moralistic (Elazar 1972; Kraemer and Newell 1990, 24-25).

Traditionalistic political culture is “rooted in an ambivalent attitude toward the marketplace coupled with a paternalistic and elitist conception of the commonwealth” (Elazar 1972, 99). It embraces a hierarchical society where government is viewed as a means of maintaining the status quo for those in power. Political parties’ major function is recruitment of people to fill elective positions that established power brokers do not want (Elazar 1972, 99).

This type of political culture was brought to Texas by early settlers from Spain, who instituted their *patron* system. Later, it was reinforced by settlers from the Old South, who contributed their plantation system (Kraemer and Newell 1990, 24). This political culture manifested itself in the “machine politics” of South Texas, which McCleskey says “has not been greatly different
from machine rule in Northern cities in its origins, its mechanics and its consequences” (McCleskey 1972, 105).

It is this political culture that produced political boss George Parr, the “Duke of Duval,” and questionable ballot tabulations that ultimately gave Lyndon B. Johnson an 87-vote victory over Coke Stevenson in the 1948 U.S. Senate race. Johnson won by less than one hundredth of one percent out of almost one million votes cast (Caro 1990, 317). Consequently, he became known as “Landslide Lyndon.”

In individualistic culture, politics is viewed as a business activity in which successful competitors are rewarded. Government’s purpose is to carry out only those tasks that the people demand, staying out of private activities (Elazar 1972, 94). It is “based on a system of mutual obligations rooted in personal relationships” (Elazar 1972, 95).

The individualistic influence was brought largely by Midwestern settlers (Kraemer and Newell 1990, 24). Faced with the challenge of taming an inhospitable environment, settlers were “true entrepreneurs, and entrepreneurs are still the heroes today, rather than technicians or professional managers” (Kraemer and Newell 1990, 26). Property owners have dominated Texas politics, as evidenced in every Texas constitution’s concern for property, say Kraemer and Newell (1990, 26). Texas politics also has exhibited a “deep dislike and distrust of government,” true to Jeffersonian democracy (Kraemer and Newell 1990, 26).

Texas exhibits little moralistic, or participatory, political culture (Kraemer and Newell 1990, 24-25), in which the public interest or the “general welfare” is the focus of government (Elazar 1972, 96). For a
moralistic style of politics to exist, individualism must be "tempered by a
general commitment to utilizing communal - preferably nongovernmental,
but governmental as necessary - power to intervene into the sphere of
private activities when it is considered necessary to do so for the public good
or the well-being of the community" (Elazar 1972, 97).

In Texas, governmental restrictions are viewed as interference with
private control and profits and, thus, are identified with "socialism"
(Kraemer and Newell 1990, 27). Entrepreneurs and those on the top end of
the economic scale are admired, while those at the lower end of the economic
ladder "deserve our scorn and little else" (Kraemer and Newell 1990, 27).
"Texans are preoccupied with success" (Kraemer and Newell 1990, 27).

Texas justices and U.S. Supreme Court justices could be expected to
carry the influences of these cultural patterns to their respective benches. The
impact of political culture on majoritarian and countermajoritarian decisions
by the Texas Supreme Court will be evaluated in Chapter 3.

Differences
Selection. There also are marked differences between the Texas Supreme
Court and the U.S. Supreme Court. Texas' justices are elected to office and
must please the voters to stay there. Under the Texas Constitution, a
candidate must be a U.S. citizen and a Texas resident who is at least 35 years
old (Texas Judicial Council 1993, 10). Professional qualifications require that a
candidate be a practicing lawyer for at least 10 years or have a combined 10
years of experience as a practicing lawyer and as a judge of a court of record.
Salaries are set by the state Legislature. In the 1994 biennium, the salary was $97,470 for the chief justice and $94,686 for the justices (Texas Judicial Council 1994).

Texas is one of 10 states in which justices conduct partisan election campaigns (National Center for State Courts, 1994). Vacancies for unexpired terms are filled by gubernatorial appointment with the advice and consent of the Senate (Texas Judicial Council 1993, 10).

Texas' counterparts on the U.S. Supreme Court are free from the experience of popular election. When a vacancy occurs on the Court, the president nominates a candidate who then must be confirmed by a Senate majority. The process of selection is not free of politics, however. "The president and Senate make their decisions in an environment of individuals and groups highly interested in these decisions" (Baum 1989, 30).

Terms. The terms of office at the state and national level are strikingly different. In Texas, a justice is elected to a single six-year term. At the U.S. Supreme Court level, a justice is appointed for life. The security of a lifetime appointment juxtaposed against a six-year elective office could be expected to impact judicial decision-making.

---

4 States in which partisan election is the method of selection for a full term are Alabama, Arkansas, Illinois, Mississippi, New Mexico, North Carolina, Pennsylvania, Tennessee, Texas and West Virginia (National Center for State Courts 1994).

5 Under the 1836 constitution establishing the Republic of Texas, Supreme Court justices were elected by joint ballot of both houses of Congress, and all other judges were subject to popular election. In 1845, when Texas joined the Union, the method of selection for Supreme Court and district court judges was changed to gubernatorial appointment with Senate confirmation. In 1850, a constitutional amendment was passed making Supreme Court justices and district judges elective. Except for the period between 1869 and 1876, all judicial positions have been subject to popular vote. Since 1876, appellate judges have been elected for six year terms, district judges for four years, and other judges for two years (McClendon 1952, p. 932).
The implications of popular election of Texas Supreme Court justices and their longevity on the Court are considered in Chapter 4 as justice’s background characteristics are assessed against their majoritarian and countermajoritarian decisions.

Jurisdiction. Another difference between the U.S. Supreme Court and the Texas Supreme Court is the types of cases the two courts hear. The Texas Supreme Court and the Oklahoma Supreme Court are the only two states with bifurcated jurisdiction that exempts them from hearing criminal appeals (Kraemer and Newell 1990, 310).

Texas’ 1876 Constitution divested the Texas Supreme Court of all criminal jurisdiction and created a separate Court of Appeals with final and exclusive appellate jurisdiction for cases not appealable to the U.S. Supreme Court. It set the model for a similar structure in Oklahoma (McClendon 1952, 931).

"Few observers of the American court system consider this division either necessary or desirable" (Kraemer and Newell 1990, 310). They note that defenders of the system cite advantages of specialization, "but critics point out that the U.S. Supreme Court, the most prestigious judicial body in the world, hears a great variety of both civil and criminal cases without any apparent lack of competence" (Kraemer and Newell 1990, 310).

---

6 In 1891, a constitutional amendment changed the name of the Court of Appeals to Court of Criminal Appeals, removed all civil jurisdiction and created Courts of Civil Appeals. All civil appeals went to these courts with the Supreme Court providing a review of their decisions. In 1940, a constitutional amendment was passed allowing direct appeals from the trial court to the Supreme Court in a limited class of cases (McClendon 1952, 931).
Texas Supreme Court justices hear cases that concern issues of crime, but the lack of criminal cases is apparent in this study. However, Texas’ difference with the U.S. Supreme Court and its similarity to the bifurcated Oklahoma Supreme Court offer unique opportunities for future study, which will be discussed in Chapter 5.

Chapter Summary

This study considers 13 hypotheses in an attempt to discover unknowns in a scantily explored area of judicial politics - state supreme courts and public opinion. It looks to Marshall’s (1989) research on the U.S. Supreme Court and principles of personal attributes models (Tate 1981) to determine linkages between public opinion and the Texas Supreme Court from 1978 through July 1994.

Specific questions from scientifically conducted statewide public opinion polls are matched with Texas Supreme Court decisions to provide cases for analyses. Decisions that agree with public opinion poll results are classified as “majoritarian.” Those that disagree with public opinion poll results are classified as “countermajoritarian.”

To yield profiles of “majoritarian” and “countermajoritarian” justices, the individual justices making the decisions in these matched cases are assessed against 10 background variables in categories of partisanship, minority/majority status, age and tenure, education and career characteristics. Regression analysis is used to describe and analyze the relationships.

This research also uses the Lexis computer database to show that justices recognize public opinion by their writing the words “public opinion”
and its synonyms into their decisions. Results are examined and compared with those of the U.S. Supreme Court.

This study moves the unit of analysis from the U.S. Supreme Court to the state level. Texas, once an independent Republic, is selected because of its similarities and dissimilarities with the United States. Texas has a large, ethnically diverse population similar to that of the nation of which it became a part in 1845. Texas' political culture also reflects two of the three types (Elazar 1972) represented on the U.S. Supreme Court. The dissimilarities between the Texas Supreme Court and the U.S. Supreme Court also make it an attractive selection. Unlike U.S. Supreme Court justices appointed for a lifetime, Texas justices are chosen in popular elections for six-year overlapping terms. Texas justices also hears only civil cases while the nation’s highest court presides over both civil and criminal.

Relationships between state supreme courts and public opinion have gone practically unnoticed by political scientists, perhaps because of the lack of convenient data required for such studies or because of a lack of interest. This field of inquiry begs attention, and the purpose of the present study is to pioneer virtually untrod territory to discover what no one else has. It is hoped that the lure of such adventure will pique the curiosity of others.


CHAPTER II

LITERATURE REVIEW

The Judicial Myth

The “official theory of judicial behavior” is that judges are above the fray of the body politic (Peltason 1955, 21). “They decide cases, at least the good judges do, by a body of rules and according to the inexorable and unvarying commands of logic. They are the spokesmen for ‘the law’” (Peltason 1955, 21). Many believe the courts ought not to be involved in the political process and that their decisions should not be affected by nonlegal considerations (Baum 1989, 2).

This belief that courts should be nonpolitical imposes some insulation from the visible political process. Most U.S. Supreme Court justices maintain an aloofness from partisan politics “chiefly because open involvement in partisan activity is perceived as illegitimate” (Baum 1989, 3). Their lifetime appointments render them independent of the popular will on election day. But even state and local judges who must submit to regular partisan election, such as those in Texas, conveniently distance themselves from politics so as not to be “unbecoming to the court.”

The U.S. Supreme Court, separate from the legislative and executive branches, is vested with the responsibility of interpreting legislative statutes, executive orders, administrative rules, state constitutions, and the U.S.
Constitution, which establishes the framework of government and serves as a "symbolic, unifying force around which Americans can and do rally" (Miller 1978, 3). In its lofty position, the Supreme Court "deliberately, even sedulously, cultivates this aura of mystery," says Miller (1978, 3).

Because courts, including the Supreme Court, have no powers of enforcement, they must depend upon their powers of persuasion to convince others that they "who sit upon the High Bench should speak the ultimate word in giving meaning to the delphic clauses of the Document of 1787 and its 26 amendments," says Miller (1978, 3). The Supreme Court's imposing building, the red curtain from which the nine black-robed justices emerge to announce their decisions, the reverential respect with which they are treated "coalesce to spin webs of self-esteem around those who are appointed to the bench" (Miller 1978, 3).

It is an attitude "carefully nurtured by the priesthood of the organized bar," says Miller (1978, 3). Jowett and O'Donnell note that "dazzling costumes, insignia and monuments all contribute toward evoking a specific image of superiority and power," in the tradition of Julius Caesar and his propaganda campaigns (1986, 39). The Supreme Court's functions and powers are a "complex mixture of fact and illusion," says Grey (1968, 11). It can challenge the president and Congress with its "veto power," and "it is blessed with the 'doctrine of finality' - what the Court says often becomes quickly and simply the 'law of the land'" (Grey 1968, 12).

The Court's greater impact, however, has been less obvious. Its influence has been achieved "imperceptibly, like the gradual growth of a coral reef," says Justice Felix Frankfurter (1939-62) (Grey 1968, 12). This is where
"illusion" comes in, says Grey. If the highest court in the land lacks the respect of the people, it is "virtually powerless" (Grey 1968, 12). The illusion Grey refers to is described by Altheide and Johnson as a form of modern propaganda necessary to maintain legitimacy (Altheide and Johnson 1980, 18).

Lerner pointed out more than 50 years ago an element of the supernatural or the irrational about the Constitution and the Court (Lerner 1937). "On the main highways of the development of the Western world, what used to be the divine right of kings has been replaced by the divine right of judges" (1937, 1306). He attributes the notion of divine right of judges to the fetish of the Constitution, the claim of the Court to exclusive guardianship of the Constitution, and the tradition of judicial neutrality (Lerner 1937, 1294). "Despite every proof to the contrary, we have persisted in attributing to them the objectivity and infallibility that are ultimately attributes only of godhead" (Lerner 1937, 1311).

Miller (1979) says the Supreme Court and the Constitution are widely perceived in a theological context. He calls Americans a "nation of Constitution-worshippers, with the Supreme Court acting as a high priesthood administering to the faithful" (Miller 1979, 14). In his analogy, law clerks are altar boys; lawyers, the acolytes; and law professors and some political scientists, the Pharisees. Supreme Court opinions are equivalent to the Word revealed in an aura of infallibility, such as stated by Justice Robert H. Jackson (1941-54): "We are not final because we are infallible, but we are infallible only because we are final" (Brown v. Allen 1953).

Even criticism of the Court evokes outcry from some quarters. Miller says that because the justices have the "task of exegesis of the sacred text, it is
not surprising that attacks on the Court by some critics bear a marked similarity to the attacks by the faithful upon heresies and heretics” (Miller 1979, 14). Scholars and politicians alike have been chided for their perceived irreverent references to the Court.

Pritchett’s publication of the Supreme Court’s non-unanimous voting records in civil liberties cases drew criticism in both the popular press and scholarly journals. In *Atlantic Monthly*, Howe, a Harvard law professor and biographer of Justice Oliver Wendell Holmes (Howe 1957), questioned whether such analyses of Supreme Court decisions could be fruitful because they cannot “record the impalable factors as subtle and complex as that of constitutional adjudication” (Howe 1949, 36). In a January 30, 1950, editorial, *The Washington Post* called for “relegation of box scores to the sports pages — where they belong.”

Peltason says that, unlike legislative voting records, publication of a judicial vote without a judges’ defense of that vote is thought by some to be misleading (Peltason 1955, 25). Mendelson singled out Pritchett’s landmark study of *The Roosevelt Court* (Pritchett 1948) for criticism in a 1963 *American Political Science Review* article, raising the issue of “subjective selection of cases for analysis” (Mendelson 1963, 594). Behavioral techniques cannot “measure the range of values that play in the jurisprudence of a Holmes, a Brandeis, a Stone, or a Cardoza - to mention a few departed heroes” (Mendelson 1963, 602). Schubert, in defending Pritchett’s studies, says, “I shall not use the derisive term ‘box scores,’ which appears to be particularly popular among those political scientists whose research experience with
quantitative methods begins and ends with the aphorism that "Thinkers don't count, and counters don't think" (Schubert 1958, 1009).

Glick says that some judges even become perturbed when interviewers ask if judges have attitudes "because the question implies that judges are something other than oracles of the law" (Glick 1988, 271). When nominees appear before U.S. senators for confirmation hearings, they often skirt controversial issues and decline to respond to questions about potential litigation (Glick 1988, 271).

The impact of Court criticism on public opinion was not systematically studied until after the 1964 Lyndon B. Johnson-Barry Goldwater presidential campaign. Republican Goldwater sought to make the Supreme Court's liberalism a central issue. His rhetoric was aimed at arousing public opinion against rulings on segregation, rights of the accused, reapportionment, and prayer in the schools. Johnson said he did not consider the high Court an appropriate campaign issue (Murphy and Tanenhaus 1968, 33).

Murphy and Tanenhaus, employing survey research data from the Survey Research Center of the University of Michigan, determined that Goldwater may have lost votes of some citizens who were angered by his castigation of the Court (Murphy and Tanenhaus 1968, 48). The researchers say they were surprised that the electorate had made such sophisticated analyses of the role of the Court in the political system (Murphy and Tanenhaus 1968, 48).

In summary, Miller says it is, indeed, a myth that justices can be "passionless vehicles for discovering and applying the law" (Miller 1978, 31). For under a mechanical jurisprudence definition, a judge would be a "human
automaton rigidly applying known rules of law, which are found or
discovered and never created, to the facts of the case before the Court (Miller
1978, 31). Glick observes that much of social science research assumes that
judges are “politicians in black robes” who will behave as legislators and
other officials (Glick 1988, 259).

The literature on public opinion and the judiciary is premised upon
research that views judges as politicians, and it seeks to explore 1) the
influence of public opinion on judicial behavior; 2) the influence of judicial
behavior on public opinion; and 3) judicial behavior that defies public
opinion. Because of the sparsity of research into linkages between state
appellate courts and public opinion, the bulk of the literature presented
focuses on the U.S. Supreme Court.

The Influence of Public Opinion on Judicial Behavior

Citizens and Public Opinion

Public opinion, is “the shared opinions of a collection of individuals
on a common concern” (Yeric and Todd 1989, 5). In a democracy, it holds an
“exalted position” because policy change may be brought about by opinion
change (Carmines and Kuklinski 1990, 240). “Public opinion, whatever its
sources and quality, is a factor that genuinely affects government policies in
the United States,” (Page and Shapiro 1983, 189). Erikson, Luttbeg and Tedin
observe that public opinion is important not only as a standard for judging
the popularity of decisions by government but also the likelihood of
compliance with those decisions (Erikson, Luttbeg and Tedin 1980, 3).
Public opinion is conveyed to policymakers in many ways. Yeric and Todd observe that input is provided through: 1) public opinion polls; 2) direct communication; 3) organized group activity; and 4) participation in elections (Yeric and Todd 1989, 19-20).

The first three methods are directly applicable in efforts to influence the U.S. Supreme Court. The fourth is not since justices are appointed for life by the president, with the advice and consent of the U.S. Senate. However, public opinion translated into votes at the ballot box is pertinent to the elected Texas Supreme Court, and it will be addressed in Chapter 3.

**Public Opinion Polls.** Public opinion polls, which became scientific enterprises in the 1930s, express citizens’ expectations for government or how the public evaluates a government action (Yeric and Todd 1989, 17). These poll results are available to Supreme Court justices, politicians, and the public through the media. Baum cites the mass media as being the Court’s primary source of information about public opinion as well as positions of other policymakers (Baum 1989, 130). “No doubt each judge selects his sources of information and reaches his conclusions about the direction and strength of public opinion according to his own political and personal habits” (Cook 1977, 576).

Although no precise scholarly study exists on justices’ consumption of mass media, Baum provides evidence that justices react to specific mass media. Justice Potter Stewart (1958-81) once wrote a letter to the *Wall Street Journal* answering its criticism of a decision. Four justices also took the unusual step of making public statements to explain their *Gannett v. De*
*Pasquale* (1979) decision in which the Court held that the public and the press could be barred from pretrial proceedings (Baum 1989, 130). The Supreme Court reversed itself a year later in *Richmond Newspapers v. Virginia* (1980), saying the public has right of access to most trials under the First Amendment. Beveridge wrote in his biography of Chief Justice John Marshall that Marshall often answered critics of Court decisions in articles he wrote for newspapers (Beveridge 1916, 318-23).

Assumptions about Supreme Court justices' reading choices were made by activists prior to arguments in *Webster v. Reproductive Health Services* (1989). The American Civil Liberties Union purchased full-page pro-choice advertisements in *USA Today, The Washington Post,* and *The New York Times.* A four-page insert bought by National Right to Life ran in *USA Today* on the day before arguments in *Webster.* The national headquarters of Planned Parenthood had run “dozens and dozens” of advertisements in newspapers (Crosby 1989, 39).

**Direct Communication.** Direct communication by individuals through letter writing also provides justices with information on public attitudes. For example, the Supreme Court received more than 15,000 letters a day from the public expressing views on abortion before the Court ruled in *Webster* (1989), upholding a Missouri law restricting abortions but stopping short of overturning *Roe v. Wade* (1973) (Crosby 1989, 40).

Citizens make known their opinions to the courts through demonstrations at public appearances, such as that experienced by Chief Justice William Rehnquist (1972-present) at the Indiana University law
school in 1986 when protesters disrupted a speech. Supporters and opponents of abortion rallied, marched, and picketed outside the Supreme Court building as the justices were considering *Webster* (1989). "Never before in American history had so many people expressed their own opinions while trying to influence the opinions the justices would write," says Crosby (1989, 39).

**Organized Group Activity.** Organized group activity to influence the Supreme Court may take an alternate form to that practiced in the legislative and executive branches. "It is considered highly improper to lobby judges directly, as a group would lobby legislators," says Baum (1989, 80).

Woodward and Armstrong illustrate the impropriety of legislative lobbying tactics in *The Brethren* when Tommy Corcoran, a "Roosevelt brain-truster from the old days," dropped in on Justice Hugo Black to "put in a good word" for El Paso Natural Gas Company in a petition rehearing. "Black was shocked," says Woodward and Armstrong. "No one came to the Supreme Court to lobby . . . .The mere mention of a pending case at a cocktail party was forbidden" (Woodward and Armstrong 1981, 89).

But interest groups can express their publics' opinions to the Supreme Court through legally accepted vehicles, such as *amicus curae*, or friend of the court briefs. These also are called "Brandeis briefs," named for Justice Louis Brandeis (1916-1939) who pioneered this new form of allowing interest groups to get their publics' messages to the Supreme Court (Epstein 1985, 6). *Amicus* briefs, unrestricted until 1949 (Peltason 1955, 45), can be submitted with the consent of both parties or by permission of the Court.
They may address the issue of whether a case should be heard or address it on
the merits if *certiorari*, or acceptance, is granted. A friend of the court also
may participate in oral arguments (Baum 1989, 80). Seventy-eight *amicus
curiae* briefs were filed in *Webster* (1989) (Crosby 1989, 41).

Another method for influencing the Court is simply by being a repeat
player. Groups systematically can bring issues to the Court’s attention
through test cases, which are aimed at obtaining a ruling on a policy issue
important to that public (Baum 1989, 80). The Legal Defense Fund for the
National Association of the Advancement of Colored People successfully has
used this tactic in racial discrimination issues.

For example, several school segregation cases were brought to the
Court’s attention before the historic *Brown v. Board of Education of Topeka*
(1954) in which school segregation was declared unconstitutional (Epstein
1985, 12). “The judges, as they sift the cert petitions day by day, year by year,
observe a new legal problem as it emerges,” says Hodder-Williams (1992, 5).

Judges and Public Opinion

Peltason says judges should not “admit to being influenced” by
anything except arguments presented in open court and the evidence
introduced (Peltason 1955, 21). Peltason also evokes Canon 28 of the Canons
of Judicial Ethics adopted by the American Bar Association in 1924: “A judge
should not be swayed by partisan demands, public clamor, or consideration of
personal popularity or notoriety, nor be apprehensive of unjust criticism”
(Peltason 1955, 21).
However, since Peltason's writings, Supreme Court justices and scholars alike have addressed public opinion, a phenomenon which Key describes as "not unlike wrestling with the Holy Ghost" (Key 1961, 8). Chief Justice Rehnquist said in a presentation at Suffolk University School of Law in Boston in 1986 that "Judges, so long as they are relatively normal human beings, can no more escape being influenced by public opinion in the long run than can people working at other jobs" (Rehnquist 1986, 40-41).

Justices have recorded the Supreme Court's "most complete debate over contemporary American public opinion" in *Furman v. Georgia* (1979) (Marshall 1989, 50), in which the Supreme Court struck down the death penalty as cruel and unusual punishment. Political scientists now systematically study public opinion, using sophisticated methodologies not possible when Peltason was writing in 1955. Sarat and Vidmar (1976), Cook (1977 and 1979), Marshall (1989), and Mishler and Sheehan (1993) have laid a foundation for investigation of public opinion and federal judicial decisions.

