

State Political Interests and American Judicial Federalism

by

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ABSTRACT

The American courts have become increasingly central to many important political debates. The marriage equality debate, the boundaries between religious freedom and society, the death penalty, eminent domain and many other contemporary issues that have direct effects on the lives of all Americans continue to play out in the court systems. While Alexander Hamilton in Federalist 82 sees the federal and state courts as complementary, this research sees these courts as often-rival political venues that political interests make strategic choices about taking legal actions in.

Prior research finds that political interests turn to the state courts for two reasons: The structure of law creates a legal incentive and the political interests have access to state level resources, e.g. attorneys skilled in the laws of a state. Yet, there appear to be important gaps in existing theory. A distinction between state and national political interests is seemingly important. State political interests are embedded within their state political communities; consequently these interests should have strong attachments with their respective state courts. Also, state political interests can be expected to select courts on the basis of political ideology and state judicial selection methods. Prior research has shown the connection between these factors and judicial decision-making, but not interest group participation.

To examine these areas of uncertainty, this research collected more than 3500 observations of the participation of political interests in the American courts. Two legal areas were selected: eminent domain and marriage equality. Ultimately, this study finds that state political interests develop strong attachments to their respective state courts and are more likely to enter into the state courts than their nationally-oriented counterparts. This research also finds that judicial ideology and state judicial selection both influence the decision to enter into the state courts. This shows a relationship between these factors and the decision to enter into the state courts. It

also suggests that these factors not only affect the choices that judges make, but other actors as well, including political interests.

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Chapter 1

INTRODUCTION

1.1 State and Federal Courts as Rival Venues

The American courts, arguably, have emerged as ideal public policy venue. Alexis de Tocqueville may have seen this the best, writing: “There is hardly a political question in the United States which does not sooner or later turn into a judicial one” (De Tocqueville 2003, p. 315). And, indeed, the American courts address many if not most of the contemporary political controversies.

It is not only the American courts taken as a whole that have become an important public policy venue, but also the state and federal courts, each constituting a separate public policy venue. Political interests and interest groups often have a choice of whether to pursue public policy in one court system or the other on a single issue. Interestingly, Alexander Hamilton, unlike Alexis de Tocqueville, may have not seen the growing importance of the American courts; otherwise, he may have argued for separation of powers between the federal and state courts to prevent the concentration of political power. Rather, Hamilton in Federalist 82 argues for a partnership between the federal and state courts. Hamilton writes: “When in addition to this we consider the State governments and the national governments, as they truly are, in the light of kindred systems, and as parts of ONE WHOLE, the inference seems to be conclusive, that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it is not expressly prohibited” (Madison, Hamilton and Jay 1987, p. 460).

Yet, arguably, the federal and state courts have emerged as distinct policy venues,

less the kindred siblings shown in Federalist 82, and more like the rival between the state and federal governments shown in Federalist 51. Political interests in recent times have sought out both the state and federal courts on a number of important issues. These have included marijuana and drug policy, religious liberty, gay marriage, abortion, gun control and immigration. Seemingly, political interests have made use of the courts, whether state or federal, which were most advantageous. When policy is not advantageous at the federal level, or with the national courts, political interests can always turn to the states and state courts, and political interests have done exactly this.

How, then, do political interests and political interest groups act in the context of judicial federalism? Given the amount of activity in both the federal and state courts in recent times, this is seemingly an important question. Nonetheless, political scientists have done little research on interest groups and judicial federalism. Farole (1998) gives the most complete account, arguing that the state courts are generally not a desirable venue for political interests, which will turn to the state courts under extraordinary conditions.

Existing research argues that there are two factors that drive political interests to turn to the state courts (Farole 1998). The first is the jurisprudential structure of American law. Political interests, then, will turn to the American courts when the law creates incentives for these groups to do so. The second condition is organizational threshold, which consists of two parts: goals and resources, of which resources is the most important part. State legal resources include staff size, longevity and patron support. (Farole 1998, p. 17-18) suggests these are important, yet his analysis looks primarily at whether an interest group has cooperating state-level attorneys as its measure of resources. To litigate at the state level, political interests require attorneys who are skilled and knowledgeable in state law, which can, according to prior research,

be difficult to find, particularly for interests far removed from the state court, perhaps in Washington D.C. Goals captures the orientation of the group, which can be either material or purposive, with purposive organizations most likely to enter into the state courts.

1.2 Questions with Prior Research

Yet, this research, while important, leaves many questions