First, the Supreme Court's debate on public opinion in *Furman* (1972) will be discussed in light of Sarat and Vidmar's (1976) research testing Justice Marshall's hypothesis on public opinion. Second, Cook's (1977 and 1979) study of the relationship between public opinion on the Vietnam War and prison sentences of draft evaders will be examined. Third, Marshall's (1989) extensive comparison of nationwide public opinion poll results and U.S. Supreme Court decisions will be considered. Finally, Mishler and Sheehan's (1993) recent time series analysis of long-term trends in aggregate public opinion and the Court's collective decisions will be reviewed.

They cited *Trop v. Dulles*, (1958) and *Weems v. United States* (1910) as introducing public opinion into the debate. *Trop* (1958) holds that the definition of cruel and unusual punishment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society" (*Trop v. Dulles* 1958). In *Weems* (1910), the Court suggested that the meaning of "cruel and unusual punishment" changes "as public opinion becomes enlightened by a humane justice." Most of the justices in *Furman* (1972) agreed that the death penalty had the public's support in 1972, but they also agreed that public opinion was not a reliable indicator of society's "evolving standards of decency" (*Furman v. Georgia* 1972).

Justice Marshall said reliable public opinion on the death penalty must reflect "informed" judgments. He hypothesized that given information about the death penalty, many would find it immoral and unconstitutional. He also said support for capital punishment must not stem from a desire for retribution. "No one has ever seriously advanced retribution as a legitimate goal of our society," he says (*Furman v. Georgia* 1972). The Court ultimately went against public opinion of the time and ruled five to four that capital punishment was unconstitutional.
Sarat and Vidmar tested Justice Marshall's hypothesis. They surveyed a random sample of 200 adult residents of Amherst, Massachusetts, giving each a questionnaire designed to measure attitudes toward criminal punishment and toward justifications for the death penalty. The subjects then were asked to read an essay to inform them about capital punishment. After reading the essay, the subjects' attitudes were remeasured to determine change (Sarat and Vidmar 1976).

Sarat and Vidmar found that a) the public was ill-informed about capital punishment; b) those informed tended to reject the death penalty; but c) when retribution was the basis of support for the death penalty, information had no effect. Before reading the informational essay, 62% of the subjects supported the death penalty. After reading the essay, 42% of the subjects were favorable to the death penalty. However, Sarat and Vidmar found that the subjects' propensity for retribution had greater effect on their death penalty position than the information (Sarat and Vidmar 1976, 193).

Sarat and Vidmar conclude that the focus of the debate over public opinion as an indicator of "evolving standards of decency" should move to the issue of retribution (Sarat and Vidmar 1976, 197).

In 1976, the Supreme Court overturned Furman (1972), ruling that the death penalty is not inherently cruel or unusual and is an acceptable form of punishment. It still stands, and public opinion supports it. A December 1993 Gallup Poll reported a 6% increase in Americans demanding capital punishment for murder, from 53 percent in 1989 to 59 percent. A corresponding 6% drop was reported among respondents opting for life sentences without parole, from 35% to 29% (The Gallup Poll Monthly 1993).
A 1977 article in *The American Journal of Political Science* by Cook examines a wartime relationship between public opinion and federal court decisions by focusing on sentences of draft evaders during the Vietnam War. She finds that the willingness of local U.S. District Court judges to convict and sentence draft evaders varied with public opinion about the war.

Her public opinion indicator is the proportion of respondents answering "yes" to the Gallup Poll question from 1965 to 1973: "In view of the developments since we entered the fighting in Vietnam, do you think the U.S. made a mistake sending troops to fight in Vietnam?" She uses draft cases decided between 1967 and 1975, aggregated by nation, region and district in longitudinal analyses. Her measure of sentence severity is an index reflecting the difference between the proportion of all federal offenders receiving sentences of probation and the proportion of draft offenders receiving probationary sentences (Cook 1977).

Pearson's correlation between national opinion and sentencing is .957, and between regional opinion and sentencing it is .894. The correlation between district opinion and sentencing is .697 (Cook 1977, 567). Using path analysis, she analyzes relationships over time, between 1967 and 1975, and finds that at the national level, public opinion explains 86% of the sentences. At the regional level, public opinion explains 80%; at the district level, public opinion explains 54% (Cook 1977, 586). She concludes that "draft cases provide a dramatic example of judicial policymaking in response to rapidly changing national public opinion" (Cook 1977, 592-93).

Kritzer challenged her findings a year later. "There is certainly no question that as disenchantment with the war grew, sentences in draft cases
became much less severe” (Kritzer 1979, 204). But he contends there is no evidence that this was a response to public opinion. He says judges were responding to the “more enduring aspects of their local environments” and suggested additional research on the “ecology” of trial courts, the interrelationship between courts and their environments (Kritzer 1979, 204).

In her reply to Kritzer in the *American Journal of Political Science*, Cook supports her original findings, saying the basis for disagreement is in their conceptualization and measurement of public opinion and judicial policy (Cook 1979, 209). She contends that her models, in which public opinion is an intervening variable rather than an independent variable, account for almost all the variation in probation and up to 90 percent of sentence length (Cook 1979, 213). “The findings substantiate my original contention that public opinion was a vital factor in judicial decisions on the war” (Cook 1979, 213).

Marshall (1989) challenges Hamilton’s belief in *Federalist 78* that the Supreme Court would be “an excellent barrier” against shifting public opinion and against “the encroachments and oppressions of the representative body” (Federalist Paper 78). Marshall (1989) analyzes 146 cases from the mid-1930s through the final Burger court term in 1986 in which Supreme Court decisions address the same issues as scientific nationwide public opinion polls.

In what Caldeira calls “the best evidence we have on the relationship between public opinion and the Court” (Caldeira 1990, 664), Marshall finds that 56%, or 82, of the 146 Court decisions are consistent with public opinion. These, he describes as “majoritarian.” Another 33% (48 of 146) are
inconsistent with public opinion. These are termed "countermajoritarian." Eleven percent (16 of 146) are "unclear." If the 16 "unclear" cases are disregarded, 63% (82 of 130) of the Supreme Court's decisions are majoritarian, while 37% (48 of 130) are countermajoritarian.

His study agrees with Dahl's propositions that the Court defers to public opinion at "crisis times" (Dahl 1957, 293). When counting 29 cases closely related to leading national concerns at "crisis times," Marshall finds that 76% are majoritarian, matching the corresponding public opinion polls. "Court decisions are significantly more majoritarian when public attention is closely focused upon an issue," he says (Marshall 1989, 82-83).

Marshall also finds that since the New Deal period, 142 majority, concurring, dissenting or per curiam opinions have specifically mentioned the words "public opinion," for an average of about three per court term. These have occurred most frequently in majority or concurring opinions on criminal process, press coverage, freedom of speech or dissent, and labor-related cases (Marshall 1989, 34).

Marshall concludes that evidence he produced suggests that the modern Court has reflected public opinion as often as popularly elected office holders (1989, 192). About half of the Court's rulings that struck down a law or policy also appeared reflective of nationwide opinion (Marshall 1989, 192). "Although Alexander Hamilton may have wished the Supreme Court to be 'an excellent barrier' against the 'ill humors' or 'dangerous innovations' of popular opinion, the modern Court has reflected mass public opinion much more frequently than it has resisted it" (Marshall 1989, 192).
Mishler and Sheehan use time series analysis and aggregate data from 1956-89 to investigate whether U.S. Supreme Court justices respond directly to public opinion or indirectly through politically motivated changes in Court membership. They test their "political adjustment hypothesis" that public opinion directly impacts the collective Court's decisions independent of the Court's membership or the political parties of the president and Congress. They find that the Court has been held responsive through political appointments to Court membership but that the Court has been "highly responsive" to majority public opinion, even without changes in membership (Mishler and Sheehan 1993, p. 97).

In addition, Mishler and Sheehan determine that linkage between public opinion and Supreme Court decisions occurs after a delay. "The five-year lag between changes in majority opinion and the reflection of those changes in the Court's decisions suggest that the Court also serves as a temporary buffer against public opinion, shielding the policy process from public caprice and the passions of the moment" (Mishler and Sheehan 1993, 97).

Mishler and Sheehan developed a composite measure of the overall ideological tenor of the Court's decisions for the 33 years studied based on Spaeth's (1991) data base on Supreme Court decisions. Their measure of "ideological main currents of public opinion" employs Stimson's (1992) index of the liberalism of the American "public mood." They use Segal and Cover's (1989) ideology scores for individual justices in their investigation of the hypothesis that the changing ideological composition of the Court mediates links between public opinion and Court decisions.
"On the most superficial level, the results appear to reassure those committed to democratic principles and concerned about the countermajoritarian potential of the Court" (Mishler and Sheehan 1993, 97). Supreme Court decisions for the period of study “not only have conformed closely to the aggregate policy opinions of the American public but have thereby reinforced and helped legitimate emergent majoritarian concerns” (1993, 97).

Judicial Behavior that Defies Public Opinion

Judicial behavior that defies public opinion may be debated in terms of an unelected, therefore, “undemocratic” institution overturning actions initiated by elected representatives. Bickel (1962) calls this the “countermajoritarian difficulty” in the context of judicial review. The Supreme Court as a countermajoritarian institution traditionally is viewed as “protector of the liberties of minorities against the tyranny of majorities” (Dahl 1957, 283). But Dahl, using majority voting in Congress as a measure of public opinion, ultimately concludes that “the Supreme Court is inevitably a part of the dominant national alliance” and “inevitably supports the major policies of the alliance” (Dahl 1957, 293).

Barnum looks at five post-New Deal cases in which the Supreme Court’s ruling was counter to public opinion at the time. All concerned issues of minorities: access to birth control information, school segregation, the role of women in society, interracial marriage, and abortion (Barnum 1985, 655). Barnum says that when assessing the decisions against trends in public opinion polls, the Court “was perhaps more consistent with majoritarian principles than is sometimes supposed” (Barnum 1985, 652). As
his measure of public opinion, Barnum uses public opinion poll results from surveys from 1960 to 1980 published by the National Opinion Research Corporation in Chicago and the Inter-University Consortium for Political and Social Research Center in Ann Arbor, Michigan. (See Appendix A.)

When the Supreme Court decided \textit{Griswold v. Connecticut} (1965), it overturned an 1879 Connecticut law against the use or assisting in the use of contraceptives, bringing the Connecticut law into line with the more than 80% of Americans who favored making birth control information available to anyone who sought it (Barnum 1985, 655).

The trend of public opinion also appeared to be moving toward a woman’s claim of sex discrimination when in 1971 the Supreme Court in \textit{Reed v. Reed} (1971) overturned an Idaho law preferring men to women in the appointment of administrators of estates. This decision marked the first time the Court had been willing to rule in favor of a woman in an equal protection case, and it occurred when nationwide support for more equality for women had risen above the 50% mark in one poll (Barnum 1985, 656-657).

The Supreme Court did not have nationwide majority support when it struck down school segregation in \textit{Brown v. Board of Education} (1954) Barnum 1985, 657). The southern states, most affected by the decision, had been operating under the “separate but equal” doctrine established by the Supreme Court in \textit{Plessy v. Ferguson} (1896). The ultraconservative John Birch Society mounted a prolonged campaign, complete with highway billboards, to impeach Chief Justice Earl Warren, but Baum claims “there was never any real possibility that Congress would respond to its urgings” (Baum (1989, 67). Nor did the Court have the nation’s backing when it overturned
laws prohibiting interracial marriage in 16 southern and border states in *Loving v. Virginia* (1967).

The Court’s decision in both cases was rejected by an overwhelming majority in the affected states, and at the national level, it is not “indisputably clear” that support for the Court’s position was on the upswing at the time of its decision (Barnum 1985, 657). “Although there is some evidence that the Court was in step with pre-existing trends in nationwide public opinion on the issues of school desegregation and interracial marriage, the Court’s intervention in the policymaking process on each of these issues was apparently a genuine act of countermajoritarian decision-making,” says Barnum (1985, 657).

Public support for legalized abortion had not reached the 50% mark when the Supreme Court ruled in *Roe v. Wade* (1973), overturning restrictive abortion statutes in 46 states. But public support for legal abortions was “rising precipitously,” having climbed about 30 points in the eight-year period prior to the Court’s decision, says Barnum (1985, 659). Barnum calls *Roe v. Wade* a classic example of the Supreme Court reflecting an upward trend in public opinion while not necessarily reflecting majority public opinion (Barnum 1985, 659).

Throughout the post-New Deal period, most Americans have supported prayer in the public schools, and the Supreme Court “has clearly been willing to defy the preferences of the majority of Americans” on this issue (Barnum 1985, 659). The Court has not retreated from its original anti-prayer decisions in *Engel v. Vitale* (1962) and *Abington School District v. Schempp* (1963).
Since that precedent was set, lower courts generally have acted to strike down state laws supporting prayer and religious observances in school. However, in Alabama in 1983, a federal judge upheld local prayer and observances saying that "the United States Supreme Court has erred in its interpretation of the Constitution" (Jaffree v. Board of School Commissioners 1983). The Supreme Court struck down the Alabama law and reprimanded the judge who upheld it (Wallace v. Jaffree 1985). "The Court’s decisions on school prayer clearly seem to qualify as a countermajoritarian intervention in the policymaking process" (Barnum 1985, 659).

Barnum’s research focus is on scientifically collected national aggregate public opinion as related to U.S. Supreme Court decisions in state and local cases. Thus, national values are presumably imposed upon local situations, where public opinion may be masked by aggregate data. However, it cannot be said with any certainty that this is the case because state data on public opinion on laws upheld by those state supreme courts is a rarity. Even Dahl acknowledges that "A case might be made out that the Court protects the rights of national majorities against local interests in federal questions." Dahl, as did Barnum, elected to "pass over the ticklish question of federalism and deal only with ‘national’ majorities and minorities" (Dahl 1957, 282).

This gap in both Barnum’s and Dahl’s research accentuates the importance of systematically collecting data, state by state, on relationships between public opinion and state supreme court decisions. Such research will supply data that could add new dimensions to Barnum’s and Dahl’s line of inquiry.
State Supreme Courts and Public Opinion

It is this dearth of research into linkages between state Supreme Court decisions and public opinion that prompts the present study on the Texas Supreme Court and public opinion. Scholarly research into linkages between state supreme courts and public opinion is virtually nonexistent, as evidenced by failure of multiple sources to yield pertinent literature.

These sources include Social Sciences Index, 1970-present; Public Affairs Information Service (PAIS) database, 1972 - present; and four online databases available through the Dialog Information Services: U.S. Political Science Documents, 1975-present; Legal Resource Index, 1980-present; Public Opinion Online, 1960-present; and Dissertation Abstracts Online, 1861-present. Other sources include the following CD-ROM databases: Periodical Abstracts, Sociofile, Psyclit, ERIC, and America: History and Life.

The sparse research that has been done shows that state judges pay attention to local opinion. Two studies on state supreme courts and one on state trial courts addressing responsiveness to local preferences are reviewed here. Research dealing with state judges and environmental influences will be discussed in Chapter 4.

Hall's examination of constituent influence in the Louisiana Supreme Court relates to public opinion expressed at the ballot box. She found that justices in the court minority who perceived that they had views inconsistent with those of their constituencies may have been hesitant to dissent in decisions on controversial issues such as the death penalty (Hall 1987).

At the time of the study in Louisiana, the seven state Supreme Court members were elected from specific geographic districts within the state by
partisan ballot for 10-year terms. Terms were staggered, and interim vacancies were filled by appointment until elections could be scheduled within six months.¹

Using data from non-unanimous criminal decisions for 1980-81, she ranked the justices according to their liberal voting tendencies. A vote to overturn a defendant's conviction or sentence was designated as liberal, and a vote supporting a conviction or sentence was coded as conservative. She then looked at each justice's percentage of votes with the court majority and the percentage of liberal dissents on conservative decisions.

Expectations about their behavior, which she drew from personal interviews, were borne out. "Whether voters and opponents are cognizant of the justices' behavior or not, certain justices seem to fear the prospect of electoral sanction and consequently alter their behavior" (Hall 1987, 1123).

In another study of state supreme courts, Lehne and Reynolds (1978) examine the impact of judicial activism in the New Jersey Supreme Court on public opinion. They use data from four surveys of New Jersey adults conducted on stratified samples of about one thousand respondents at various points during a 1975-76 controversy over a court order for the legislature to present a constitutionally acceptable school finance plan. They collected data on ideology, partisanship, support for the governor, support for the state legislature, and approval of the state supreme court order (Lehne and Reynolds 1978, 897-899).

---

¹ Louisiana Supreme Court justices now are elected from specific geographic districts within the state through nonpartisan election for 10-year terms. Terms are staggered and interim vacancies are filled by Supreme Court selection (National Center for State Courts 1994).
They found that the public's attitude toward the court did not change consistently. Fluctuations in citizen evaluation of the state supreme court coincided with similar shifts in attitudes toward the governor and the legislature. The data suggest that public attitudes toward the New Jersey Supreme Court were not substantially changed by judicial activism (Lehne and Reynolds 1978, 903).

Kuklinski and Stanga (1979) use statewide referendum results as their measure of public opinion in analyzing sentencing behavior of California superior court judges. They compare results of a 1972 referendum to remove criminal penalties for the personal use of marijuana to the sentencing behavior of California county courts. They find that sentencing behavior is more strongly related to local referendum results in 1973 after the 1972 referendum than in the year before it (Kuklinski and Stanga 1979, 1093).

Kuklinski and Stanga also suggest that the post referendum sentencing behavior may not have been prompted by worries of re-election. California superior court judges are selected in nonpartisan elections for staggered six-year terms, but large numbers obtain their election through appointment by the governor. "Since very few judges even faced opposition in 1972, the changes in sentencing policy clearly were not products of tough challenges in that year's general election" (Kuklinski and Stanga 1979, 1096).

They urge additional research on institutional arrangements that encourage citizens to make their wishes known to government officials. "Such arrangements should facilitate citizen communication than is direct, concise and based on a large proportion of the electorate," (Kuklinski and Stanga 1979, 1090).
Summary

Public opinion has been described as "so powerful, national leaders of all leanings look on it as the great gorilla in the political jungle, a beast that must be kept calm" (Sussman 1988, 7). The literature shows and, indeed, Supreme Court justices confirm, that they do not live in vacuums uninfluenced by what happens around them. They cannot escape knowing the public will. As Justice Cardoza (1932-1938) observes, "The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by" (Cardoza 1921, 168).

Despite beliefs that the Supreme Court is a countermajoritarian institution to protect minorities from democratic excess, Barnum (1985) and Marshall (1989) present strong arguments that it is not as much so as traditionally held. Marshall concludes that the U.S. Supreme Court is about as responsive to public opinion as the elected executive and legislative branches.

The void in literature specifically addressing state supreme courts and public opinion forces examination of the Texas Supreme Court and public opinion from the perspective of the U.S. Supreme Court. This is not a direct comparison, and generalizations from the U.S. Supreme Court cannot be made to state supreme courts. Nonetheless, the literature on the U.S. Supreme Court can suggest hypotheses for study at the state level.
CHAPTER REFERENCES


Jaffree v. Board of School Commissioners. 1983. 554 F. Supp. 1104
(S.D. Alab.), 248.

A. A. Knopf.

Kritzer, Herbert M. 1979. “Federal Judges and their Political Environments:
The Influence of Public Opinion.” American Journal of Political

Kuklinski, James and John Stanga. 1979. “Political Participation and
Government Responsiveness: The Behavior of California Superior


Lerner, Max. 1937. Constitution and the Court as Symbols. Yale Law Journal
46:1290-1317.


Boston: Unwin Hyman.


Westport, Conn.: Greenwood Press.


Plessy v. Ferguson. 1896. 163 U.S. 537.


CHAPTER III

TEXAS SUPREME COURT DECISIONS AND PUBLIC OPINION

The literature shows and U.S. Supreme Court justices acknowledge that they are not automatons immune to "the great tides and currents" (Cardoza 1921, 168) of their political environment. The justices are not insulated from the public will expressed in the thousands of personal letters they receive and the myriad public speeches, rallies, protest marches, and opinion polls which are publicized in the ubiquitous mass media.

Marshall (1989) demonstrated that most of the U.S. Supreme Court's decisions on issues about which the nation's public had been surveyed were, indeed, reflections of public opinion. Marshall (1989) also provided evidence that justices recognize public opinion because they made direct mention of it in their written decisions between 1935 and 1986.

This chapter applies Marshall's methodology to the state of Texas. It explores the hypothesis that the majority of Texas Supreme Court decisions on issues between 1978 and 1994 are correspondent to survey data. The chapter also investigates linkages between the Texas Supreme Court and direct references to public opinion in written decisions. In addition, the chapter explores the linkages between direct mentions of public opinion over time.
Poll Results and Court Decisions

Public opinion, by nature, varies in topic and intensity. "As events occur and impressions or information accumulates, people's attitudes may change, and public opinion can shift radically" (Yeric and Todd 1989, 21). One method of gauging sensitivity of the Texas Supreme Court to public opinion at a point in time is by comparing the Court's decisions to survey data. However, such a study is a "prisoner of the survey items which others have chosen to ask in the past" (Monroe 1979, 7). The number of cases available for analysis during the 16 1/2-year period of this study was contingent upon the number and diversity of issues dictated by public opinion poll questions. A total of 503 poll questions were identified for the 1978 to July 1994 time frame.¹

Poll questions were organized by year and issue. Signed written opinions and per curiam opinions of the Texas Supreme Court then were read and compared for a six-year period. For example, an issue raised in a 1978 poll was compared with decisions delivered by the Court from 1978 to 1983. This allowed up to a one-year lag for an appeal to reach the state Supreme Court² and five years for public opinion to register on the Court's decision (Mishler and Sheehan 1993, 96).

¹The Texas Poll provided the foundation for the opinion data. It produced 80% (400) of the questions. This base was augmented by the Texas Crime Poll, which provided 15.5% of the questions; the University of Texas at Austin Graduate School of Business Poll, 3%, and the Texas Monthly Poll, 2%. Twelve percent (54) yielded matches. Of the matches, 72% were identified from among the Texas Poll questions, 11% from the Texas Crime Poll, 9% from the University of Texas at Austin Graduate School of Business Poll, and 7% from the Texas Monthly Poll.

²Jim Hutchinson, Texas Office of Court Administration, and Michael Murphy, Clerk's Office of the Texas Supreme Court, Austin, Texas, Telephone Interviews, July 18, 1994.
Matches then were made between the opinion poll results and the Court’s decisions, according to an adaptation of Marshall’s rules (1989, 75-77). (See Appendix B.) When the wording of a poll question raised an issue addressed in a Texas Supreme Court decision, a match was made. Those decisions agreeing with a poll majority were classified as “majoritarian.” Those disagreeing were classified as “countermajoritarian.”

Multiple court decisions addressing a single poll question during the appropriate time frame were aggregated and counted as one case. If the aggregate data did not fall into either the “majoritarian” or “countermajoritarian” category, they were classified as “unclear” and disregarded in further analysis (Marshall 1989).³

In Texas, it was expected that the state Supreme Court would be responsive to public opinion for two reasons. First, Texas justices have been socialized in the same political cultures as the respondents who answered public poll questions. Most justices are products of Texas’ traditionalistic and individualistic political cultures that Elazar (1972) set forth and which were described in Chapter 1. Most attended Texas undergraduate and law schools, with almost half of those serving between 1978 and 1994 having graduated from the University of Texas law school. This will be discussed in Chapter 4.

Justices also were expected to exhibit a high level of agreement with public opinion because they are elected for six-year terms in partisan contests and can be removed from office at the ballot box. “The process of facing an electorate may have a subtle but significant impact on the way certain types of

³ This study focuses on cases that are either majoritarian and countermajoritarian. The six “unclear” cases are identified in Appendix C.
justices, who have a strong desire to retain the office and who anticipate possible electoral opposition, vote on highly salient political issues" (Gann Hall 1987, 1118).

Retired California Supreme Court Justice Otto Kaus said after the 1987 defeat of California Chief Justice Rose Bird, "There’s no way a judge is going to be able to ignore the political consequences of certain decisions, especially if he or she has to make them near election time. That would be like ignoring a crocodile in your bathtub" (Reidinger 1987, 52).

Political culture, requirement for elective office, and Marshall’s (1989) findings at the national level prompted Hypothesis 1: The majority of Texas Supreme Court decisions on issues addressed in public opinion polls correspond to public opinion between 1978 and July 1994.

As expected, the majority of the matched cases were congruent with public opinion. Of the 54 matches made, 74% (40) were majoritarian and 26% (14) were countermajoritarian. (See Appendix C.) The next step was to examine the cases in terms of their content. Following the literature, cases were classified by issue categories.

Issue Categories

The majoritarian and countermajoritarian cases were grouped into 12 issue categories similar to those identified by Marshall (1989). (See Table 3.1). Each court decision was read and assigned to a category based on its content. The categories were not pre-arranged so that they would resemble Marshall’s (1989). The Texas categories are 1) Education; 2) Health/Welfare; 3) Foreigners; 4) Home Ownership; 5) Economic/Industrial Development;
Table 3.1. Majoritarian and Countermajoritarian Decisions 1978-1994

\[ N=54 \]

<table>
<thead>
<tr>
<th>Majoritarian (74% ( N=40 ))</th>
<th>Countermajoritarian (26% ( N=14 ))</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Education</strong> (100% ( N=4 ))</td>
<td><strong>Education</strong> (0%)</td>
</tr>
<tr>
<td>Teacher competency test.</td>
<td>None.</td>
</tr>
<tr>
<td>Teacher salary increase.</td>
<td></td>
</tr>
<tr>
<td>&quot;No pass, no play&quot; reform.</td>
<td></td>
</tr>
<tr>
<td>Emphasis on sports.</td>
<td></td>
</tr>
<tr>
<td><strong>Health/Welfare</strong> (100% ( N=3 ))</td>
<td><strong>Health/Welfare</strong> (0%)</td>
</tr>
<tr>
<td>Increased state expenditures for mental health.</td>
<td>None.</td>
</tr>
<tr>
<td>Homelessness.</td>
<td></td>
</tr>
<tr>
<td>Protection of children in day care.</td>
<td></td>
</tr>
<tr>
<td><strong>Foreigners</strong> (100% ( N=3 ))</td>
<td><strong>Foreigners</strong> (0%)</td>
</tr>
<tr>
<td>Illegal aliens.</td>
<td>None.</td>
</tr>
<tr>
<td>Anglo-Saxon ownership of corporations.</td>
<td></td>
</tr>
<tr>
<td>American-made cars versus Japanese-made cars.</td>
<td></td>
</tr>
<tr>
<td><strong>Home Ownership</strong> (100% ( N=2 ))</td>
<td><strong>Home Ownership</strong> (0%)</td>
</tr>
<tr>
<td>Mortgage debt.</td>
<td>None.</td>
</tr>
<tr>
<td>Homeowner treatment.</td>
<td></td>
</tr>
<tr>
<td>Majoritarian</td>
<td>Countermajoritarian</td>
</tr>
<tr>
<td>--------------</td>
<td>---------------------</td>
</tr>
<tr>
<td><strong>Economic/Industrial Development</strong> <em>(92% N=12)</em></td>
<td></td>
</tr>
<tr>
<td>Unemployment, money, and the economy.</td>
<td></td>
</tr>
<tr>
<td>Upgrade of highways high priority.</td>
<td></td>
</tr>
<tr>
<td>Amount spent on roadways.</td>
<td></td>
</tr>
<tr>
<td>Improvement of Railroad system.</td>
<td></td>
</tr>
<tr>
<td>Nuclear power expense.</td>
<td></td>
</tr>
<tr>
<td>Nuclear economic benefits.</td>
<td></td>
</tr>
<tr>
<td>Oppose nuclear power plants.</td>
<td></td>
</tr>
<tr>
<td>Limits on liability case awards.</td>
<td></td>
</tr>
<tr>
<td>High jury awards.</td>
<td></td>
</tr>
<tr>
<td>Government and inflation.</td>
<td></td>
</tr>
<tr>
<td>The economy is top issue.</td>
<td></td>
</tr>
<tr>
<td>Unemployment.</td>
<td></td>
</tr>
<tr>
<td><strong>Minority/Gender</strong> <em>(80% N=4)</em></td>
<td></td>
</tr>
<tr>
<td>Election of minorities.</td>
<td></td>
</tr>
<tr>
<td>Gay rights.</td>
<td></td>
</tr>
<tr>
<td>Homosexuals.</td>
<td></td>
</tr>
<tr>
<td>Women's environment.</td>
<td></td>
</tr>
<tr>
<td><strong>Crime</strong> <em>(67% N=4)</em></td>
<td></td>
</tr>
<tr>
<td>Conviction of drug possession.</td>
<td></td>
</tr>
<tr>
<td>Conditions in Texas prisons.</td>
<td></td>
</tr>
<tr>
<td>Intentional injury to a child.</td>
<td></td>
</tr>
<tr>
<td>Shock probation.</td>
<td></td>
</tr>
<tr>
<td><strong>Economic/Industrial Development</strong> <em>(8% N=1)</em></td>
<td></td>
</tr>
<tr>
<td>Texas Blue Law.</td>
<td></td>
</tr>
<tr>
<td><strong>Minority/Gender</strong> <em>(20% N=1)</em></td>
<td></td>
</tr>
<tr>
<td>Discrimination against Blacks and Hispanics.</td>
<td></td>
</tr>
<tr>
<td><strong>Crime</strong> <em>(33% N=2)</em></td>
<td></td>
</tr>
<tr>
<td>Forfeiture of vehicles.</td>
<td></td>
</tr>
<tr>
<td>Drunken drivers.</td>
<td></td>
</tr>
<tr>
<td>Majoritarian</td>
<td>Countermajoritarian</td>
</tr>
<tr>
<td>-----------------------------------------------------------------------------</td>
<td>----------------------------------------------------------</td>
</tr>
<tr>
<td><strong>Civil Liberties (67% N=4)</strong></td>
<td><strong>Civil Liberties (33% N=2)</strong></td>
</tr>
<tr>
<td>Political beliefs.</td>
<td>Screened demonstrations.</td>
</tr>
<tr>
<td>Religion.</td>
<td>False light invasion of privacy.</td>
</tr>
<tr>
<td>Gun owners.</td>
<td></td>
</tr>
<tr>
<td>Firearms.</td>
<td></td>
</tr>
<tr>
<td><strong>Government (50% N=1)</strong></td>
<td><strong>Government (50% N=1)</strong></td>
</tr>
<tr>
<td>Government and quality of life.</td>
<td>Initiative and referendum.</td>
</tr>
<tr>
<td><strong>Environment (50% N=1)</strong></td>
<td><strong>Environment (50% N=1)</strong></td>
</tr>
<tr>
<td>Adequate water supply.</td>
<td>Resolution of water problems.</td>
</tr>
<tr>
<td><strong>Courts/Police/Lawyers (25% N=1)</strong></td>
<td><strong>Courts/Police/Lawyers (75% N=3)</strong></td>
</tr>
<tr>
<td>Lawyers' ethics.</td>
<td>Criminal rights.</td>
</tr>
<tr>
<td></td>
<td>Police rights.</td>
</tr>
<tr>
<td></td>
<td>Police in government.</td>
</tr>
<tr>
<td><strong>Taxation (25% N=1)</strong></td>
<td><strong>Taxation (75% N=3)</strong></td>
</tr>
<tr>
<td>Increase in corporate franchise tax.</td>
<td>Property taxes for schools.</td>
</tr>
<tr>
<td></td>
<td>Property tax enforcement.</td>
</tr>
<tr>
<td></td>
<td>Increased fees.</td>
</tr>
</tbody>
</table>

In four issue categories (Home Ownership, Education, Health/Welfare, and Foreigners), the Texas Court maintains total agreement with the majoritarian position. Near unanimity (92%) prevails in the Economic/Industrial Development category. The Court and public opinion are in concert on 80% of the Minority/Gender issues. The Court and public opinion are in moderate agreement on Crime and Civil Liberties issues (67%), and they agree on 50% of the Government and Environment issues. The Court, however, takes a strongly countermajoritarian position in the Courts/Police/Lawyers category (75%) and the Taxation category (75%).

Traditionalistic, Individualistic, and Moralistic Influences

One explanation of the Texas Supreme Court's majoritarian and countermajoritarian decisions is through the three political cultures identified by Elazar (1972) and discussed in Chapter 1 - traditionalistic, individualistic, and moralistic. Most prevalent in Texas are the traditionalistic and individualistic (Elazar 1972) with little evidence of the moralistic (Elazar 1972 and Kraemer and Newell 1990, 24-25).

Traditionalistic and individualistic political cultures exhibit strong influence in the behaviors of both the Texas Supreme Court and public opinion poll respondents, while moralistic is not as prevalent. In the Economic/Industrial Development category, the cases reflect traditionalistic culture in maintenance of the status quo in power. They support policy that rewards private entrepreneurial business and industry, which are products of
an individualistic culture. Condemnation of property for highway and roadway upgrades, improvement of railroad transportation, and economic benefits for new industry are prominent. The insurance industry, too, finds an ally in both the Court and the public will. They want to protect the industry through legal limits on high jury awards in liability cases.

The Court and public opinion clash on one case in the Economic/Industrial Development category. Texas public opinion called for the abolishment in 1984 of the Texas Blue Law, which would have further enhanced Texas' traditionalistic and individualistic influence. However, the Court took a moralistic view, intervening in the affairs of private business to uphold an unpopular law it perceived as necessary for the public good.

The property owners who have dominated Texas politics (Kraemer and Newell 1990, 26), too, fare well in support from both the Court and public opinion. They want homes protected from debt other than the original mortgage against them, and they consistently vote with homeowners in Deceptive Trade Practice Act cases.

In Education, both the Court and public opinion support moralistic ideals in improvement in teacher competency and salaries. They also indicate that the "frills" of sports and other extracurricular activities should not be the central focus of education. In the Health/Welfare category, the Court and Texas opinion poll respondents recognize that more money is needed to solve the problems of mental health, and they are concerned about homelessness and the protection of children in day care.

However, the Court and collective opinion are at odds about how to pay for these activities in which moralistic government steps in to protect the
public good. The Court consistently has upheld taxation of private property, while public opinion poll respondents consistently oppose government's coercion to pay it.

The traditionalistic and individualistic political cultures also are dominant over the moralistic in the Minority/Gender category. The Court and public opinion are congruent in their positions on the gay rights movement and homosexual activities. Neither wants government to intervene and award this group status in the community.

The Court and public opinion demonstrate ambiguity in their support for racial minorities and women. They display a moralistic willingness to acknowledge lack of equal status, but commitment to remedy is not prevalent. These three classes of individuals typically are the economic "underdogs" of an individualistic society, and those at the lower end of the economic ladder "deserve our scorn and little else" (Kraemer and Newell 1990, 27).

Others at the wrong end of the economic and social ladder are the criminals, and both the Court and public opinion poll respondents agree most of the time on their treatment. The Court and poll results are consistent in their belief that Texas prisons are too easy, those convicted of drug possession should be deprived of certain services and property, and persons harming children should be severely punished. The Court, however, took a moralistic view to protect the "underdogs" when it forbade forfeiture of vehicles when their owners were convicted of possessing small amounts of marijuana.

---

4 Tate (1981, 363) refers to "underdogs" as the "have nots" and the "top dogs" as the "haves."
In the Courts/Police/Lawyers category, respondents are strongly individualistic in their perception of court treatment of criminals. They say courts are not hard enough on criminals and that courts have hindered law enforcement efforts to control crime. In these cases, the Court moralistically protect criminal rights, ruling against police officers and against the public will.

The Court and survey respondents in the Civil Liberties category are individualistic in their beliefs that government should stay out of religion, politics, and gun issues. However, survey respondents are traditionalistic in their desire to pass judgment on planned demonstrations to be certain that they do not violate community values. The Court takes a moralistic route and supports the potentially unpopular minority whose demonstrations might impact community values.

In the Environment category, both the Court and survey results put a high moralistic priority on adequate water supply for all, but respondents favor an individualistic, local approach to remedying water problems. The Court stands with the moralistic perspective, viewing state intervention as the solution for the public good of Texas. Despite strong individualistic influence in Texas, both the Court and public opinion take a moralistic position in the Government category. They agree that government is necessary to protect quality of life.

The Foreigners category reflects the traditionalistic nature of Texas to maintain the status quo and the powers that be. Discouragement of non-Anglo-Saxons to establish businesses in Texas and disregard for illegal aliens were areas of Court and public opinion agreement.
A Comparison

Nine of the Texas categories are similar to the 13 Marshall (1989) identified at the U.S. Supreme Court level. He identified 63% of 130 matches between 1935 to 1986 as reflections of public opinion and then placed them in categories. However, he did not describe the individual cases assigned to each category. (See Table 3.2.)

Similarity in issues at the state and national levels should be expected. The cases heard by the U.S. Supreme Court arrived there as appeals from state Supreme Courts or from federal courts in like geographic regions. However, it should not be expected that issues that occupy the collective minds of the public and the courts remain static.

Agendas and Caseloads

Literature on agendas and caseloads show that, like public opinion, issues before the courts change with time in both subject matter and intensity. For example, Tate and Handberg (1986) combined data collections of Schubert, Handberg and Spaeth to analyze decision-making of the U.S. Supreme Court in nonunanimous cases from 1916 to 1985 and unanimous cases from 1946 to 1985. They found that cases dealing with federal tax and fiscal policy dominated the bulk of the caseload in 1916. Until the late 1930s, economics decisions had the Court's attention, with over 90 percent of the Court's unanimous decisions in this category in 1925 and 1929. After 1949, the Court

---

5 Marshall's Religion category was combined with Free Speech/Dissent/Media/Obscenity to provide greater comparability to Texas categories.
Table 3.2. Texas Matchings 1978-1994 Compared with Marshall's U.S. Supreme Court Matchings 1935-1986*

<table>
<thead>
<tr>
<th>Category</th>
<th>Texas</th>
<th></th>
<th>Category</th>
<th>U.S.</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Majoritarian</td>
<td>N</td>
<td></td>
<td>Majoritarian</td>
<td>N</td>
</tr>
<tr>
<td>Education</td>
<td>100 (4)</td>
<td></td>
<td>Education/Schools</td>
<td>65 (20)</td>
<td></td>
</tr>
<tr>
<td>Health/Welfare</td>
<td>100 (3)</td>
<td></td>
<td>Social Welfare/Poverty</td>
<td>50 (8)</td>
<td></td>
</tr>
<tr>
<td>Foreigners</td>
<td>100 (3)</td>
<td></td>
<td>Nat'l Sec./For. Pol./Communism</td>
<td>70 (20)</td>
<td></td>
</tr>
<tr>
<td>Econ./Ind./Dev.</td>
<td>91 (12)</td>
<td></td>
<td>Trans./Commerce</td>
<td>80 (5)</td>
<td></td>
</tr>
<tr>
<td>Minority/Gender</td>
<td>80 (4)</td>
<td></td>
<td>Race/Segreg./Integrat.</td>
<td>75 (16)</td>
<td></td>
</tr>
<tr>
<td>Civil Liberties</td>
<td>67 (4)</td>
<td></td>
<td>Free Speech/ Dissent/ Media/Obscenity/Rel.**</td>
<td>56 (14)</td>
<td></td>
</tr>
<tr>
<td>Government</td>
<td>50 (1)</td>
<td></td>
<td>Intergovernmental Rel.</td>
<td>46 (11)</td>
<td></td>
</tr>
<tr>
<td>Courts/Pol/Law.</td>
<td>25 (1)</td>
<td></td>
<td>Crim. Rights/Courts/Police</td>
<td>48 (21)</td>
<td></td>
</tr>
<tr>
<td>Taxation</td>
<td>25 (1)</td>
<td></td>
<td>Bus. Reg./Taxes</td>
<td>77 (13)</td>
<td></td>
</tr>
<tr>
<td>Totals***</td>
<td>25 (1)</td>
<td>(33)</td>
<td></td>
<td></td>
<td>(128)</td>
</tr>
</tbody>
</table>

No Comparison:
- Home Ownership 100 (2)
- Crime 67 (4)
- Environment 50 (1)

N = 40

No Comparison:
- Labor/Unions/Strikes 69 (25)
- Privacy/Morality/Abortion 50 (14)
- Election/Camp. Finance 69 (13)

N = 180


** Religion was combined for comparability.

***Probability of t = .4931
shifted emphasis to civil rights and liberties, where it remains to a lesser
degree today (Tate and Handberg 1986).

Pacelle found that as the U.S. Supreme Court establishes doctrine in a
specific area, it shuffles that issue to the “back-burner,” to its exigent agenda.
Then, the Court moves toward issues in which it wants to establish new
document, its volitional agenda (Pacelle 1991). The Court gave warning of its
desire to switch to civil liberties when, in a footnote of United States v.
Carolene Products (1937), Justice Harlan Fisk Stone said issues concerning
individual rights and civil liberties would “receive more exacting judicial
scrutiny” (Pacelle 1991, 50). Although this did not occur until two decades
later, Pacelle said the disparity in time is significant in that it “demonstrates
the dynamics of agenda change” (Pacelle 1991, 51).

At the federal Courts of Appeals level, Baum, Goldman, and Sarat
(1981) examined the evolution of litigation from 1895 to 1975 and found that
the business of these courts has undergone drastic alteration. No longer are
they dominated by private economic disputes. Their work is predominantly
spawned by federal policies and problems associated with them. The
legislative and executive branches of the federal government are “largely
responsible for a historic transformation in the activities of the Courts of
Appeals as well as the caseload problems from which these courts
increasingly suffer” (Baum, Goldman and Sarat 1981-82, 308).

At the state court level, McIntosh (1980-81) examined the civil docket of
a St. Louis trial court from 1820 to 1970 and found that, as did Tate and
Handberg (1986), that economic-oriented cases, such as contract and property
cases, dominated the early 19th century docket. But by the 1920s, a large
majority of cases filed were torts or divorce petitions. He observed that economic-related issues have not disappeared from the docket but have only declined as a proportion of the docket.

Daniels (1990) concluded that civil caseloads in four Illinois counties he studied from 1879 to 1960 did not necessarily follow a linear or curvilinear pattern as a function of modernization, as Sarat and Grossman (1975) has shown in federal court studies. Instead, the Illinois caseloads were impacted primarily by local socioeconomic factors “rather than the manifestation of grand, macroevolutionary trends” (Daniels 1990, 320).

Stookey (1986) determined in examination of four Arizona trial courts between 1912 and 1951 that major economic change in society, such as depression, is reflected in litigation rates. For example, he said that in bad economic times, civil action by repeat players such as big business against “one-shotters,” usually individuals, increased. But he said this quickly returns to original rates when normality resumes (Stookey 1986).

Poll Questions

Marshall’s (1989) categories and the Texas groupings also focus attention on differences in the numbers and types of questions asked in national and state public opinion polls at various points in time. Marshall’s national study covered 35 more years than the Texas study, nine of which overlapped. He also would have had greater numbers of survey results available for comparison in the national study than were available for Texas. Marshall does not numerically define the universe from which he identified
questions for comparison. However, evidence exists of the growth of polls at the national level.

For example, Ladd and Benson (1992) observed that in the 1960s alone, some 6,900 questions were asked in polls by selected major news organizations. In the 1970s, the total rose to 37,000, and in the 1980s, about 89,000 questions were asked (Ladd and Benson 1992, 20). These numbers, which are not inclusive, are far larger than those produced by the Texas polling organizations. In Texas, 506 poll questions have been identified for comparison with Texas Supreme Court decisions from 1978 to 1994.

The 130 majoritarian and countermajoritarian matches made by Marshall and the 54 identified in the Texas study are not likely to represent a random sample of either court’s decisions because the matches are driven by the poll questions. The questions in public opinion polls most often focus on salient issues of the day, and those are overrepresented (Marshall 1989, 73-74). In Texas, the period between 1984 and 1994 was better represented than in earlier years because the Texas Poll was founded in 1984 and produced more questions than polls from 1978 to 1984.

Although Marshall’s pool of possible poll questions was larger, his time frame longer, and his number of matches greater than in Texas, the Texas study had more written decisions per year to analyze. In Texas, the Court delivered about 200 per year during the period of study (Texas Judicial Council Fiscal Years 1978-1993). The U.S. Supreme Court hands down about 150 written decisions each year (Glick 1988, 228).
Matches in both the Texas study and Marshall's (1989) averaged about 2% per year. In Texas, the yearly average of majoritarian decisions was 74%, and in Marshall's (1989) study, the yearly average was about 64%.

The Texas Supreme Court is an elected body representing one of 50 states and hears only civil cases, some of which are appealable to the U.S. Supreme Court. The U.S. Supreme Court is an appointive national body, confirmed by an elective body, and it hears both civil and criminal cases as the nation's court of last resort.

Despite their differences, the expected similarity in issues they address is evident. A t-test was used to determine whether or not the differences between the two group means was significant. The calculated probability of t was .4931, indicating no statistically significant difference between the Texas and U.S. categories of matched cases (See Table 3.2).

The 54 majoritarian and countermajoritarian decisions rendered by the Texas Supreme Court will be used later in a search for explanation of individual judicial behavior. Attribute variables of each justice and his/her propensity to cast majoritarian votes will be explored in Chapter 4.

Mentions of Public Opinion in Written Decisions

The above analysis of the majoritarianism of the Texas Supreme Court identifies the issue areas in which the Court and public opinion agree or disagree, and it focuses the influence of Texas' political culture on those decisions. The analysis also supports debunking of the judicial myth that judges are above the body politic (Peltason 1951, 21) and should not be affected by nonlegal considerations (Baum 1989, 2).
Further inquiry into the majoritarianism of the Texas Supreme Court yields evidence that justices recognize and sometimes refer in their writings to the public opinion which their decisions mirror. This prompts exploration of Hypothesis 2: Texas Supreme Court justices recognize public opinion through use of the direct mention of the words "public opinion" or its synonyms in their written decisions.

A Lexis computer database was used for word searches to identify direct mentions of public opinion or its synonyms\(^6\) in Texas Supreme Court decisions. Texas justices mentioned public opinion in 30 decisions for the 1978 to 1994 period for an average of about two per year. (See Table 3.3.)\(^7\) Eighteen direct mentions were in majority opinions, five were in concurrences, and seven were in dissents. Seven of the Texas Supreme Court cases used in testing Hypothesis 1 included 11 of the direct mentions.\(^8\)

Texas justices recognize public opinion and acknowledge it in their writings as predicted. However, this does not occur often. Of the

\(^6\) Acceptable synonyms are popular will, will of the people, will of the majority, popular discussion, sovereign will, will of the voters, public intent, open debate, public debate, prevailing sentiment, debate on public issues, public outrage, public outcry, public attention, public attitude, intention of the people, popular belief, and public clamor.

\(^7\) The Lexis database includes Texas Supreme Court decisions from 1886 to present. Public opinion was mentioned 71 times for the period from 1886 to July 1994, for an average of almost one per year. For the 74-year period, there were six dissents and no concurrences.

Table 3.3 References to Public Opinion in Texas Supreme Court Decisions

1960 - 1994

<table>
<thead>
<tr>
<th>Year</th>
<th>Opin.</th>
<th>Concur.</th>
<th>Diss.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1960</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1961</td>
<td>0</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1962</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1963</td>
<td>0</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1964</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1965</td>
<td>0</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1966</td>
<td>0</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1967</td>
<td>0</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1968</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1969</td>
<td>0</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1970</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1971</td>
<td>0</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1972</td>
<td>0</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1973</td>
<td>0</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1974</td>
<td>0</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1975</td>
<td>0</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>1976</td>
<td>1</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Year</th>
<th>Opin.</th>
<th>Concur.</th>
<th>Diss.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1977</td>
<td>0</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1978</td>
<td>0</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1979</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1980</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1981</td>
<td>0</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>1982</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1983</td>
<td>0</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>1984</td>
<td>1</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>1985</td>
<td>0</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>1986</td>
<td>1</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>1987</td>
<td>0</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>1988</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1989</td>
<td>3</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>1990</td>
<td>0</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>1991</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>1992</td>
<td>5</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>1993</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1994</td>
<td>1</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Total: 24 5 7

N = 36

Source: Lexis Computer Search
approximately 200 decisions the Court delivered each year from 1978 to 1994, about 1% referred to public opinion. Marshall (1989), too, found infrequent mention of public opinion at the U.S. Supreme Court level, although higher than in Texas. He identified about 2% direct mentions per year for the years 1935 to 1986.9

Perhaps Texas justices are less willing to mention public opinion than appointed U.S. Supreme Court justices because of a perceived need to appear in partisan political campaigns that they are neutral on issues of law and are not swayed by the “influence of popular outcry and public pressure” (Drury 1983, 470). “Judges - they’re not representatives,” a Texas state senator told The Dallas Morning News, “A judge doesn’t really represent citizens; he or she is supposed to impart fair justice”10

Comparison of Direct Mentions Over Time

Although direct mention of public opinion in judicial decisions is infrequent, it was expected that those occurrences over time might exhibit trends that would help explain Texas justices’ majoritarianism. Mass media are the predominant vehicles connecting the public with government institutions and officials (Graeber 1993; Mayer 1993; Neuman, Just and Crigler 1992; Patterson 1993; Ranney 1983), and it was expected that public opinion would be more salient on a greater number of issues addressed by the Texas Supreme Court from 1978 to 1994 than in earlier periods.

---
9 Marshall counted mentions of the words “public opinion” only. He did not use synonyms.
The proliferation of broadcast media and their dissemination of messages through television, AM and FM radio, television cable, and satellite systems have greatly improved chances that a political message will be heard by large listening and viewing audiences. It also is reasonable to believe the increased frequency and thoroughness of public opinion polling in Texas and subsequent media reports about results would raise the justices' level of public opinion awareness.

In Texas, the average mentions of public opinion per year and the number of broadcast media outlets have correspondingly risen. (See Figure 3.1.) In 1960, Texas had 375 AM, FM, and television broadcast stations, \textit{(Broadcasting Yearbook 1960)}. By 1978, that number had grown to 651 broadcast outlets \textit{(Broadcasting Yearbook 1978)}, and by 1994, Texas had 829 AM, FM, and television stations \textit{(Broadcasting and Cable Yearbook 1994)}.\footnote{At the same time that broadcast stations were proliferating, newspapers were losing numbers. Texas daily newspapers dropped from 113 in 1960 (Editor & Publisher Yearbook 1960) to 112 in 1978 (Editor & Publisher Yearbook 1978) to 92 in 1994 (Editor & Publisher Yearbook 1994). Weekly newspapers fell from 480 in 1978 (Editor & Publisher Yearbook 1978) to 420 in 1994 (Editor & Publisher 1994). Texas weeklies were not tallied in 1960 by Editor & Publisher Yearbook (O'Brien telephone interview, Nov. 22, 1994).}

Public opinion polling in Texas, too, has increased and matured. Joe Belden and Alex Louis of Dallas are credited with organizing the first scientific political polls in Texas in the 1950s, and they were partners for 14 years at Belden Associates of Dallas\footnote{Belden Associates, Research and Counseling in Marketing and Public Affairs, listed two offices on a cover page for \textit{Summaries of Two Statewide Studies} conducted for The Governor's Committee on Public School Education, April 26, 1968. One was in Dallas at the Southland Center, and the other was in Mexico: \textit{International Research Associates, S.A. de C.V. Reforma 330, Mexico 6, D.E.}} \textit{(Simnacher 1993)}. Some sampled the statewide population and others focused on specific populations such as educators, and both appeared sporadically.
Figure 3.1A Broadcast Stations

Figure 3.1B Public Opinion Mentions
A Belden Poll continuity guide for 1954-1974 was provided by The Roper Center for Public Opinion Research and The Texas Poll. However, most questions concerned Texas demographics and commercial product preferences. National and state issue questions were limited. Respondents’ answers to the questions were not available.

Other scientific statewide polls have been conducted once or twice a year and during election years since the late 1970s. These include the University of Houston’s Center for Public Policy polls, which were regularly taken for the Houston Chronicle and The Dallas Morning News between 1978 and 1984, and the Texas Crime Poll by Sam Houston State University Criminal Justice Center, Huntsville, Texas. The University of Texas at Austin Graduate School of Business poll and Texas Monthly magazine’s poll have appeared sporadically.

The first regular statewide quarterly public opinion poll using scientific polling methods was instituted in 1984 by Harte-Hanks Communications at Texas A&M University’s Public Policy Resources Laboratory. Its publication, The Texas Poll Report, stated that the survey intended to “explore a particular state issue with a set of core questions” then allow others with “valid public policy questions” to purchase space on the poll’s questionnaire on a per-question basis (The Texas Poll Report, February 1984).

The number of poll questions in The Texas Poll has risen from 27 reported in the first issue of The Texas Poll Report to 41 in the January-March 1994 issue. “The mutual goal in this effort is to chart one of the last unexplored frontiers in Texas: the public mind. What Texans collectively
think about a variety of issues and concerns is largely unknown” (The Texas Poll Report, February 1984). Poll results are disseminated in both its own publication and through statewide television, radio and newspaper outlets.

On the national scene, “the world of public opinion in today’s sense really began with the Gallup Polls of the mid-1930s” (Bogart 1972, 14). George Gallup and Elmo Roper conducted systematic, more scientific polls than prior endeavors. Their poll results and those later by Louis Harris were reported as news stories or syndicated columns in newspapers (Mann and Orren 1992, 2).

In the late 1960s, the major television networks, CBS, NBC and ABC, formed polling operations, and in 1975, the New York Times and CBS formed a polling partnership. Today, media organizations, both local and national, spend millions of dollars in their efforts to tap public opinion on issues and candidates (Mann and Orren 1992, 2-3). “During the past 20 years, the significance of news media polls has skyrocketed. . . . News media polls now have eclipsed those from other sources, including polls conducted independently by commercial polling firms such as Gallup and Harris, academic surveys, and those conducted for interest groups” (Mann and Orren 1992, 4).

These expectations prompted Hypothesis 3: Direct mentions of the words “public opinion” or its synonyms will be more frequent from 1978 to 1994 than in earlier periods. A Lexis search confirmed this prediction. Frequency of direct mentions of public opinion for the full period of the Texas study was 30, or about 2 per year. However, that number was more than quadruple the seven direct mentions from the previous 18 years (1960-1977). (See Table 3.3.)
The upward trend is further demonstrated by collapsing the study period into three almost equal time frames. From 1978-1983, public opinion was mentioned once a year. In 1984-1989, mentions rose to 1.8 per year. By the final years of the study, 1990 through July 1994, public opinion had been mentioned 2.9 times per year.

Marshall (1989) also saw a rising trend in the number of mentions at the U.S. Supreme Court level. The number increased from 2.4 per year in the 1934-1959 time span to 3.1 per year in the 1960-1986 period.

Proliferation of mass media outlets and burgeoning numbers of opinion surveys are evident during times of steady rise in the number of direct mentions of public opinion in both Texas and U.S. Supreme Court decisions. Perhaps these concurrent phenomena will suggest hypotheses for future research.

**Concurrences and Dissents**

The marked change in frequency of mentions since 1960 in Texas calls attention to the number of mentions in concurrences and dissents. (See Table 3.3.) During the 1960 to 1977 period, only one of seven mentions of public opinion was in a dissent. But from 1978 to 1994, 12 mentions came in dissents or concurrences, and 10 of those were in the 1984 to 1994 time frame.

Although an analysis of concurrences and dissents is beyond the scope of this study, it is interesting to note that the 1984 to 1994 period coincides with Republicans on the state Supreme Court for the first time since Reconstruction. In 1988, the present chief justice, Phillips, became the first Republican to hold the office since Reconstruction and the first Republican ever elected to the position (Kraemer and Newell 1990, 121). Republicans held

Chapter Summary

This chapter has focused on the majoritarian propensities of Texas Supreme Court justices and evaluated them in comparison to Marshall's (1989) national findings. Texas public opinion poll questions were compared with written decisions of the Texas Supreme Court from 1978 to 1994. Matches were made between poll questions and Court decisions addressing the issues. Fifty-four matches were identified for analysis. Of those, 74% of the Court decisions reflect public opinion as determined by the poll results. Marshall (1989) found 63% at the national level with 130 matches. As predicted, the majority of Texas Supreme Court decisions on issues raised in public opinion polls correspond to public opinion for the period of study.

The majoritarian and countermajoritarian cases were grouped into 12 issue categories similar to Marshall's 13 categories for discussion. They were assessed against three political cultures identified by Elazar (1972) - traditionalistic, individualistic, and moralistic. The Texas Court decisions reflected the traditionalistic and individualistic political cultures Elazar (1972) and Kramer and Newell (1990) associated with Texas.

Issues that reach the courts change, like public opinion, over time in both topic and intensity. Literature on agendas and caseloads in both state and federal courts was presented to demonstrate content and fluidity (Baum, Goldman, and Sarat 1981; Daniels 1990; McIntosh 1980-81; Pacelle 1991; Sarat and Grossman 1975; Stookey 1986; Tate and Handberg 1986).
The chapter also examined the hypothesis that Texas Supreme Court justices recognize public opinion and mention it in their written decisions. For the period from 1978 to 1994, Texas justices referred to public opinion or its synonyms in 30 decisions, or an average of about two per year. When compared to the U.S. Supreme Court, these findings were similar to those found by Marshall (1989). He identified 142 written decisions that specifically mentioned the words “public opinion” from 1934 to 1986, an average of about three per court term.

The Texas findings also confirmed the expectation that direct mentions of the words “public opinion” or its synonyms would be more frequent from 1978 to 1994 than in earlier periods. During the 18 years between 1960 and 1978, public opinion was mentioned by justices in their decisions only seven times, an average of about .4 per year. However, during the period from 1978 to 1994, the rate was two mentions per year, a significant increase. Marshall, too, found a rise in the number of direct mentions in the later years of his study.

The data analyzed in this chapter have uncovered two phenomena that prompt suggestions for future study. First, the average mentions of public opinion in Texas and the nation per year have risen in tandem with the proliferation of broadcast media outlets and the growth and frequency of public opinion polls. Second, the mentions have increased dramatically in dissents and concurrences at a time when Republicans have been elected to the state supreme Court for the first time in many years. Both merit further exploration in an effort to understand majoritarianism in the Texas Supreme Court.


Editor & Publisher Yearbook. 1960. New York: Editor & Publisher.

Editor & Publisher Yearbook. 1978. New York: Editor & Publisher.

Editor & Publisher Yearbook. 1994. New York: Editor & Publisher.

New York: Thomas Y. Crowell Co.


Telephone Interview. July 18.


Boston: Unwin Hyman.


CHAPTER IV

TEXAS SUPREME COURT JUSTICES AND THEIR INDIVIDUAL DECISIONS

Despite Peltason's admonition that judges should not "admit to being influenced" by anything except evidence introduced (Peltason 1955, 21), Texas Supreme Court justices' actions suggest a linkage with public opinion. The Court's written decisions exhibit a high level of agreement with public opinion on issues addressed by both the Court and public opinion polls.

Not only does the Court show agreement with public opinion, it also publicly acknowledges it by referring to it in written decisions that become permanent record. Decisions unabashedly incorporate the words "public opinion" and synonyms such as "prevailing sentiments of the people" (Law Examiners v. Stevens 1994) and "will of the people" (Texas v. Thomas, Campbell and Greytok 1989). The findings at the Texas Supreme Court level support Marshall's (1989) discoveries at the U.S. Supreme Court level.

This chapter seeks to explain the behavior of the individual justices who make those collective decisions that both reflect and refer to public opinion. It examines the majoritarian propensities of Texas Supreme Court justices by assessing their individual votes against 10 personal background characteristics: party identification, gender and ethnicity, age, tenure, prelaw education, legal education, prestige of legal education, judicial experience, prosecutorial experience, and previous nonjudicial elective office.
An assumption of personal attributes research in judicial behavior is that "past social experience, broadly defined, significantly influences the decisions that judges will make when confronted with socio-legal conflicts in their courts" (Ulmer 1986, 957). The present investigation follows this path of inquiry in an attempt to identify in Texas Supreme Court justices attributes that other political scientists have identified as potential explanation for judicial behavior at the federal level.

Personal Attributes Models

Pritchett (1948) and Schubert (1965 and 1974) established the foundation for research that has developed personal attributes models for studying individual judicial behavior. They primarily were interested in the group context of the supreme Court for analyzing voting blocs, but their methods required that they first consider the justices' individual attitudes as measured by their voting behavior. It is an intriguing and challenging enterprise that Pritchett sparked when he determined in 1948 that the fundamental division on the Roosevelt Court was a conflict between voting behavior on personal liberty and economic policy (Pritchett 1948).

Pritchett tallied the votes of justices in nonunanimous decisions on these policy areas, measured agreement relationships among the justices, and identified blocs of justices forming patterns in terms of liberal and conservative voting. He analyzed the Courts term by term from 1935 to 1941 and observed changes. He used only nonunanimous decisions in his investigation because those votes provided "genuine assurance that the result
was influenced by judicial preferences as to public policy” (Pritchett 1948, 240). In these cases, justices working with identical information arrive at varying conclusions.

Seventeen years later, Schubert (1965) picked up where Pritchett left off and examined decisions on civil rights and liberties and economics from 1946 to 1963, using his “psychometric model.” It was a predictive model in which he identified on one axis a justice’s ideology, the “i” point, and on another axis, certain values he called the “j” points. When a case was presented, the justice could be expected to vote for it if the “i” point were greater than the “j” point. If not, the justice was predicted to cast a vote against it (Schubert 1965).

Schubert then employed factor analysis for identifying voting blocs. In The Judicial Mind Revisited, a 1974 replication, he revised his method to combine factor analysis with multidimensional scaling and produced virtually the same results.

Pritchett and Schubert’s classification of “liberal” and “conservative” attitudes applied to U.S. Supreme Court justices’ votes on civil rights and liberties cases and economics cases now is “routine in studies of judicial decision-making” (Tate 1981, 356):

In a civil liberties case, justices who were in favor of granting (or granting more of) the claimed civil right were classified as supporting the liberal position; justices who were opposed to granting (or wanted to grant less of) the claimed right were classified as supporting the conservative position . . . . Liberals in economics cases support unions over management, government regulation of business activities, workers claims against employers, and small businessmen
over large corporations. Conservatives, then, do the opposite (Ryan and Tate 1975, 13).

Soon after Schubert looked into the “judicial mind” of the U.S. Supreme Court (1965), Goldman (1966) contributed a pioneering study on the U.S. Courts of Appeals using data from 1961 to 1964. He devised a scoring procedure for assigning “liberal” or “conservative” designations to civil rights and economics decisions of the 11 federal appeals courts and tested certain demographic variables against their voting records. He determined, using correlations, that party affiliation was associated with voting behavior, especially when issues of economic liberalism were involved. Religion, socio-economic origins, education and age were not significantly related.

When Goldman revisited voting behavior on the U.S. Courts of Appeals in 1975, he used the same quantification of voting behavior as the earlier study over a 10-year span but submitted the data to stepwise multiple regression analysis. He arrived at basically the same conclusions as in his earlier research. He found that party and age variables were significant and that the religion variable appeared stronger than in the first study.

Since then, Tate (1981), Ulmer (1986), Marshall (1989), and Tate and Handberg (1991) have expanded personal attributes research for application at the U.S. Supreme Court level. The studies are comparable in that their dependent variables are percentages and conceptually related, some of their independent variables are similar, and all four employ multiple regression for analysis. They are described here in detail because their methodologies form the basis for the current study of the Texas Supreme Court.
Using Pritchett's (1948) and Schubert's (1965 and 1994) classification of liberal and conservative, Tate (1981) found that seven background characteristics accounted for 87% of the variance in U.S. Supreme Court justices' split-decision voting on civil rights and liberties issues and 72% of the variance in voting on economic issues from 1946 to 1978. Tate's dependent variables were a percentage of justices' civil rights and liberties liberalism and a percentage of justices' economics liberalism.

He submitted 15 independent, or attribute, variables to stepwise regression as part of a process to eliminate those lacking explanatory power. Those that appeared potent but were spurious because of correlation with other attributes also were eliminated. Variables that had been found important in earlier research were not automatically excluded after the stepwise regression if they appeared insignificant but were further investigated for collinearity.

Variables ultimately identified as statistically significant at .001, were simultaneously entered in the final regression model (Tate 1981, 361). These were party identification, appointing president, prestige of prelaw education, appointment from elective office, appointment region, extensiveness of judicial experience, and type of prosecutorial experience.

Ulmer (1986) questioned whether Tate's personal attributes models were timebound and offered his own model covering court terms from 1903 to 1935. He evaluated four potential models of U.S. Supreme Court justices' behavior, using two criterion variables: support for state/local government and support for federal government. He examined these in terms of whether
they involved "underdogs" or "nonunderdogs" (Ulmer 1986, 962).\textsuperscript{1} The predictors of these criteria were whether a justice's father was a state or federal judicial officer, a legislator or an elected or appointed executive officer; the party of the justice, and whether the justice was first-born (Ulmer 1986, 963).

Ulmer's analysis found that the independent variables accounted for 36\% of the variance over the 66-year period. When the 1903-1935 terms were compared with the 1936-1968 terms, the model accounted for 72\% of the variance in the second period but only 18\% in the first. He said his findings did not necessarily establish that social background models in general are timebound, "although they do suggest that such a question must now be raised about any such model that claims to explain Supreme Court decisions" (Ulmer 1986, 965).

In the time-honored tradition of scholarship, Tate and Handberg (1991) accepted the challenge and defended Tate's 1981 personal attributes model. Their 1991 study used data on 46 justices over a 72-year time span, 1916 to 1988. In their replication, they considered the following variables: political (partisanship and appointing presidents and their intents), social cleavage (region, social class, and religion), family origins (birth order and father's government service) and career socialization (judicial/prosecutorial experience.)

Elimination of statistically insignificant variables differed from Tate's 1981 study. Instead of employing stepwise regression in a screening process for significance, they examined the variables simultaneously in an initial regression model and then dropped the statistically insignificant predictors.

\textsuperscript{1} Tate (1981, 363) refers to "underdogs" as the "have-nots" and the "top dogs" as the "haves."
Independent variables determined to be significant at or beyond the .01 level were retained in their final model for reporting.

Their analyses confirmed expected relationships to civil rights and liberties liberalism. Justices' partisanship and appointing president's intentions were positively related; southern origins and rural origins were negatively related; prosecutor/judicial experience was negatively related; and social class, non-Protestant religion, and judicial experience were not significantly related. Ulmer's variable from his 1986 work, father's government service, was negatively related, but first-born status was not negatively related to civil rights and liberties (Tate and Handberg 1991).

The analyses also illustrate expected relationships to economic liberalism. Positive relationships exist for partisanship and appointing president's intentions; a negative relationship for agricultural origins; a positive relationship for judicial experience, and a negative relationship for prosecutorial/judicial experience; and no statistically significant impact for first-born status or father's service as a government officer, southern origins, family social status, and non-Protestant religion.

Tate and Handberg (1991) concluded that their personal attributes models of Supreme Court justices explained 47 percent of the variance in civil rights and liberties voting and 51 percent of the variance in economics voting behavior for 1916 to 1988. They acknowledged that the models reflected change in social and political influences over the long time span, but they refuted Ulmer's implications of timeboundness (Tate and Handberg 1991).
State-Level Adaptation of Personal Attributes Models

To adapt personal attributes models on liberal and conservative voting to the Texas study, the terms "majoritarian" and "countermajoritarian" are equated with "liberal" and "conservative," respectively, in hypothesis formation. The substitution of "majoritarian" and "countermajoritarian" is found in Mills' (1956) theory of elites, which clashes with classical liberalism basing a government's right to rule on the tenet of popular sovereignty.

In a democratic society, "the people are presented with problems. They discuss them. They decide on them. They formulate viewpoints. These viewpoints are organized, and they compete. One viewpoint 'wins out.' Then, the people act out this view, or their representatives are instructed to act it out, and this they promptly do" (Mills 1956, 300). Mills, however, calls this "a set of images out of a fairy tale... The issues that now shape man's fate are neither raised nor decided by the public at large" (Mills 1956, 300). Those in "positions to make decisions having major consequences" are the "elites" (Mills 1956, 4).

Mills defines elites as the powerful few "in command of the major hierarchies and organizations of modern society. They rule the big corporations. They run the machinery of the state and claim its prerogatives. They direct the military establishment. They occupy the strategic command posts of the social structure, in which are now centered the effective means of the power and the wealth and the celebrity which they enjoy" (Mills 1956, 4).

Mills says professional politicians have been brushed aside in government decision-making by political outsiders who join a "political directorate." They are the "legal, managerial, and financial members of the
corporate rich" who have been loyal or trustworthy in economic, military, or political enterprises (Mills 1956, 235).

The elites Mills identifies are the "conservatives" in personal attributes studies. Ryan and Tate describe conservatives in the judiciary as those supporting management over unions, business activities over government regulation, employers against workers, and large corporations over small business (Ryan and Tate 1981, 13). As the ruling few, the elites, or conservatives, become the protectors of their powerful status, and their decisions to continue that status may be counter to the popular will. In that sense, a decision contrary to public opinion is a countermajoritarian decision in the present study.

People not included in the ruling elite are the many, or the majority. They are the "ordinary" of society whose powers are "circumscribed by the everyday worlds in which they live. . . . 'Great changes' are beyond their control but affect their conduct and outlook nonetheless" (Mills 1956, 3).

Mills says the nonelites are on the receiving end of elitist decision-making, which is contrary to a liberal democratic society envisioned by John Locke in his Second Treatise of Government. Using Ryan and Tate's descriptions, liberals in the judiciary would seek to make the playing ground more equal for workers by supporting unions over management, allowing government regulation to limit activities of business, and protecting small business from large, elite corporations (Ryan and Tate 1981, 13).

In this sense, a liberal vote in the U.S. Supreme Court becomes a vote for the nonelite majority. If a court decision agrees with public opinion
against the ruling elite, a decision would be "majoritarian" for purposes of the present study.

Methodology

The majoritarian or countermajoritarian behavior of Texas Supreme Court justices is examined through assessment of 10 personal attribute variables against the written decisions analyzed in Chapter 3. For each Texas Supreme Court case identified, the individual justices who voted on that case were categorized as majoritarian or countermajoritarian.

A majoritarian justice is one who wrote an opinion classified in Chapter 3 as majoritarian, a justice who concurred in that decision, and one who did not dissent. A justice who dissented in a majoritarian case was coded as countermajoritarian.

A countermajoritarian justice is one who wrote an opinion classified in Chapter 3 as countermajoritarian, a justice who concurred in that decision, and one who did not dissent. A justice who dissented in a countermajoritarian case was coded as majoritarian.

A justice listed as not participating was not counted. Per curiam opinions were treated as unanimous decisions.

Unlike the U.S. Supreme Court, the Texas Supreme Court does not publish its vote on a decision. Only the name of the justice who wrote the decision is made public. Names also appear on concurrences and dissents. Nonparticipants in a decision are listed. Per curiam decisions are unsigned.

To determine the names of justices who participated in the decisions, lists of each year's Court from 1978 to 1994 were prepared. (See Appendix E.)
Death and appointment were the predominant reasons noted in the lists for change in Court membership in off-election years.

The date of each case was noted and matched with the appropriate Court membership list to ensure that the justices were serving on the Court on the particular date of the decision. Once membership was determined, each justice was coded as being majoritarian or countermajoritarian for each decision.

Each justice’s percentage of majoritarianism in a total of 91 separate cases then became the dependent variable against which the attribute variables were assessed. Ordinary least squares multiple regression was used to describe the relationship between each justice’s percentage of majoritarianism and the joint influences of the independent attribute variables. The initial model was evaluated using the $R^2$ value to indicate the percent of variation in the dependent variable that is explained by the independent variables operating jointly.

The independent variables under consideration by category were 1) Partisanship: Democrat, Republican, or other; 2) Gender and Ethnicity; 3) Age and Tenure: age at time of election or appointment and length of term in office; 4) Education: prestige of legal education, prelaw education and legal education; and 5) Career Characteristics: judicial experience, prosecutorial experience and prior elective office other than judicial or prosecutorial.

First, the Texas Supreme Court justices will be described through frequency counts and means. Next, the results of the regression analysis are discussed.
Texas Supreme Court Justices Described

Thirty justices\(^2\) served on the Texas Supreme Court from 1978 to 1994 (See Appendix E.) During that time span, four chief justices presided: Greenhill, 1978-1981; Pope, 1982-1985; Hill, 1986-1987; and Phillips, 1988-1994. The justices' attribute variables in Table 4.1, Table 4.2, and Table 4.3 will be briefly summarized and accompanied by information not available in the tables.

Partisanship

**Party.** For the period of study, all but seven of the 30 justices were Democrats. One Republican, Phillips, became chief justice in 1988. Until that time, the lone Republican on the Court was Garwood, who served in 1979-1980. Other Republicans were Culver, Cook, Hecht, Cornyn, and Enoch.

Gender and Ethnicity

**Gender.** Of the three women justices since 1978, one, Spector, a Democrat, was elected and assumed office January 1, 1994. Sondock was appointed by Governor Bill Clements to serve from June 25, 1982, until the end of the year to fill in for Denton, who died. Culver, also a Clements appointee, left the Court in 1988 after less than a year of service.

When each woman served, she was the only one on the Court. However, for a brief period in 1925 the entire three-judge Court was made up of women. Governor Pat Neff appointed them as special justices from January to May, 1925, after all three members of the Court had disqualified

\(^2\) Tom Luce, who was appointed to hear one case in 1989, is not included.
Table 4.1: Party, Age and Tenure, Gender and Ethnicity of Texas Supreme Court Justices, 1978-1994

<table>
<thead>
<tr>
<th>Party</th>
<th>Gender</th>
<th>Ethnicity</th>
<th>W Hisp. Af. Am.</th>
<th>D R</th>
<th>Service Yrs.</th>
<th>Tenure Begin Age</th>
</tr>
</thead>
<tbody>
<tr>
<td>Joe R. Greenhill</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1957-82</td>
<td>x</td>
</tr>
<tr>
<td>Zollie Steakley</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1961-81</td>
<td>x</td>
</tr>
<tr>
<td>Jack Pope</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1965-84</td>
<td>x</td>
</tr>
<tr>
<td>Sears McGee</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1969-87</td>
<td>x</td>
</tr>
<tr>
<td>James G. Denton</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1970-82</td>
<td>x</td>
</tr>
<tr>
<td>Price Daniel</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1971-78</td>
<td>x</td>
</tr>
<tr>
<td>Sam D. Johnson</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1972-79</td>
<td>x</td>
</tr>
<tr>
<td>Charles W. Barrow</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1977-84</td>
<td>x</td>
</tr>
<tr>
<td>T.C. Chadick</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1977-78</td>
<td>x</td>
</tr>
<tr>
<td>Robert M. Campbell</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1978-88</td>
<td>x</td>
</tr>
<tr>
<td>Franklin Spears</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1979-90</td>
<td>x</td>
</tr>
<tr>
<td>Will Garwood</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1980-90</td>
<td>x</td>
</tr>
<tr>
<td>C.L. Ray</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1981-88</td>
<td>x</td>
</tr>
<tr>
<td>James P. Wallace</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1982</td>
<td>x</td>
</tr>
<tr>
<td>Ruby Kless Sondock</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1983-88</td>
<td>x</td>
</tr>
<tr>
<td>Ted. Z. Robertson</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1984-94</td>
<td>x</td>
</tr>
<tr>
<td>William Kilgarrin</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1985-87</td>
<td>x</td>
</tr>
<tr>
<td>John L. Hill Jr.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1986-88</td>
<td>x</td>
</tr>
<tr>
<td>Oscar Mauzy</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1987-92</td>
<td>x</td>
</tr>
<tr>
<td>Tom Phillips</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1988-94</td>
<td>x</td>
</tr>
<tr>
<td>Barbara Culver</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1988</td>
<td>x</td>
</tr>
<tr>
<td>Party</td>
<td>D</td>
<td>R</td>
<td>Service Yrs.</td>
<td>Tenure</td>
<td>Begin Age</td>
<td>Gender</td>
</tr>
<tr>
<td>------------------</td>
<td>---</td>
<td>---</td>
<td>--------------</td>
<td>--------</td>
<td>-----------</td>
<td>--------</td>
</tr>
<tr>
<td>Eugene A. Cook</td>
<td>x</td>
<td></td>
<td>1988-92</td>
<td>3</td>
<td>50</td>
<td>x</td>
</tr>
<tr>
<td>Jack Hightower</td>
<td>x</td>
<td></td>
<td>1988-94</td>
<td>6</td>
<td>62</td>
<td>x</td>
</tr>
<tr>
<td>Nathan L. Hecht</td>
<td>x</td>
<td></td>
<td>1989-94</td>
<td>5</td>
<td>40</td>
<td>x</td>
</tr>
<tr>
<td>Lloyd Doggett</td>
<td>x</td>
<td></td>
<td>1988-94</td>
<td>6</td>
<td>42</td>
<td>x</td>
</tr>
<tr>
<td>John Cornyn</td>
<td>x</td>
<td></td>
<td>1991-94</td>
<td>3</td>
<td>39</td>
<td>x</td>
</tr>
<tr>
<td>Bob Gammage</td>
<td>x</td>
<td></td>
<td>1991-94</td>
<td>3</td>
<td>53</td>
<td>x</td>
</tr>
<tr>
<td>Craig Enoch</td>
<td>x</td>
<td></td>
<td>1993-94</td>
<td>1</td>
<td>43</td>
<td>x</td>
</tr>
<tr>
<td>Rose Spector</td>
<td>x</td>
<td></td>
<td>1993-94</td>
<td>1</td>
<td>60</td>
<td>x</td>
</tr>
</tbody>
</table>

| Totals | 23 | 7 | 219 | 1599 | 27 | 3 | 29 | 1 | 0 |

N=30
Table 4.2. Career Characteristics of Texas Supreme Court Justices, 1978-1994

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Joe R. Greenhill</td>
<td></td>
<td>x</td>
<td></td>
</tr>
<tr>
<td>Zollie Steakley</td>
<td></td>
<td>x</td>
<td></td>
</tr>
<tr>
<td>Jack Pope</td>
<td>x</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sears McGee</td>
<td>x</td>
<td></td>
<td></td>
</tr>
<tr>
<td>James G. Denton</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Price Daniel</td>
<td></td>
<td>x</td>
<td>x</td>
</tr>
<tr>
<td>Sam D. Johnson</td>
<td>x</td>
<td>x</td>
<td></td>
</tr>
<tr>
<td>Charles W. Barrow</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>T.C. Chadick</td>
<td>x</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Robert M. Campbell</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Franklin Spears</td>
<td></td>
<td>x</td>
<td></td>
</tr>
<tr>
<td>Will Garwood</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>C.L. Ray</td>
<td>x</td>
<td></td>
<td>x</td>
</tr>
<tr>
<td>James P. Wallace</td>
<td></td>
<td>x</td>
<td></td>
</tr>
<tr>
<td>Ruby Kless Sondock</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ted. Z. Robertson</td>
<td></td>
<td>x</td>
<td></td>
</tr>
<tr>
<td>William Kilgarlin</td>
<td></td>
<td></td>
<td>x</td>
</tr>
<tr>
<td>Raul Gonzalez</td>
<td>x</td>
<td>x</td>
<td></td>
</tr>
<tr>
<td>John L. Hill Jr.</td>
<td></td>
<td>x</td>
<td>x</td>
</tr>
<tr>
<td>Oscar Mauzy</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tom Phillips</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Barbara Culver</td>
<td></td>
<td>x</td>
<td></td>
</tr>
<tr>
<td>----------------</td>
<td>-----------</td>
<td>------------</td>
<td>------------------</td>
</tr>
<tr>
<td>Eugene A. Cook</td>
<td></td>
<td>x</td>
<td>x</td>
</tr>
<tr>
<td>Jack Hightower</td>
<td></td>
<td>x</td>
<td>x</td>
</tr>
<tr>
<td>Nathan L. Hecht</td>
<td>x</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Lloyd Doggett</td>
<td></td>
<td></td>
<td>x</td>
</tr>
<tr>
<td>John Cornyn</td>
<td>x</td>
<td>x</td>
<td>x</td>
</tr>
<tr>
<td>Bob Gammage</td>
<td>x</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Craig Enoch</td>
<td>x</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rose Spector</td>
<td>x</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Total: 20 | 9 | 10

N=30
Table 4.3. Education of Texas Supreme Court Justices, 1978-1994

<table>
<thead>
<tr>
<th>Name</th>
<th>Pre-law Ed.</th>
<th>Legal Ed.</th>
<th>Prestige</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Texas</td>
<td>Non-Texas</td>
<td>Texas</td>
</tr>
<tr>
<td>Joe R. Greenhill</td>
<td>x</td>
<td></td>
<td>x</td>
</tr>
<tr>
<td>Zollie Steakley</td>
<td>x</td>
<td></td>
<td>x</td>
</tr>
<tr>
<td>Jack Pope</td>
<td>x</td>
<td></td>
<td>x</td>
</tr>
<tr>
<td>Sears McGee</td>
<td>x</td>
<td></td>
<td>x</td>
</tr>
<tr>
<td>James G. Denton</td>
<td>x</td>
<td></td>
<td>x</td>
</tr>
<tr>
<td>Price Daniel</td>
<td>x</td>
<td></td>
<td>x</td>
</tr>
<tr>
<td>Sam D. Johnson</td>
<td>x</td>
<td></td>
<td>x</td>
</tr>
<tr>
<td>Charles W. Barrow</td>
<td>x</td>
<td></td>
<td>x</td>
</tr>
<tr>
<td>T.C. Chadick</td>
<td>x</td>
<td></td>
<td>x</td>
</tr>
<tr>
<td>Robert M. Campbell</td>
<td>x</td>
<td></td>
<td>x</td>
</tr>
<tr>
<td>Franklin Spears</td>
<td>x</td>
<td></td>
<td>x</td>
</tr>
<tr>
<td>Will Garwood</td>
<td>x</td>
<td></td>
<td>x</td>
</tr>
<tr>
<td>C.L. Ray</td>
<td>x</td>
<td></td>
<td>x</td>
</tr>
<tr>
<td>James P. Wallace</td>
<td>x</td>
<td></td>
<td>x</td>
</tr>
<tr>
<td>Ruby Kless Sondock</td>
<td>x</td>
<td></td>
<td>x</td>
</tr>
<tr>
<td>Ted. Z. Robertson</td>
<td>x</td>
<td></td>
<td>x</td>
</tr>
<tr>
<td>William Kilgarlin</td>
<td>x</td>
<td></td>
<td>x</td>
</tr>
<tr>
<td>Raul Gonzalez</td>
<td>x</td>
<td></td>
<td>x</td>
</tr>
<tr>
<td>John L. Hill Jr.</td>
<td>x</td>
<td></td>
<td>x</td>
</tr>
<tr>
<td>Oscar Mauzy</td>
<td>x</td>
<td></td>
<td>x</td>
</tr>
<tr>
<td>Tom Phillips</td>
<td>x</td>
<td></td>
<td>x</td>
</tr>
<tr>
<td>Barbara Culver</td>
<td>x</td>
<td></td>
<td>x</td>
</tr>
<tr>
<td></td>
<td>Pre-law Ed.</td>
<td>Legal Ed.</td>
<td>Prestige</td>
</tr>
<tr>
<td>---------------------</td>
<td>-------------</td>
<td>-----------</td>
<td>----------</td>
</tr>
<tr>
<td></td>
<td>Texas</td>
<td>Non-Texas</td>
<td>Texas</td>
</tr>
<tr>
<td>Eugene A. Cook</td>
<td>x</td>
<td></td>
<td>x</td>
</tr>
<tr>
<td>Jack Hightower</td>
<td>x</td>
<td></td>
<td>x</td>
</tr>
<tr>
<td>Nathan L. Hecht</td>
<td></td>
<td>x</td>
<td>x</td>
</tr>
<tr>
<td>Lloyd Doggett</td>
<td>x</td>
<td></td>
<td>x</td>
</tr>
<tr>
<td>John Cornyn</td>
<td>x</td>
<td></td>
<td>x</td>
</tr>
<tr>
<td>Bob Gammage</td>
<td>x</td>
<td></td>
<td>x</td>
</tr>
<tr>
<td>Craig Enoch</td>
<td>x</td>
<td></td>
<td>x</td>
</tr>
<tr>
<td>Rose Spector</td>
<td></td>
<td>x</td>
<td>x</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>28</td>
<td>2</td>
<td>28</td>
</tr>
</tbody>
</table>

*N=30*
themselves from hearing lawsuits involving the Woodmen of the World. All had a conflict of interest because they were members of the organization. The women appointed were Hattie Henenberg, Hortense Ward, and Ruth Brazzill.³

**Ethnicity.** No African-American served, and Gonzalez is the only justice with a Hispanic surname on the Court during the study period. All others were white.

**Age and Tenure**

**Age at Election or Appointment.** The ages of Texas chief justices at their election or appointment range from 39 to 62, with a mean of 57. Phillips, at 39, was the youngest chief justice, and Hill, at 62, was the oldest. Greenhill was 43 when he began his service as an associate justice in 1957 and was 58 when he became chief justice. Pope was 69 when he was appointed chief Nov. 23, 1982, after having already served 17 years as an associate. Of the associate justices, the oldest at the time he became a justice was Chadick at 67. Cornyn was the youngest at 39. The mean age of associate justices on the Court from 1978 to 1994 is 52.

**Length of Tenure.** For the period of study, Phillips had the longest tenure as chief justice, six years (1988-94). Greenhill, who served 25 years on the Court (1957-1982), spent a total of 10 years as chief justice (1957-82), but only four of those occurred during the 1978 to 1994 period. Pope, who served 19 years on the Court, was chief for two years (1982-1984). Hill’s term of court service was

his two years as chief justice (1985-1987). The mean tenure of chief justices from 1978 to 1994 is just over three years.

Among associate justices, Steakley had the longest tenure at 20 years (1961-1981), and Chadick, Garwood, Sondock, and Culver had the shortest. They each served a year or less on the Court. Justices for the period of study served an average of seven years.

Education

Prelaw. All four chief justices obtained their prelaw education in Texas. Greenhill earned a B.B.A. degree from University of Texas; Pope graduated from Abilene Christian University, and Phillips holds a B.A. degree from Baylor. Hill attended Kilgore College for one year and the University of Texas two years before entering law school at the University of Texas under a program that allowed students to bypass an undergraduate degree.4 All but four of the associate justices received their undergraduate education in Texas. Garwood graduated from Princeton in 1952, Hecht graduated from Yale in 1971, and Spector graduated from Columbia in 1954. Wallace is a 1952 University of Arkansas graduate.

The universities best-represented among Texas associate justices' undergraduate education are University of Texas, Baylor University, and University of Houston, with three each; Southern Methodist University and Texas Tech, with two each; and Hardin-Simmons, Rice, A&M, Texas Wesleyan, Texas A&I, Trinity, and University of Corpus Christi, one each.

---

Barrow attended Baylor as an undergraduate and then went to Baylor Law School without a baccalaureate degree.\(^5\)

**Legal.** Chief justices Greenhill, Pope, and Hill received their legal education at the University of Texas, and Phillips earned a Juris Doctorate from Harvard University in 1974. All but one of the 26 associate justices graduated from Texas law schools. The exception was Chadick, who received an LL.B. from Cumberland University, Lebanon, Tennessee, in 1934.

Law schools at Baylor and University of Houston each graduated four associate justices, and Southern Methodist University and St. Mary's each graduated three. Those who received their legal education from Baylor are Daniel, Barrow, Campbell, and Hightower. University of Houston law school graduates are Sondock, Wallace, Gonzalez, and Cook.

Graduates of Southern Methodist University are Robertson, Cornyn and Spector. Justices who graduated from St. Mary’s University are Culver, Hecht, and Enoch. The remaining 11 have law degrees from University of Texas.

**Career Characteristics**

Most justices had either judicial experience or prosecutorial experience before going on the Court, and some had both. Some also had been elected to public office in nonjudicial or nonprosecutorial positions.

Four had both judicial and prosecutorial experience before they began service on the state Supreme Court: Johnson, Robertson, Gonzalez, and Gammage. Of these, Gammage also had been a U.S. Congressman (1977-1979)

---

and had served in the Texas House of Representatives and in the Texas Senate.

Sixteen others had judicial experience but no prosecutorial experience when they were elected or appointed to the Texas Supreme Court. They are Chief Justices Pope and Phillips and associate justices McGee, Denton, Barrow, Chadick, Spears, Ray, Wallace, Sondock, Kilgarlin, Culver, Hecht, Cornyn, Enoch, and Spector. Of these, Kilgarlin also had been a member of the Texas House of Representatives, Ray also had served in the Texas House, and Wallace had been a former state senator.

Two chief justices, Greenhill and Hill, and associate justices Daniel, Steakley, and Hightower had prosecutorial experience but no judicial experience. In addition to Daniel's position as Texas attorney general from 1947-1952, he had amassed an impressive record in elective offices before becoming a state Supreme Court justice. He was Texas governor (1957-1963), a U.S. senator (1953-1957), and a member of the Texas House of Representatives (1939-1943). He was Speaker of the Texas House in 1943.

Steakley and Hightower also been elected to office in positions other than as prosecutors. Steakley was Texas secretary of state (1957-1961), and Hightower was a U.S. congressman (1975-1985) and a state senator (1965-1975).

Five justices had neither previous judicial nor prosecutorial experience. They are Campbell, Garwood, Mauzy, Cook and Doggett. Of these, both Mauzy and Doggett had been longtime state senators. Mauzy served in the Texas Senate from 1967 to 1987, and Doggett served from 1973 to 1985.
Observations on 10 Hypotheses

Ten personal attribute hypotheses now are examined in a search for explanation of the majoritarian behavior of individual Texas Supreme Court justices. The state-level hypotheses replicate as closely as possible those Tate (1981) investigated at the U.S. Supreme Court level.

Tate's study, which Ulmer has called "the most ambitious" of personal attributes research (Ulmer 1986, 957), was selected because of the large number of variables considered, the thoroughness with which their analyses were reported, and ease of adaptation to Texas justices. Although Marshall (1989) gave attention to attribute variables, his independent variables were not as adaptable to Texas as Tate's (1981) and the results of his analyses were not as precisely reported (Marshall 1989).

The void of state-level research leaves a gaping breach in the Texas study. State-level analyses cannot be compared because the research does not exist. This gulf further emphasizes the importance of the Texas study in setting a foundation for future inquiry into the majoritarian behavior of state Supreme Court justices.

Partisanship

The analysis of attribute variables begins by looking at partisanship as a possible predictor of majoritarian behavior. Tate (1981), Tate and Handberg (1991) and Goldman (1975) all have identified party affiliation as an important variable in predicting federal court voting on civil rights and liberties issues and on economic issues. Tate also observed that "Party identification is
shown to affect the behavior of America's top judicial elite in the same way it affects that of other political elites and the masses" (Tate 1981, 362).

Justices are "politicians in black robes" (Glick 1988, 259) who function in the political system. At the national level, presidents promote their own ideologies and party interests through their appointments to the U.S. Supreme Court. "Seats on the Supreme Court provide means for a president to build political support" (Baum 1989, 43). About 90% of presidential nominees to the high court are members of the appointing president's political party (Baum 1989, 43).

Presidents expect to perpetuate their own political ideologies in the justice's individual votes, furthering their own party's fortunes. Similarly, it could be expected that a Texas Supreme Court justice elected by majority party voters would be responsive to a majority of the people. The state political system "by requiring that judges be elected and be recruited from lawyers with predominantly state political experience, links judges to the state political system and to the political norms of state politics" (Vines 1965, 17).

In 1978, the first year of the present study, Texas still exhibited strong tendencies toward its one-party Democratic status, despite the election of the first Republican governor since Reconstruction. Democrats remained in control of statewide offices, although Republicans were making gains. Since 1978, the governorship has alternated at each election between the two major parties, and Republicans have strengthened their endeavors in state and local races. In 1992, the final election before the end of the present study, the Democrats held the governor's office and Republicans were gaining ground in both the House and the Senate (See Figure 4.1.)
Figure 4.1.A. Party Representation in Texas House of Representatives, 1979-1994

Figure 4.1.B. Party Representation in Texas Senate, 1979-1994
On the bench of the Texas Supreme Court, Democrats solidly held all nine positions until Republican Governor Bill Clements appointed Garwood in 1979. Until the late 1980s when Phillips became chief justice and Cook and Culver assumed office, Garwood was the lone Republican to serve. Republicans had increased their numbers to a membership of four by July 1994, just one shy of a majority.

Vestiges of Texas' history as a one-party Democratic state remain, and the party maintains a majority in the Legislature and the Supreme Court. In addition, justices in Texas are elected to their positions and, thus, may be prone to follow the public mood. For these reasons, it was hypothesized that: Texas Supreme Court justices who identify with the Democratic Party are more majoritarian than those who identify with the Republican Party.

The findings, however, indicate the reverse. The seven Republican justices were strongly more majoritarian than the 23 Democratic justices. Republicans cast only 23% of the total votes (852), but of those votes, 81% were majoritarian. Democrats cast 77% of the total votes, and 67% were majoritarian. The regression coefficient was not statistically significant (-1.9 at the .05 level) and failed to help explain because Democrats made up 77% of the sample and skewed the results.

Explanation for the high level of Republican agreement with public opinion could lie in electoral politics. The Republicans, as a minority party striving to achieve majority status, may have perceived themselves to be more vulnerable than if they had been in the majority party. Consequently, the justices, in efforts to preserve their gains and establish a stronghold, may have been anxious to please the electorate.
The high percentage of Republican justices' majoritarian votes indicate a responsiveness to what Jones et al. (1986) called a "party realignment" in Texas after the 1984 election. The Reagan-Bush Republican ticket took 64 percent of the Texas vote in the presidential election, and Republicans added 15 seats in the 150-member Texas House to bring their total to 52 seats. They also added one new member, raising from five to six, Republican seats in the 31-member Texas Senate (Jones et al. 1986, 168).

Future research should consider the rise of a minority party and emergence of a two-party system in Texas in an attempt to explain the propensity of individual justices to follow public opinion in their written decisions. Mr. Dooley’s observation at the U.S. Supreme Court level may be applicable in Texas: "No matter, whether th’ constitution follows th’ flag or not, th’ supreme coort follows the’ iliction returns" (Dunne 1963, 160).

At the national level, Marshall (1989), too, had expected that Democratic U.S. Supreme Court justices would be more majoritarian than Republicans. From the 1930s to the mid 1980s, the Democratic party could "reasonably be counted as the nation’s dominant party" (Marshall 1989, 108). However, he found that the 16 Republican justices had voted consistently with public opinion in 60% of their votes, and the Democratic justices had been majoritarian in 57% of their decisions (Marshall 1989, 108).

Ulmer (1986) did not find a significant relationship between party identification and a justice's support for government in cases in which party identification was matched against "underdogs" (Ulmer 1986, 961). He said, "It may not be strictly logical... to argue that party 'causes' or influences
judicial votes. It is logical to view the variable as a surrogate for background factors that, for the present, remain unidentified" (Ulmer 1986, 961).

Gender and Ethnicity

Another variable researchers have considered in search of explanation for judicial behavior is majority or minority status in society. Since the U.S. Supreme Court historically has been dominated by white males, attribute variable research has not addressed possible influence of gender or minority ethnicity. However, the minority perspective has been considered by researchers using religion as a variable. Although its success in explanation has been limited, it is a variable that intrigues political scientists.

Goldman (1975), an early personal attributes researcher, included religion in his analysis of U.S. Courts of Appeals judges. He suggested that judges of minority faiths, principally Catholic and Jewish religions, "are or have been outsiders in American society having never fully received widespread social, economic, and political acceptability" (Goldman 1975, 498). He said that because of their historical or personal experiences as minority groups, "these judges may have been socialized to favor the underdog" (Goldman 1975, 498).

Tate (1981) examined the same variable for U.S. Supreme Court justices and found little or no explanation when other variables were included. "This finding is surprising since in the literature Protestantism was consistently associated with conservatism on civil liberties" (Tate 1981, 362). Persistently, Tate and Handberg (1991) revived the variable in their 1991
study, but it again was found not significantly related to the dependent variable (Tate and Handberg 1991, 473).

Marshall added ethnicity and/or gender to religion to form his "minority" variable. He determined that the U.S. Supreme Court's Catholic, Jewish, black and female minority were slightly less consistent (56%) with public opinion than their white, male, Protestant colleagues (60%).

There is an abundance of literature that shows minorities have different experiences than nonminorities (Bullard 1990; Coughlin 1989; Draper 1993; Hess and Stein 1993; Sniderman 1985). It is reasonable to believe that minority status individuals in Texas would have had similar experiences as those Goldman (1975) described as "are or have been outsiders . . . having never fully received widespread social, economic, and political acceptability."

The persistence of researchers in following up on Goldman's 1975 finding prompted a similar curiosity and hypothesis in the Texas study: *Justices who are nonwhite and/or female are more majoritarian than their white, male counterparts.*

In Texas, women and ethnic minorities have held statewide elective office only in isolated situations. Miriam Amanda "Ma" Ferguson was elected in 1924 and 1932 as governor after her husband, James E. "Pa" Ferguson, was impeached in 1917 for misuse of public funds. He "directed her tenure in office from behind the scenes" (Mladenka and Hill 1986, 69). In 1982, Ann Richards became the second woman in Texas history to hold a statewide elective office when she was elected state treasurer. Richards was elected governor in 1990.
Hispanics and African-Americans comprise 38% of the state’s population, but neither has been represented in the governor’s office. Attorney General Dan Morales has been the highest state-level Hispanic official, and numbers in the state legislature have increased from 13 in 1978 to 31 in 1994. African-Americans have not had a state-level officer, and their numbers in the state legislature have increased only slightly during the period of the current study. In 1978, 14 African-Americans were in the Legislature and in 1994, there were 16. The highest level was in 1990 with 15.

The Texas Supreme Court has remained predominantly white and male. Four women and one Hispanic justice served on the Texas Supreme Court from 1978 to 1994, and they were not noticeably different from their white, male counterparts in their propensity to agree with public opinion. The four minority members were 72% majoritarian in the 102 votes they cast. The white male justices were 70% majoritarian in their 750 votes.

The sample size of minority justices is too small to be evaluated with normal distribution approaches. But as the number of the minority justices increase, the analysis of this group’s behavior could improve our understanding of the Court’s dynamics.

Age and Tenure

Age has been explored as a possible variable influencing decisions by U.S. Supreme Court justices. Schubert suggested in *The Judicial Mind Revisited* that the “relatively advanced age” of the U.S. Supreme Court justices “probably had the effect of reinforcing stability in their ideological standpoints” (Schubert 1975, 143).
In his 1975 replication, Goldman determined that older judges "simply tended to be more conservative" than younger judges on issues of criminal procedures, civil liberties, labor, injured persons, political liberalism, economic liberalism, and activism. (Goldman 1975, 499) "Age appears to have been the single most important background for civil liberties and the voting on activism" (Goldman 1975, 501).

If a linkage between age and judicial decisions has been indicated in the U.S. Supreme Court and in the U.S. Courts of Appeals, it is reasonable to predict that it may have similar effects in a state supreme court. Regardless of the level of analysis, justices should behave in a similar manner. They will be more set in their beliefs and more resistant to changing public opinion than younger justices. "There is evidence to suggest that attitudes become somewhat less susceptible to change as people age" (Atchley 1991).

Consequently, Hypothesis 6 was tested: Justices elected or appointed to the Texas supreme Court before age 50 are more majoritarian than justices who began their service at age 50 or more.

As expected, Texas Supreme Court justices elected or appointed to the Texas Supreme Court before age 50 were more majoritarian (73%) than their colleagues who assumed their positions at age 50 or more (66%). The regression coefficient (-.009) for age indicates that the more majoritarian individuals tended to be younger.

In the same vein, it might be expected that the longer justices serve on the Court, the more secure they become in their positions and the less responsive they are to public opinion. Dahl (1957) suggested that membership change on the U.S. Supreme Court through deaths, resignations,
and appointments prevents the Court from becoming impervious to new, developing values.

This implication that justices with longtime careers on the Court become less responsive to public opinion was tested as Hypothesis 7: justices serving two terms or less on the Texas Supreme Court are more majoritarian than those serving more than two terms.

As expected, Texas justices who have served two six-year terms or less were slightly more majoritarian (70%) than those with longer tenure of two or more terms (66%). This finding, however, was different from Marshall's (1989) analysis at the U.S. Supreme Court. He found "no evidence that the modern Court's justices grew either less majoritarian or more conservative over their tenure on the Court" (Marshall 1989, 118).

Education

Personal attributes research on judicial behavior typically addresses the impact of the prestige of a justice's education. The U.S. Constitution does not require that its members be lawyers, but all have been (Baum 1989, 53). The Texas Constitution requires that a candidate for election to the state Supreme Court be a practicing lawyer for at least 10 years or have a combined 10 years of experience as a practicing lawyer and as a judge of a court of record. To be a practicing lawyer today in Texas, one must have graduated from an accredited law school and passed the Texas Bar examination.

Since justices at both the national and state level are highly educated individuals, researchers attend to the prestige of their educational institutions as a possible predictor of behavior. Schmidhauser says prestigious law
schools may point students toward a particular emphasis, such as national law as opposed to state law (Schmidhauser 1959, 25 and 1979, 72). Marshall found that justices with education at prestigious law schools were significantly more majoritarian than those who received their legal education from less prestigious law schools. (Marshall 1989, 112).

In Texas, the University of Texas Law School enjoys a national as well as local reputation for quality. It typically is listed among the top law schools in the nation in rankings by the National Jurist, and Princeton Review. It boasts one of the five largest legal libraries in the nation, a bar examination passage rate of 96%, and a placement rate of 95%.\(^6\) It is the best-represented law school among members of the Texas Supreme Court, with 13 graduates. Baylor and University of Houston are the next best-represented law schools on the Court with four graduates each.

It is logical that the University of Texas Law School would attract many of the state's "best and brightest" because of its prestige and its location in Austin, the state's seat of government. They would have greater opportunity for exposure to the arena of partisan politics than students at other Texas law schools. Opportunity would be readily available to become personally acquainted with lawyers working in state politics. These opportunities, if accepted, could be expected to sensitize potential future state Supreme Court justices to the notion of responsiveness to fellow Texans. This reasoning prompted Hypothesis 8: Justices who received their legal education from

\(^6\) Shelli Soto, Director of Admissions, University of Texas Law School, Austin, Telephone Interview, November 29, 1994.
University of Texas at Austin are more majoritarian than justices who received their legal education at other Texas law schools.

However, analysis of the data does not indicate that the prestige of the University of Texas produced more majoritarian justices. The 14 justices who received their legal education at the University of Texas were 64% majoritarian in their voting. The 15 justices who graduated from other Texas law schools were 74% majoritarian.

A Texas Education

A justice who attended a university or law school in Texas could be expected to have been exposed to the traditionalistic and individualistic political culture of Texas (Elazar 1972; Kraemer and Newell 1990) by virtue of having resided in Texas for several years. Similarly, students attending a university or law school in Massachusetts and residing there for several years could be expected to be influenced by the moralistic and individualistic political culture of that state (Elazar 1972, 106-107). It is reasonable that students' future experiences would be impacted by the influence of those political cultures.

The influence of the geographic area in which a justice has lived has been a variable researchers at the federal appellate court level have considered in search of explanation for judicial voting decisions. Tate (1981) found that regional influences were a significant factor in U.S. Supreme Court justices' votes on civil rights and liberties issues but not on economic issues. "Justices appointed from the southern states are shown to be less
favorable toward civil liberties claims than their northern counterparts” (Tate 1981, 362).

Goldman (1975) considered region important enough to test for the possibility that inclusion of southern circuit judges would undermine his data. With southerners excluded, he found that Democrats posted statistically significant higher scores on activism than when southerners were included (Goldman 1975, 498). Because political culture is different from state to state and region to region and students at universities and law schools spend several years under those influences while they are attending educational institutions, Hypotheses 9 and 10 were formulated:

**Hypothesis 9:** Justices who received their prelaw education from an institution in Texas are more majoritarian than justices who received their prelaw education from non-Texas institutions.

**Hypothesis 10:** Justices who received their legal education from an institution located in Texas are more majoritarian than justices who received their legal education from non-Texas universities.

Analysis of the data produced results contrary to both hypotheses. The four Texas Supreme Court justices who graduated from non-Texas universities were as majoritarian at 71% as the 26 graduates of Texas universities, who were 70% majoritarian. The 29 justices who received their legal education in Texas also were 70% majoritarian.

The findings in the three education hypotheses indicate that neither the geographic area of Texas with its traditionalistic and individualistic

---

7 The lone justice who graduated from a non-Texas law school, Chadick, was 100% majoritarian on the two votes he cast on decisions matching public opinion poll results.
political culture nor the prestige of the University of Texas law school is linked to the propensity of Texas Supreme Court justices to vote with public opinion.

One explanation to be explored in future study is the homogenization of Texas' political culture as immigration from other states occurs and the state moves toward a stronger two-party system. Since 1940, Texas' population has risen from less than 6.5 million to almost 17 million, and its population is projected to become more ethnically diverse (U.S. Department of Commerce, 1990). The state also experienced what Jones et al. (1986) called a “party realignment” in Texas after the 1984 election, as discussed above.

Judicial Experience

Judicial experience often is assumed to affect judicial decision-making. Some believe justices with prior experience on the bench will be more attuned to legal requirements and, thus, be more conservative. Others believe the experience of weighing both sides of a dispute will make a justice more liberal (Tate and Handberg 1991, 470).

Tate found that judicial career experience impacted decisions by U.S. Supreme Court justices from 1946 to 1978. He determined that the more judicial experience a U.S. Supreme Court justice had, the more willing he was to support civil rights and liberties cases (Tate 1981, 362). He also said found “clear that judicial experience is a liberalizing influence in the Supreme Court justices’ voting on economic issues” (Tate 1981, 363).

Tate and Handberg (1991) revisited Tate’s social attribute research 10 years later. They constructed an index to measure judicial experience that
recognized "extensive experience" as five years or more, "some experience" as less than five years, and no experience. They used multiple regression to analyze the data and found impact on liberalism in economics cases but none on civil rights and liberties cases (Tate and Handberg 1991, 474).

Goldman, in his study of voting behavior on the U.S. Court of Appeals, hypothesized that prior judicial experience would have no statistically significant association with judges' decisions. However, he found that judges without prior judicial experience posted a higher dissent rate than judges who had bench experience (Goldman 1975, 501).

In Texas, where both trial and appellate court judges are elected, a justice who assumes the bench at the state Supreme Court with judicial experience has stood for election at least twice - once for a lower court judgeship and once for the state Supreme Court. Justices also know they must face a re-election race again in six years if they want a chance at another term on the state Supreme Court.

Their prior judicial experience involved elections in their home cities or counties where Key's notion of "friends and neighbors" politics were operative. Key suggested that voters elected "home boys" because of common interests and name recognition (Key 1949). A judge in Texas "becomes a politician who must respond to the desires of his constituents in order to be re-elected" replied a judge in a 1987 survey of Texas civil and criminal district judges (Riddlesperger 1988, 9).

Given that federal-level research has shown that past judicial experience influenced judicial decision-making and that Texas justices with judicial experience have participated in the political arena, it is reasonable to
hypothesize that: \textit{Justices with prior judicial experience are more majoritarian than those elected or appointed with no judicial experience.}

However, this was not found to be the case in the present study of the Texas Supreme Court. Justices with prior judicial experience were not more majoritarian than those with no judicial experience. The 20 justices with prior judicial experience were 69\% majoritarian, while those justices lacking previous bench experience were 72\% majoritarian.

An explanation for this could be that justices with limited vote-getting experience are anxious to please their constituents, while those justices with more electoral experience are aware of Texas' uninformed voters in judicial races. Voters in judicial races probably do not know a candidate's qualifications and typically rely on name recognition in making a decision at the ballot box (Champagne 1986). "Texas voters have elected accused felons who had familiar sounding names, as they did with Don Yarbrough in 1976" (Thielemann 1993, 473).\footnote{Don Yarbrough, whose name sounded like that of former U.S. Senator Ralph Yarborough or 1962 Democratic gubernatorial candidate Don Yarborough, was elected while a defendant in 16 civil suits on charges ranging from fraud and negligence to failure to repay debts (Kraemer and Newell 1990, 160).}

Respondents in Texas public opinion polls "consistently indicate that Texas voters are not well informed on political issues or on candidates" (Kraemer and Newell 1990, 160). By extension, these uninformed voters probably are not aware of a state Supreme Court justice's decisions on approximately 200 cases each year. Politically experienced justices may be aware of this and not be as concerned about voter approval as their less politicized colleagues.
The same rationale can be applied to justices who have held other elective offices. Tate (1981) found a meaningful relationship between justice's decisions in economics cases and whether or not they had been in an elective office when appointed to the U.S. Supreme Court. "Lawyers who have found favor with a mass electorate are likely to be more liberal than their counterparts who continue to labor mostly in the service of the socioeconomic elites" (Tate 1981, 363).

It was hypothesized that: Justices who have previously held nonjudicial, nonprosecutorial elective office are more majoritarian than those who have not held such offices.9

However, the finding was contrary. As in the finding on judicial experience, Texas Supreme Court Justices who had served in elective offices other than those in which they gained judicial or prosecutorial experience were less majoritarian (66%) than those who had not (72%).

Marshall (1989) also uncovered a similar result. In his study of 36 U.S. Supreme Court justices, he identified 29 who had an elected or appointed public position in their career backgrounds. He, too, determined that former office holders were slightly less majoritarian than justices who had held elective or appointed jobs in government (Marshall 1989, 113).

---

9 A hypothesis addressing Texas Supreme Court justices' membership in the Texas Trial Lawyers Association was considered for inclusion. However, the association has no directories or historical public documentation of its membership. Rhonda High, of the Association's executive office in Austin, said in an October 18, 1994, telephone interview that only a current, computerized membership list is maintained. Public records show that most justices either were not members of the organization before they began their service on the Court or they refrain from listing them in their self-report biographies in a variety of Who's Who publications. Former Chief Justice John L. Hill Jr. confirmed in a Nov. 1, 1994, letter that he was president of the Texas Trial Lawyers Association in 1955.
Prosecutorial Experience

Prosecutorial experience in a judge's background also has been a topic for inquiry by researchers, and some have found it predictive. Tate (1981) determined that U.S. Supreme Court justices with prosecutorial experience are less favorable toward civil liberties issues than those with no experience as a prosecutor. Prosecutorial experience is "a conservatizing influence" (Tate 1981, 363).

Tate also considered the interactive effects of prosecutorial and judicial career backgrounds and found that among prosecutors, those with some judicial experience were more favorable to civil liberties claims than those with no time on the bench (Tate 1981, 362). Prosecutors with judicial experience reflected "the moderating influence of sitting on the other side of the bench" (Tate 1981, 362).

Tate and Handberg used an index of judicial/prosecutor experience to evaluate impact on decision-making. They found that the variables had a statistically significant impact on decisions in economics cases but none in civil liberties cases (Tate and Handberg 1991, 475-76).

Since Tate (1981) found that prosecutorial experience had an effect on judicial behavior that was different from prior judicial experience, it would seem beneficial to consider whether this situation existed at the state level. The hypothesis examined: Justices without prior prosecutorial experience are more majoritarian than those with prosecutorial experience.

The Texas data indicated, however, that the reverse was true. Texas Supreme Court justices who had not been prosecutors were 68% majoritarian
in their 609 votes, while those who had prosecutorial experience were 74% majoritarian in their 243 votes.

An explanation for this finding may also lie in electoral politics. Chief prosecutors in Texas, like justices, must face the voters each election year. The political arena also is not new territory to U.S. attorneys, assistant attorneys general, or assistant district attorneys, who are appointees of politicians. Recognizing the need for voter approval at the polls, justices with prosecutorial experience may be concerned enough about public opinion that they reflect it in their decisions.

Results Summarized

Investigation of Hypotheses 4-13 sought to identify possible links between personal attributes of Texas Supreme Court justices and their majoritarian voting propensities. Multiple regression analysis was used to determine if the combined effects of 10 independent variables were significantly related to justices' percentage of majoritarianism. The independent variables were 1) Political Party; 2) Gender and Ethnicity; 3) Age; 4) Tenure; 5) Prestige of Texas Legal Education; 6) Texas prelaw education; 7) Texas legal education; 8) Judicial Experience; 9) Nonjudicial, Nonprosecutorial Elective Office; and 10) Prosecutorial Experience.

The independent variables were simultaneously entered into a regression model. The probability of F, a test of the statistical significance of the overall regression equation, was evaluated. The probability value (.938) was not significant at the .05 level.
Had the F ratio been significant, it could have been assumed that at least one independent variable contributed information for prediction of the dependent variable. However, this was not the case. The t-tests of individual independent variables also indicate that none is significantly related to the dependent variable. The $R^2$ indicates that only 17% of the variance is explained. Table 4.4 summarizes these results.

Percentages, however, can be used to describe the proportion of majoritarianism as it relates to each of the 10 variables. The findings indicate that two of the 10 hypotheses were borne out by the data while the remaining eight were not. As expected, Texas Supreme Court justices who went on the Court before age 50 were more majoritarian (73%) than their colleagues in the over-50 age group (66%), and justices with less tenure on the Court were more majoritarian (70%) than those with longer tenure (66%).

Contrary to the hypothesis, Republicans were strongly more majoritarian than Democratic justices. Republicans' written decisions were 81% in agreement with public opinion, compared with Democrats' 67%.

The analysis disputed all three education hypotheses. The 14 graduates of the prestigious University of Texas School of Law were considerably less majoritarian (64%) in their decisions than the 15 justices who graduated from other Texas law schools (74%). Those who received their undergraduate degrees from out-of-state institutions were as majoritarian (71%) as the graduates of Texas universities (70%).

Data on justices' career experience yielded unexpected results. Justices with prior judicial experience and those who had previously held nonjudicial or nonprosecutorial elective office were not more majoritarian than
Table 4.4. Results of Regression Analysis

<table>
<thead>
<tr>
<th>Independent Variable</th>
<th>B</th>
<th>t</th>
<th>Prob. of t&gt;</th>
<th>X</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Constant)</td>
<td>61.09</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pre-Law</td>
<td>1.1389</td>
<td>.138</td>
<td>.8919</td>
<td></td>
</tr>
<tr>
<td>Legal</td>
<td>7.3150</td>
<td>.360</td>
<td>.7224</td>
<td></td>
</tr>
<tr>
<td>UT</td>
<td>-2.077</td>
<td>-.184</td>
<td>.8557</td>
<td></td>
</tr>
<tr>
<td>Judicial Exp.</td>
<td>7.8074</td>
<td>.704</td>
<td>.4898</td>
<td></td>
</tr>
<tr>
<td>Pros. Exp.</td>
<td>-5.4828</td>
<td>-.503</td>
<td>.6206</td>
<td></td>
</tr>
<tr>
<td>Elected</td>
<td>15.8632</td>
<td>1.238</td>
<td>.2307</td>
<td></td>
</tr>
<tr>
<td>Party</td>
<td>-1.878</td>
<td>-.115</td>
<td>.9096</td>
<td></td>
</tr>
<tr>
<td>Gender/Ethnicity</td>
<td>-8.0318</td>
<td>-.504</td>
<td>.6198</td>
<td></td>
</tr>
<tr>
<td>Age</td>
<td>-.0099</td>
<td>-.013</td>
<td>.9896</td>
<td></td>
</tr>
<tr>
<td>Term</td>
<td>.3955</td>
<td>1.082</td>
<td>.7187</td>
<td></td>
</tr>
</tbody>
</table>

| Intercept             | 69.68 |
| R²                    | .17  |
| Adjusted R²           | .27  |
| Std. Error of Est.    | 24.14 |
| F (df)                | .382 (10,19) |
| Prob. of F            | .938 |
those with no experience on the bench or other elective office. The 20 justices who formerly had served as judges were 69% majoritarian in their voting, while the 10 with no previous experience were 72% majoritarian.

Findings contrary to the hypotheses showed that justices who had previously won elective office outside the courts were less responsive to public opinion (66%) than those who had not been elected officials (72%). It was also determined, contrary to expectations, that justices who had prosecutorial experience were more majoritarian (74%) than those who had not been prosecutors (68%).

It was predicted that minority status justices would be more majoritarian than their white, male counterparts. The percentages show that there was little difference in the small, skewed sample. The three women justices and the one Hispanic male justice were in agreement with public opinion on 72% of their decisions, while the white males were 70% majoritarian.

Texas and the National Studies Compared

Marshall (1989), too, found little explanation in attribute variables for a justice’s tendency to make majoritarian decisions. When he combined his predictors into a single model using stepwise regression, he determined that only three were closely linked to an individual justice’s majoritarian propensity.

These were 1) whether a justice attended a prestigious law school; 2) whether the justice served as a presidential confidant; and 3) whether the justice held the post of chief justice. In this model, a hypothetical chief justice
who graduated from a prestigious law school and had been in the president's inner-circle of advisers could be expected to render majoritarian decisions 75% of the time. "Adding further variables failed to improve upon this model" (Marshall 1989, 124).

Tate (1981), who identified attribute variables that explained 72% to 87% percent of the variance in the voting of U.S. Supreme Court justices in split decisions on civil rights and liberties and economics, cautioned against generalizations. "It is not clear that similarly successful models can be constructed for the judges of lower federal courts or state appeals courts" (Tate 1981 363). He recommended that his findings "must be regarded as suggestive, but hardly conclusive, on the utility of attribute models in explaining the decision-making of judges in general" (Tate 1981, 363).

Indeed. Personal attributes research in federal courts is the most complete available, but as Table 4.5. indicates, it is scanty. Variables that have proved potent predictors in some studies have not in others. Some variables have not been tested but once. The time periods for the studies differ. Questions linger. But a foundation has been laid for ongoing exploration.

The search for explanation of behavior of state Supreme Court justices is much less developed. Researchers have been reluctant to venture into state court inquiry, and little exists for comparison. Clearly, the attribute models selected for the present study provide virtually no explanation for why Texas Supreme Court justices behave as they do in their responsiveness to public opinion.
Table 4.5. Attributes of Texas Supreme Court Justices Compared With U.S. Supreme Court Justices

<table>
<thead>
<tr>
<th></th>
<th>Texas Ragland ('94)</th>
<th>U.S. Supreme Court</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>R-SQ</td>
<td>Happy ('81)</td>
</tr>
<tr>
<td></td>
<td>Adj. R-SQ</td>
<td>Civil</td>
</tr>
<tr>
<td>R-SQ</td>
<td>.17</td>
<td>.87</td>
</tr>
<tr>
<td>Adj. R-SQ</td>
<td>.27</td>
<td>.82</td>
</tr>
</tbody>
</table>

Coefficients

| Party          | -1.9                  | 29.1   | 38.4   | 5.94 | NR | 9.3 | 6.6 |
| Judicial Exp.  | 7.8                   | 6.3    | 9.9    | NT   | NR | ** | ** |
| Prosec. Exp.   | -5.5                  | 24.2   | 10.7   | NT   | NR | ** | ** |
| Elected Office | 15.8                  | NR     | 27.0   | NT   | NR | NT | NT |
| Prestige Sch.  | -2.1                  | NR     | 10.0   | ***  | NT | NR | NS | NS |
| Prewlaw-Texas  | 1.13                  | NA     | NA     | NA   | NA | NA | NA |
| Legal-Texas    | 7.3                   | NA     | NA     | NA   | NA | NA | NA |
| Age             | -.009                 | NS     | NS     | NT   | NR | NT | NT |
| Tenure          | .4                    | 6.3    | 9.9    | NT   | NR | NS | -4.9 |
| Gender/Ethnic   | 8.0                   | NT     | NT     | NT   | NR | NT | NT |

NR = not reported  
NT = not tested  
NS = not significant  
NA = not applicable  

* Coefficients from multiple regression equations that include three or more attribute variables.  
** Combined in a Prosecutor/Judicial Service Index  
*** Pre-law school prestigious
However, the importance of this study should not be disregarded. The findings suggest a hint of what linkages may not exist between a justice’s personal attributes and his or her willingness to vote with public opinion.

It is evident, as Tate acknowledged (1981), that explanation for U.S. Supreme Court justices’ behavior cannot be generalized to the supreme courts in Texas and 49 other states. This raises a question of whether the findings of the Texas study might be predictive for other state supreme courts. The only way to find out is to conduct similar investigations in other state supreme courts and compare the results. It is only through multiple and replicated systematic examination that state supreme court justice’s behavior on the bench will be understood.

Chapter Summary

Each justice’s percentage of majoritarianism (the dependent variable) was assessed against 10 personal background characteristics (independent variables). They are 1) Party Identification; 2) Gender and Ethnicity; 3) Age; 4) Tenure; 5) Prestige of Legal Education; 6) Texas Prelaw Education; 7) Texas Legal Education; 8) Judicial Experience; 9) Nonjudicial, Nonprosecutorial Elective Office; and 10) Prosecutorial Experience.

A subsequent multiple regression analysis in which all 10 variables were entered simultaneously indicated that F values were not statistically significant and that the background variables explained only 17% of the variance. Percentages, however, bore out two of the 10 hypotheses and were strikingly similar. As expected, Texas Supreme Court justices elected or appointed to the Court before age 50 were more majoritarian (73%) than those
who went to the Court at age 50 or more (66%). Additionally, justices with less tenure on the Court were more majoritarian (70%) than those with longer tenure (66%).

The lack of explanation offered by personal attributes variables emphasizes the importance of the Texas study as a basis for comparison for other state supreme court-level research. It also accentuates the challenge of Kuhnian (1962) puzzles to be solved in the search to explain linkages between state supreme court justices and public opinion.
CHAPTER REFERENCES


   New York: Macmillan
Kuhn, Thomas S. The Structure of Scientific Revolutions. Chicago:
   University of Chicago Press.
   Boston: Unwin Hyman.
Moorhead, Dean. 1973. "Texas' All-Woman Supreme Court."
   The Texas Star. February 11.
   Random House.
Pritchett, C. Herman. 1948. The Roosevelt Court: A Study in Judicial Politics
Ryan, John Paul and C. Neal Tate. 1975. The Supreme Court in American
   Science Association.


*State of Texas v. Dennis Thomas, Jo Campbell and Marta Greytok.* 1989. 766 S.W. 2nd. 217 (Texas).


CHAPTER V

CONCLUSIONS AND SUGGESTIONS FOR FUTURE RESEARCH

This study has moved the unit of analysis from the U.S. Supreme Court to the Texas Supreme Court using classification schemes (Marshall 1989) and attribute models (Tate 1981; Tate and Handberg 1991; and Ulmer 1986) previously applied to the U.S. Supreme Court. It has determined that linkages exist between the Texas Supreme Court's written decisions and public opinion from 1978 to July 1994.

The findings provide a basis of comparison for future inquiry in Texas and the 49 other states. Similar investigations will not be confounded by the same lack of a benchmark that this study faced. State supreme courts differ from each other in method of selection, jurisdiction, and organization. They are alike in that each is the highest appellate court in its own state. However, none is directly comparable to the U.S. Supreme Court, which sits in judgment over appealed state decisions as the nation's court of last resort. As Vines observes, "We cannot generalize our knowledge concerning the Supreme Court, necessarily, to the operation of other courts" (Vines 1965, 5.)

Discoveries about the U.S. Supreme Court and other courts through previous systematic study have not been generalized to the Texas study. Precautions were taken not to force the Texas Supreme Court into the mold of federal courts. However, the Texas study leaned heavily upon the literature of federal appellate courts, especially the U.S. Supreme Court, in generating 13
hypotheses for testing at the state level and in providing a basis of comparison. Similarities and differences between the Texas Supreme Court and the U.S. Supreme Court were identified early in the study and served as a regular reminder to the researcher that inferential leaps could not be made from one court to the other.

Findings of sparse state-level trial court studies, too, were carefully considered and offered for comparison. Baum (1988) appropriately observed that "Trial courts and appellate courts, especially supreme courts, are quite different institutions in important respects. Indeed, it can be argued that a state trial court resembles a grass roots-level administrative agency and a supreme court a legislature more than either court resembles the other" (Baum 1988, 866).

Findings Summarized

The Texas study sought to identify linkages between the state Supreme Court and public opinion through 1) a matching of written decisions with scientifically conducted public opinion polls; 2) direct mention of public opinion and its synonyms in Texas justices' decisions; 3) comparison of these mentions over time; and 4) comparison of 10 personal attributes of justices with matched decisions.

Although Peltason admonished judges not to be "swayed by partisan demands, public clamor, or consideration of personal popularity or notoriety" (Peltason 1955, 21), the written decisions of Texas Supreme Court justices demonstrate a linkage with public opinion. As expected, the majority of matched cases reflected public opinion as measured by results of statewide,
scientifically conducted surveys. Of the 54 matches, 74% agreed with public opinion (majoritarian), and 26% did not (countermajoritarian).

The justices' written decisions exhibited strong influences of Texas' political culture. They were traditionalistic in that they supported policy that maintained the status quo in power, and they were individualistic in their backing of policy that rewards private entrepreneurial business and industry, which are products of an individualistic culture (Elazar 1972 and Kramer and Newell 1990).

Peltason also says judges should not "admit to being influenced" by anything except arguments presented in open court and the evidence introduced (Peltason 1955, 21). However, Texas Supreme Court justices' written decisions were tantamount to an admission. They mentioned it in 30 decisions for the 1978 to 1994 period for an average of about two per year. Although they mentioned it infrequently, the number of mentions for the 1978 to 1994 period were more than quadruple that for the previous 18 years.

The average mentions of public opinion per year have risen as the number of broadcast media outlets in Texas has proliferated and the frequency of public opinion polling has risen. The marked change in frequency also calls attention to the number of mentions in concurrences and dissents. They have risen as Republicans have gained positions on the state Supreme Court for the first time since Reconstruction.

The study also examined the majoritarian propensities of Texas Supreme Court justices by assessing their individual votes against 10 personal background characteristics. These were party identification, gender and ethnicity, age, tenure, prelaw education, legal education, prestige of legal
education, judicial experience, prosecutorial experience and previous, nonjudicial, nonprosecutorial elective office.

These variables were submitted to multiple regression analysis in which all 10 variables were entered simultaneously. The results indicated that the F values were not statistically significant and that the background variables explained only 17% of the variance. Percentages, however, produced expected results on two variables: age and tenure. As predicted, Texas Supreme Court justices elected or appointed to the Court before age 50 were more majoritarian than those who went to the Court at age 50 or more. Justices with less tenure on the Court also were more majoritarian than those with longer tenure.

The remaining eight personal attribute variables failed to provide explanation for the propensity of Texas Supreme Court justices to vote consistently with public opinion. These findings suggest that the Texas Supreme Court is vastly different from the U.S. Supreme Court, where attribute variables have accounted in some studies for 70% to 90% of the variance (Tate 1981). Equally important, the Texas study designates linkages that did not exist between a justice's personal attributes and his or her willingness to vote with public opinion for the 1978 to 1994 time frame. This should assist future research as a starting point.

Suggestions for Future Research

It has been demonstrated that Texas Supreme Court justices vote with public opinion and recognize it, but explanation for their behavior is lacking. An immediate possibility scholars might consider is that attribute variables in
Texas may not have the predictive power that Tate (1981) and Tate and Handberg (1991) found in the U.S. Supreme Court. Perhaps explanation lies in the dynamics of electoral politics in a state populated by increasingly diverse people and where a strong two-party system is emerging.

The high percentage of Republican justices' majoritarian votes may indicate a responsiveness to what Jones et al. (1986) called a "party realignment" in Texas after the 1984 election. As Texas' population swells from immigration from other states and Mexico, the native traditionalistic and individualistic political culture may be diluted by newcomers bringing their political cultures and Republican Party status. Perhaps Republican justices, anxious to be elected or to remain in office, are striving to please the electorate to strengthen their hold on the state's highest court. Perhaps what Mr. Dooley said about the U.S. Supreme Court is prophetic for Texas: that the justices follow the election returns (Dunne 1963, 160).

Attribute variables as an explanation for judicial behavior at the state supreme court level should not be abandoned, however. To further investigate their predictability and the possibility that they were overwhelmed by electoral politics, they should be explored in a nonelectoral environment and in a court similar to Texas'.

Replication in Oklahoma would be ideal. Oklahoma is the only other state which has a bifurcated supreme court that hears only civil cases and its justices are appointed by the governor on recommendation by a judicial nominating commission. The appointed justices then stand for a retention election. Oklahoma also has a similar traditionalistic and individualistic political culture (Elazar 1972, 106-7). Outcomes from Oklahoma then could be
compared with the Texas results to determine impact of the attribute
variables in an appointive environment.

The investigation of linkages between Texas Supreme Court justices
and public opinion has potential for replication in all states. Once Oklahoma
is completed, similar studies should be conducted for comparison in other
regions of the country where political cultures differ from Texas and
Oklahoma. Eventually, enough state studies could be amassed that regions
could be compared with each other. A byproduct of such a collection of
studies would be a database of majoritarian and countermajoritarian state
Supreme Court decisions that could be shared nationwide to aid in expanded
investigation of state supreme courts and public opinion.

The purpose of the Texas study was accomplished. It cracks the door on
state level research to reveal a virtually unmined territory for future
investigation. It is hoped that it will pique the curiosity of other research
pioneers to explore linkages between the "politicians in black robes" (Glick
1988, 259) at the state supreme court level and the "shared opinions of a
collection of individuals on a common concern" (Yeric and Todd 1989, 5).
CHAPTER REFERENCES


Dunne, Finley Peter. 1963. Mr. Dooley on Ivrything and Ivrybody.
New York: Dover Publications.

New York: Thomas Y. Crowell Co.


Boston: Unwin Hyman.


APPENDIX A

PUBLIC OPINION ON FIVE ISSUES
Public Opinion on Five Issues


"Percent answering "Yes" to: "Do you think birth control information should be available to anyone who wants it, or not?" (NORC).

"Percent answering "Same schools" to: "Do you think white students and Negro students should go to the same schools or separate schools?" (NORC).

"Percent answering "Approve" to: "Do you approve or disapprove of a married woman earning money in business or industry if she has a husband capable of supporting her?" (NORC).

"Percent answering "No" to: "Do you think there should be laws against marriages between Negroes and whites?" (NORC).

"Percent answering "Yes" to: "Please tell me whether...you think it should be possible for a pregnant woman to obtain a legal abortion if she is not married and does not want to marry the man?" (NORC).

Note: Cases are: (A) Griswold v. Connecticut, 381 U.S. 479 (1965); (B) Brown v. Board of Education, 347 U.S. 483 (1954); (C) Reed v. Reed, 404 U.S. 71 (1971); (D) Loving v. Virginia, 388 U.S. 1 (1967); (E) Roe v. Wade, 410 U.S. 113 (1973).
APPENDIX B

CODING RULES FOR MATCHING PUBLIC OPINION POLLS WITH TEXAS SUPREME COURT DECISIONS
CODING RULES FOR MATCHING PUBLIC OPINION POLLS WITH
TEXAS SUPREME COURT DECISIONS*

1) When the wording of one (or more) poll items closely matches an issue raised in a Texas Supreme Court decision, a match will be made.

2) A Court decision that agrees with a poll majority or plurality will be classified as "majoritarian."

3) A Court decision that disagrees, in substance, with a public opinion poll majority (or plurality) will be classified as "countermajoritarian."

4) Multiple court decisions addressing a single poll question during the appropriate time frame will be considered a "package" and will be counted as one case.

5) If all Court decisions in a package are in agreement with a public opinion poll majority (or plurality), the case will be classified as "majoritarian."

6) If all Court decisions in a package disagree, in substance, with a public opinion poll majority (or plurality), the case will be classified as "countermajoritarian."
7) If the package includes both “majoritarian” and “countermajoritarian” Court decisions, the case will be classified as “unclear.”

8) Companion decisions will be classified as a single case.

9) If available polls report conflicting results, the Court’s decision will be classified as “unclear,” since no readily apparent poll majority or plurality exists.

10) If an earlier decision is counted, then later decisions that simply follow the precedent will not be counted.

11) A later decision that overturned an earlier-counted decision, however, might be counted.

12) If a later decision follows an earlier precedent, but a poll is available only for the later decision, then the later ruling will be counted.

13) If the Court orders a lower court to apply or consider a law, then the Court is assumed to have upheld the law’s constitutionality - even if the Court did not expressly so hold.

14) If the court upheld a specific application of a more general law or policy, it will be considered to have upheld the law or policy itself.

15) A single Court decision involving two or more issues may be treated as two or more separate decisions if it can thereby be better compared with available poll results.
Decisions will be counted only if a poll item is available within a six-year period. For example, a question asked in 1984 would be compared with opinions from 1984 through 1989.

APPENDIX C

MATCHES: TEXAS SUPREME COURT DECISIONS
AND TEXAS PUBLIC OPINION POLL RESULTS, 1978-1994
APPENDIX C

MATCHES: TEXAS SUPREME COURT DECISIONS
AND TEXAS PUBLIC OPINION POLL RESULTS 1978-1994

Here is a listing of the 60 matches between Texas Supreme Court decisions and statewide Texas public opinion poll results from 1978 to July 1994. Each is identified as Majoritarian, Countermajoritarian, or Unclear. They are listed in 12 categories: Crime, Courts/Police/Lawyers, Economic and Industrial Development, Government, Environment, Education, Taxation, Home Ownership, Civil Liberties, Minority and Gender, Health and Welfare, and Foreigners.

Crime

1. Drugs-Forfeiture of Property
   a. State of Texas v. $11,014 (1991)
   b. $8,353 v. State of Texas (1992)
   c. $31,400 v. State of Texas (1992)
   d. State of Texas v. $435,000 (1992)
   (Texas Poll Question 1988: Would you support a law which denies public housing or college loans to those convicted of possessing drugs? Yes 54%, No 35%)
   Package: Majoritarian

2. Prisons
   Texas Poll Question 1985: In your opinion, are conditions in Texas prisons too harsh, too easy, or about right? Too easy 38%, About right 29%, Too harsh 10%
   Package: Majoritarian
3. **Intentional Injury to a Child**  
   *Gail Nixon, Individually and as Next Friend of R.M.V., a Minor v. Mr. Property Management Co., Inc.* (1985)  
   (Texas Crime Poll Question 1981: Intentionally injuring a child should be a first-degree felony. Agree 53%, Disagree 47%)  
   *Majoritarian*

4. **Intoxication**  
   (Texas Crime Poll Question 1981: Should public intoxication be prohibited by law? Yes 84%, No 16%)  
   Package: *Unclear*

5. **Marijuana**  
   (Texas Crime Poll Question 1981: Should using marijuana be against the law? Yes 72%, No 28%)  
   Package: *Countermajoritarian*

6. **Driving While Intoxicated**  
   b. *Frank Smith, Individually, and d/b/a Charley’s Angels v. Randy Sewell* (1993)  
   (Texas Poll Question 1990: On a scale of 1-10, with 10 being the most serious, just how serious do you consider each of the following crimes: DWI 55%, fourth in a list of seven, behind Murder 94%, Rape 83%, and Drug Sales 75%)  
   Package: *Countermajoritarian*

7. **Shock Probation**  
   *Ex Parte Eugene Acly* (1986)  
   (Texas Crime Poll Question 1981: Shock probation would be appropriate in criminal non-support cases. Agree 67%, Disagree 33%)  
   *Majoritarian*
8. Courts and Criminals
(Texas Crime Poll Question 1978: Courts are too easy on criminals. Agree 75%, Disagree 25%)
Package: Countermajoritarian

9. Courts and Police
   e. Fifty-Six Thousand Seven Hundred Dollars in U.S. Currency v. State of Texas (1987)
(Sam Houston State Poll Question 1982: Do you think rulings by courts in the area of law enforce enforcement have ____ police in their efforts to control crime? Severely hindered 41%, Somewhat hindered 36%)
Package: Countermajoritarian

10. Police
    Brenda Ann Travis, Individually and as Next Friend of Jason v. City of Mesquite, Texas (1991)
(Texas Poll Question 1987: I am going to list several government functions, and I would like you to tell me whether each one rates excellent, good, poor or very poor. Police Excellent 8%, Good 70%)
Countermajoritarian

11. Lawyer Trust
    c. In the Matter of Lloyd E. Humphreys (1994)
    e. In the Matter of Leslie Hazlett Thacker (1994)
(Texas Poll Question 1991: To each that I name, please tell me if you mostly feel a high level of trust, a moderate level of trust, very little
trust or almost no trust in whatever I name: Lawyers, Low trust 37%, Moderate trust 47%, High trust 15%)
Package: Majoritarian

Economic and Industrial Development

12. Airport

Dallas/Fort Worth International Airport Board, a Joint Board of the City of Dallas v. City of Irving (1993)
(Texas Poll Question 1990: What is the single most important issue facing Texas? Unemployment/Money/Economy, first of 13 options)
Package: Majoritarian

13. Existing Highways

b. City of Austin v. The Avenue Corporation (1986)
(UT-Austin Business School Poll 1982: Ranking of involvement alternatives for the state. Improve existing highways, No. 1 of 13 alternatives)
Package: Majoritarian

14. State Roads and Highways

e. State of Texas and City of Austin v. Munday Enterprises (1993)
(Texas Poll Question 1989: For each of the following, I would like you to tell me whether the amount being spent by the state government should be increased, kept at the same level, or decreased. What about funding for state roads and highways? Increased 39%, Same 51%, Decreased 6%)
Package: Majoritarian

15. Railroads

(UT-Austin Business School Poll (1982): Ranking of involvement alternatives for the state. Improve railroad system, No. 8 of 13 alternatives)
Package: Majoritarian
16. **Nuclear Power Cost**
   
   
   (Texas Poll Question 1989: What do you think the most important issues are, with respect to nuclear power? No prompts. More expensive, 3%, 6th of nine responses)

17. **Nuclear Power Plants #1**
   
   
   
   (Texas Poll Question 1989: Nuclear plants are a high technology industry which create economic benefits. Strongly agree 5%, Agree 68%)

18. **Nuclear Power Plants #2**
   
   *State of Texas v. Dennis Thomas, Jo Campbell and Marta Greytok* (1989)
   
   (Texas Poll Question 1984: When a new power plant is needed, would you favor or oppose a plant that used nuclear power? Oppose 42%, Favor 40%, No opinion 18%)

19. **Inflation**
   
   *Parker County v. Spindletop Oil and Gas Co.* (1982)
   
   (Texas Monthly Poll Question 1980: What do you think is the main cause of inflation in the U.S. today? Government 28%, the No. 2 selection among seven options)

20. **Economy**
   
   *Director of the Department of Agriculture and Environment v. Printing Industries of Texas* (1980)
   
   (Texas Monthly Poll Question 1980: What is the most important issue in the presidential campaign? Economy 24%, the No. 1 selection among seven options)

21. **Unemployment**
   
   *Mike Moncrief, County Judge v. Marshall Tate* (1980)
   
   (Texas Monthly Poll Question 1980: What is the most important issue in the presidential campaign? Unemployment 5%, No. 7 of seven options)
22. Blue Law


(Texas Poll Question 1984: At present, Texas has a law that prevents most stores from opening on Sundays. Would you favor or oppose a new law which would allow more stores to be open on Sundays?
Favor 71%, Oppose 24%)

*Countermajoritarian*

---

23. Liability Limits

*Lisa Beth Rose v. Doctor's Hospital Facilities, d/b/a Doctors Hospital* (1990)

(Texas Poll Question 1987: Do you think there should be a legal limit on the amount of money that can be awarded by courts in liability cases, or do you think it should just be left up to the juries?
Limit 51%, No limit 43%)

*Majoritarian*

---

24. Jury Awards


(Texas Poll Question 1987: The availability and cost of liability insurance is an issue that the state Legislature is considering. I am going to list some things that some people say may be causing the problem, and I want you to tell me which one or two, if any, you think are most to blame for the problem. Juries awarding unreasonable amounts of money 37%, third in a list of seven)

*Majoritarian*

---

25. Insurance Sales Trust


(Majoritarian)


(Countermajoritarian)

(Texas Poll Question 1991: To each one that I name, please tell me if you mostly feel a high level of trust, a moderate level of trust, very little trust, or almost no trust in whatever I name: Insurance Salesmen, Low trust 56%, Moderate trust 38%, high trust 56%)

Package: *Unclear*
Government

26. Government Regulation
   (UT-Austin Business School Poll 1982: Government is necessary to protect and improve quality of life. Strongly agree 30%, Somewhat agree 35%)
   Package: Majoritarian

27. Initiative and Referendum
   (Texas Monthly Poll Question 1981: Initiative and referendum is a bill which would allow any group of registered voters to bring a law up for legislative action by getting enough signatures on a petition. The Legislature may either enact that law or present that law and an alternative one to the public for vote. Do you approve or disapprove of initiative and referendum. Approve 74%, Disapprove 15%)
   Countermajoritarian

Environment

28. Environmental Protection
   d. Texas Water Commission v. the Honorable Jerry Dellana, Judge (1993) (Majoritarian)
   e. Texas Association of Business v. Texas Air Control Board and Texas Water Commission (1993) (Countermajoritarian)
   (Texas Poll Question 1990: On a scale of 1-20, with 1 being not at all important and 10 being very important, I'd like you to tell me how important you think protecting the environment is by telling where you would place yourself on the scale: 70% selected 8, 9 and 10)
   Package: Unclear
29. Water Supply
   In re: The Adjudication of the Water Rights in the Medina Watershed
   Lower Colorado River Authority v. Texas Department of Water
   Resources (1982)
   (UT-Austin Business School Poll 1982: Ranking of involvement
   alternatives for the state: Ensure adequate water supply, second in
   priority of 13 alternatives)
   Package: Majoritarian

30. Water Control
   In Re: The Adjudication of Water Rights of the Brazos III Segment of
   the Brazos River Basin (1988)
   (Texas Poll Question 1984; Should water shortage problems generally be
   handled by individual communities or should they be handled by the
   state government? Communities 49%, State Government 40%)
   Countermajoritarian

            Education

31. Teacher Competency Tests
   Texas Poll Question 1984: Do you think that teachers in Texas should
   have to pass a competency test before being certified to teach in public
   schools? Yes 90%, No 10%)
   Majoritarian

32. Teacher Salaries
   (Texas Poll Question 1986: I am going to list some specific changes that
   were made (in elementary and high schools in Texas this year), and I
   would like you to tell me whether you generally favor or oppose the
   change: Raising teachers’ pay, Agree 81%, Disagree 12%)
   Majoritarian

33. No Pass, No Play
   (Texas Poll Question 1984: This summer, the Legislature and the
   governor made a number of major changes in policies about
   elementary and high schools in Texas. Do you generally agree or
   disagree with the changes they made in public education?
   Agree 50%, Disagree 29%)
   Majoritarian
34. **Extracurricular Emphasis**  
(Texas Poll Question 1984: Do you think public schools elsewhere in Texas place too much emphasis on extra-curricular activities such as sports and band? Yes 60%, No 40%)  
*Majoritarian*  

Taxation  

35. **Local Property Tax #1**  
(Texas Poll Question 1984: Would you be in favor of increasing any of the following taxes to make more money available for public schools? Local property taxes, No 77%, Yes 23%)  
*Countermajoritarian*  

36. **Local Property Tax #2**  
(UT-Austin Business School Poll 1982: Opinions toward taxing methods, Strongly opposed to 59.6%, Somewhat opposed to 20%)  
*Package: Countermajoritarian*  

37. **Economic Development Tax**  
(Texas Poll Question 1986: Would you be willing to pay increased taxes or fees to the state in order to encourage economic development? Agree 69%, Disagree 26%)  
*Countermajoritarian*  

38. **Corporate Franchise Tax**  
(Texas Poll Question 1987: I am going to list some of the tax increases that were made, and I would like you to tell me whether you agree or disagree with each. Increase the corporate franchise tax by about 28 percent. Agree 45%, Disagree 38%)  
*Majoritarian*
Home Ownership

39. **Homestead Law**


(Texas Poll Question 1987: Texas has homestead protection laws that make borrowing money against your home for other than a mortgage impossible. Some people argue this should be changed to make it easier to borrow money and to take advantage of the new federal tax law. Others say it is important to protect people so that banks cannot take their homes. What do you think. Should Texas allow loans of this type or not? Don't make loans 55%, Make loans 35%)

*Majoritarian*

40. **Homeowners**


(Texas Poll Question 1989: Do you own your own home or expect to? Yes 89%, No 7%)

*Package: Majoritarian*

Civil Liberties

41. **Demonstrations**


(Texas Poll Question 1992: Political groups should be able to demonstrate only after a screening committee has determined that the case is safe and the demonstration would not violate community values. Agree 58%, Disagree 35%)

*Countermajoritarian*

42. **Privacy**

*Clyde Ura Cain, Sr. v. Hearst Corp., d/b/a Houston Chronicle* (1994)

(Texas Poll Question 1992: Every individual has a right to privacy. Agree 96%)

*Countermajoritarian*
43. Free Press  
      (Majoritarian)  
      (Majoritarian)  
      (Countermajoritarian)  
      (Texas Poll Question 1992: A free, uncensored press is very important.  
       Agree 81%, Disagree 13%)  
      Package: Unclear

44. Religious/Political Beliefs  
   Ex Parte: Michael Lowe (1994)  
   (Texas Poll Question 1992: A person should be able to hold any  
    religious or political conviction, no matter how different or bizarre.  
    Agree 75%,  
    Disagree 22%)  
   Majoritarian

45. Importance of Religion #1  
   a. Appraisal Review Board and the Taylor County Appraisal District v.  
      International Church of the Foursquare Gospel (1986)  
      (Countermajoritarian)  
      (Countermajoritarian)  
   c. Juliette Fowler Homes Inc. v. Welch Associations, Inc. (1990)  
      (Majoritarian)  
      (Texas Poll Question 1985: How important would you say religion is in  
       your own life? Very important 70%, Fairly important 22%)  
      Package: Unclear

46. Importance of Religion #2  
   b. First Baptist Church of San Antonio v. Bexar County Appraisal  
      Review Board (1992)  
      (Texas Poll Question 1990: Would you say religion in your daily life is:  
       Very Important 69%, Fairly Important 24%)  
      Package: Majoritarian

47. Gun Ownership #1  
   International Armament Corp. v. Clifford Wayne King (1985)  
   (Texas Crime Poll 1983: Do you own a gun? Yes 66%, No 34%.  
   Majoritarian
48. **Gun Ownership #2**  
*Greater Houston Transportation Co. d/b/a Yellow Cab Co. v. Kurt Steven Phillips* (1990)  
(Texas Poll Question 1985: Do you happen to have in your home any guns or revolvers? Yes 54%, No 43%)  
*Majoritarian*

49. **Gun Ownership #3**  
      (Countermajoritarian)  
      (Majoritarian)  
      (Countermajoritarian)  
   (Texas Poll Question 1988: Do you or anyone else living in your household own a gun? Yes 54%, No 45%)  
   Package: *Unclear*

**Minority and Gender Issues**

50. **Racial Discrimination in Hiring**  
   (Texas Poll Question 1988: Do you think that discrimination against Blacks and Hispanics in hiring is: Not very serious or not serious 47%, Very serious or Somewhat serious 44%,)  
   Package: *Countermajoritarian*

51. **Minority Representation**  
(Texas Poll Question 1991: For the next several months, the Texas Legislature will be focusing a lot of attention on redrawing boundaries of voting districts. Would you favor or oppose the new boundaries being drawn to ensure election of minority representatives in areas that are predominantly populated by minority people? Favor 62%, Oppose 21%)  
*Majoritarian*
52. Homosexuals #1
   (Texas Poll Question 1993: I’d like your overall opinion of some trade and professional and special interest groups. Is your overall opinion of ___ very favorable, mostly favorable, mostly unfavorable or very unfavorable? People active in the gay rights movement, Unfavorable 60%, favorable 25%)
   
   Majoritarian

53. Homosexuals #2
   *In Re: Jack Hampton, District Judge, 283rd State District Court of Dallas County* (1989)
   (Texas Poll Question 1984: If your party nominated a generally well-qualified man for governor and he happened to be a homosexual, would you vote for him? No 61%, Yes 29%)
   
   Majoritarian

54. Women
   (Texas Poll Question 1992: Who has a more difficult time in today’s world - men or women? Women 59%, Men 18%, Both same 16%)
   
   Majoritarian

   Health and Welfare

55. Mental Health
   *Vera Bell Robinson v. Central Texas MHMR Center* (1989)
   (Texas Poll Question 1989: For each of the following, I would like you to tell me whether the amount being spent by the state government should be increased, kept at the same level, or decreased. What about funding for mental health? Increased 65%, Same 24%, Decreased 3%)
   
   Majoritarian

56. Homelessness
   (Texas Poll Question 1988: How serious do you think the problem of homeless people is in the state of Texas? Very serious 51%, Somewhat serious 34%)
57. **Child Care**  
(Texas Poll Question 1989: Where do/did your elementary age children stay after school? At day care 10%, the third highest of nine options)  
*Majoritarian*

Foreigners

58. **Illegal Aliens**  
*Unauthorized Practice Committee, State Bar of Texas v. Eddie Cortez, Individually and d/b/a Cortez Agency* (1985)  
(Texas Poll Question 1984: In general, what do you think is the most important problem facing the state of Texas today? Illegal aliens 6%, tied for eighth among eight options)  
*Majoritarian*

59. **Foreign Corporations**  
*HL Farm Corp. v. Jackie Self* (1994)  
(Texas Poll Question 1991: If each of these countries could be put on a scale from 1 to 10, with 1 indicating you feel coolly toward the country and 120 indicating you feel warmly toward the country, how would you describe your feelings toward: Great Britain Warm 73%, Neutral 17%, Cool 10%)  
*Majoritarian*

60. **Foreign Products**  
(Texas Poll Question 1992: If you were in the market for a new car right now and you found two cars you liked - one was American, one was Japanese, and they were exactly the same price - which would you be more likely to buy? American 78%, Japanese 17%)  
*Majoritarian*
APPENDIX D

TEXAS SUPREME COURT JUSTICES, 1978-1994
## APPENDIX D

TEXAS SUPREME COURT

JUSTICES, 1978-1994

<table>
<thead>
<tr>
<th>Justice</th>
<th>Party</th>
</tr>
</thead>
<tbody>
<tr>
<td>Joe R. Greenhill, Chief</td>
<td>Dem</td>
</tr>
<tr>
<td>Zollie Steakley</td>
<td>Dem</td>
</tr>
<tr>
<td>Jack Pope</td>
<td>Dem</td>
</tr>
<tr>
<td>Sears McGee</td>
<td>Dem</td>
</tr>
<tr>
<td>James G. Denton</td>
<td>Dem</td>
</tr>
<tr>
<td>Price Daniel</td>
<td>Dem</td>
</tr>
<tr>
<td>Sam D. Johnson</td>
<td>Dem</td>
</tr>
<tr>
<td>Charles W. Barrow</td>
<td>Dem</td>
</tr>
<tr>
<td>T.C. Chadick&lt;sup&gt;1&lt;/sup&gt;</td>
<td>Dem</td>
</tr>
<tr>
<td>Robert M. Campbell&lt;sup&gt;2&lt;/sup&gt;</td>
<td>Dem</td>
</tr>
</tbody>
</table>

<sup>1</sup> Left office Nov. 30, 1978
<sup>2</sup> Elected and assumed office Dec. 1, 1978

### 1979 Court

| Joe R. Greenhill, Chief        | Dem   |
| Zollie Steakley                | Dem   |
| Jack Pope                      | Dem   |
| Sears McGee                    | Dem   |
| James G. Denton               | Dem   |
| Charles W. Barrow              | Dem   |
| Robert M. Campbell             | Dem   |
| C.L. Ray                       | Dem   |
| James P. Wallace<sup>1</sup>   | Dem   |

<sup>1</sup> Assumed office 1-2-81 following election, replacing Zollie Steakley, who did not seek re-election.

### 1980 Court

| Joe R. Greenhill, Chief        | Dem   |
| Zollie Steakley                | Dem   |
| Jack Pope                      | Dem   |
| Sears McGee                    | Dem   |
| James G. Denton               | Dem   |
| Will Garwood<sup>1</sup>       | Rep   |
| Charles W. Barrow              | Dem   |
| Robert M. Campbell             | Dem   |
| Franklin Spears                | Dem   |

<sup>1</sup> Left bench Nov. 24, 1980.

### 1981 Court

| Joe R. Greenhill, Chief        | Dem   |
| Jack Pope                      | Dem   |
| Sears McGee                    | Dem   |
| James G. Denton               | Dem   |
| Charles W. Barrow              | Dem   |
| Robert M. Campbell             | Dem   |
| Franklin Spears                | Dem   |
| C.L. Ray                       | Dem   |
| James P. Wallace<sup>1</sup>   | Dem   |

<sup>1</sup> Resigned Oct. 16, 1979
<sup>2</sup> Appointed effective Nov. 1 by Gov. Bill Clements

### 1982 Court

| Jack Pope, Chief<sup>1</sup>   | Dem   |
| Joe R. Greenhill, Chief<sup>2</sup> | Dem   |
| Sears McGee                    | Dem   |
| James G. Denton<sup>3</sup>    | Dem   |
| Charles W. Barrow              | Dem   |
| Robert M. Campbell             | Dem   |
| Franklin Spears                | Dem   |
| C.L. Ray                       | Dem   |
| James P. Wallace               | Dem   |
| Ruby Kless Sondock<sup>4</sup> | Dem   |

<sup>1</sup> Left office Nov. 30, 1978
<sup>2</sup> Elected and assumed office Dec. 1, 1978
<sup>3</sup> Appointed effective Nov. 1 by Gov. Bill Clements
<sup>4</sup> Resigned Oct. 16, 1979

171
2 Resigned Oct. 25, 1982
3 Died June 10, 1982.
5 Assumed office on Dec. 2, 1982, following his election to replace Jack Pope, who did not seek re-election and on his early appointment to replace Jack Pope, who was appointed Chief Justice upon retirement of Joe R. Greenhill.

### 1983 Court

<table>
<thead>
<tr>
<th>Name</th>
<th>Party</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jack Pope, Chief Justice</td>
<td>Dem</td>
</tr>
<tr>
<td>Sears McGee</td>
<td>Dem</td>
</tr>
<tr>
<td>Charles W. Barrow</td>
<td>Dem</td>
</tr>
<tr>
<td>Robert M. Campbell</td>
<td>Dem</td>
</tr>
<tr>
<td>Franklin S. Spears</td>
<td>Dem</td>
</tr>
<tr>
<td>C.L. Ray</td>
<td>Dem</td>
</tr>
<tr>
<td>James P. Wallace</td>
<td>Dem</td>
</tr>
<tr>
<td>Ted Z. Robertson</td>
<td>Dem</td>
</tr>
<tr>
<td>William W. Kilgarlin</td>
<td>Dem</td>
</tr>
</tbody>
</table>

### 1984 Court

<table>
<thead>
<tr>
<th>Name</th>
<th>Party</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jack Pope, Chief Justice</td>
<td>Dem</td>
</tr>
<tr>
<td>Sears McGee</td>
<td>Dem</td>
</tr>
<tr>
<td>Charles W. Barrow</td>
<td>Dem</td>
</tr>
<tr>
<td>Robert M. Campbell</td>
<td>Dem</td>
</tr>
<tr>
<td>Franklin S. Spears</td>
<td>Dem</td>
</tr>
<tr>
<td>C.L. Ray</td>
<td>Dem</td>
</tr>
<tr>
<td>James P. Wallace</td>
<td>Dem</td>
</tr>
<tr>
<td>Ted Z. Robertson</td>
<td>Dem</td>
</tr>
<tr>
<td>William W. Kilgarlin</td>
<td>Dem</td>
</tr>
</tbody>
</table>

### 1985 Court

<table>
<thead>
<tr>
<th>Name</th>
<th>Party</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jack Pope, Chief</td>
<td>Dem</td>
</tr>
<tr>
<td>John L. Hill Jr., Chief</td>
<td>Dem</td>
</tr>
<tr>
<td>Sears McGee</td>
<td>Dem</td>
</tr>
</tbody>
</table>

### 1986 Court

<table>
<thead>
<tr>
<th>Name</th>
<th>Party</th>
</tr>
</thead>
<tbody>
<tr>
<td>John L. Hill Jr., Chief</td>
<td>Dem</td>
</tr>
<tr>
<td>Sears McGee</td>
<td>Dem</td>
</tr>
<tr>
<td>Robert M. Campbell</td>
<td>Dem</td>
</tr>
<tr>
<td>Franklin S. Spears</td>
<td>Dem</td>
</tr>
<tr>
<td>C.L. Ray</td>
<td>Dem</td>
</tr>
<tr>
<td>James P. Wallace</td>
<td>Dem</td>
</tr>
<tr>
<td>Ted Z. Robertson</td>
<td>Dem</td>
</tr>
<tr>
<td>William W. Kilgarlin</td>
<td>Dem</td>
</tr>
<tr>
<td>Raul A. Gonzalez</td>
<td>Dem</td>
</tr>
</tbody>
</table>

### 1987 Court

<table>
<thead>
<tr>
<th>Name</th>
<th>Party</th>
</tr>
</thead>
<tbody>
<tr>
<td>John L. Hill Jr., Chief</td>
<td>Dem</td>
</tr>
<tr>
<td>Sears McGee1</td>
<td>Dem</td>
</tr>
<tr>
<td>Robert M. Campbell</td>
<td>Dem</td>
</tr>
<tr>
<td>Franklin S. Spears</td>
<td>Dem</td>
</tr>
<tr>
<td>C.L. Ray</td>
<td>Dem</td>
</tr>
<tr>
<td>James P. Wallace</td>
<td>Dem</td>
</tr>
<tr>
<td>Ted Z. Robertson</td>
<td>Dem</td>
</tr>
<tr>
<td>William W. Kilgarlin</td>
<td>Dem</td>
</tr>
<tr>
<td>Raul A. Gonzalez</td>
<td>Dem</td>
</tr>
<tr>
<td>Oscar H. Mauzy2</td>
<td>Dem</td>
</tr>
</tbody>
</table>

1988 Court

Tom Phillips, Chief Rep
Franklin Spears Dem
C.L. Ray Dem
James P. Wallace Dem
Ted Z. Roberts Dem
William Kilgarlin Dem
Raul Gonzalez Dem
Oscar H. Mauzy Dem
Barbara Culver Rep

1989 Court

Tom Phillips, Chief Rep
Thomas W. Luce, Chief1
Franklin S. Spears Dem
C.L. Ray Dem
Raul A. Gonzalez Dem
Oscar H. Mauzy Dem
Eugene A. Cook2 Rep
Jack Hightower3 Dem
Nathan L. Hecht4 Rep
Lloyd Doggett4 Dem
Ted Z. Robertson5 Dem
William W. Kilgarlin5 Dem
Barbara G. Culver6 Rep

1 Special limited appointment to hear one case.

1990 Court

Tom Phillips, Chief Rep
Raul A. Gonzalez Dem
Oscar H. Mauzy Dem
Eugene A. Cook Rep
Jack Hightower Dem
Nathan L. Hecht Rep
Lloyd Doggett Dem
John Cornyn1 Rep
Bob Gammage2 Dem

1 Elected effective Jan. 1, 1991, to replace Franklin Spears, who did not run for re-election.

1991 Court

Tom Phillips, Chief Rep
Raul A. Gonzalez Dem
Oscar H. Mauzy Dem
Eugene A. Cook Rep
Jack Hightower Dem
Nathan L. Hecht Rep
Lloyd Doggett Dem
John Cornyn1 Rep
Bob Gammage2 Dem

1992 Court

Tom Phillips, Chief Rep
Raul A. Gonzalez Dem
Oscar H. Mauzy Dem
Eugene A. Cook Rep
Jack Hightower Dem
Nathan L. Hecht Rep
Lloyd Doggett Dem
John Cornyn Rep
Bob Gammage Dem

1993 Court

Tom Phillips, Chief Rep
Raul Gonzalez Dem
Jack Hightower Dem
Nathan Hecht Rep
Lloyd Doggett Dem
John Cornyn Rep
Bob Gammage Dem
Craig Enoch  Rep
Rose Spector  Dem

1994 Court

Tom Phillips, Chief  Rep
Raul Gonzalez  Dem
Jack Hightower  Dem
Nathan Hecht  Rep
Lloyd Doggett  Dem
John Cornyn  Rep
Bob Gammage  Dem
Craig Enoch  Rep
Rose Spector  Dem

1 Term expires Dec. 31, 1994.

Source: Texas Judicial Council
Annual Reports and Staff
APPENDIX E

CODEBOOK: ATTRIBUTES OF
TEXAS SUPREME COURT JUSTICES, 1978-1994
APPENDIX E

ATTRIBUTES OF TEXAS SUPREME COURT JUSTICES, 1978-1984

CODEBOOK

Category 1 - Education

Var 01 Justice

Var 02 1 = Ever been chief justice? Yes.
2 = Ever been chief justice? No.

Var 03 1 = Pre-law education in Texas.
2 = Pre-law education outside Texas.
3 = Pre-law/Legal combined.

Var 04 1 = Legal education in Texas.
2 = Legal education outside Texas.

Var 05 1 = Prestigious University of Texas at Austin.
2 = All other universities.

Category 2 - Career Characteristics

Var 06 1 = Prior judicial experience? Yes.
2 = Prior judicial experience? No.

Var 07 1 = Prior prosecutorial experience? Yes.
2 = Prior prosecutorial experience? No.

Var 08 1 = Previously held elective office other than judicial or prosecutorial? Yes.
2 = Previously held elective office other than judicial or prosecutorial? No.
Category 3 - Age and Tenure

Var 09  Age at time of election: in years.
Var 10  Year of election: last two digits.
Var 11  Year last term ended (1994 for those still serving): last two digits.

Category 4 - Partisanship

Var 12  1 = Justice's party Identification: Democrat.
        2 = Justice's party identification: Republican.
        3 = Justice's party identification: Other.

Category 5 - Minority/Majority Status

Var 13  1 = Gender: male
        2 = Gender: female
Var 14  1 = Ethnicity: white.
        2 = Ethnicity: Hispanic surname.
        3 = Ethnicity: African-American.
        4 = Ethnicity: other.

Category 6 - Voting

Var 15  Number of majoritarian opinions as chief justice.
Var 16  Number of majoritarian opinions as associate justice.
Var 17  Number of countermajoritarian opinions as chief justice.
Var 18  Number of countermajoritarian opinions as associate justice.
BIBLIOGRAPHY


*Editor & Publisher Yearbook.* 1960. New York: Editor & Publisher.

*Editor & Publisher Yearbook.* 1978. New York: Editor & Publisher.

*Editor & Publisher Yearbook.* 1994. New York: Editor & Publisher.


Harte-Hanks Communications, Inc. 1984. The Texas Poll Report. College Station, Texas:


Kuhn, Thomas S. The Structure of Scientific Revolutions. Chicago: University of Chicago Press.


Plessy v. Ferguson. 1896. 163 U.S. 537.


Presented at Suffolk University School of Law, Boston, April 10.


State of Texas v. Dennis Thomas, Jo Campbell and Marta Greytok. 1989. 766 S.W. 2nd 217 (Texas).


*United States v. Carolene Products*. 1937. 304 U.S. 144 (1937)


Itasca, Ill.: F.E. Peacock Publishers, Inc.
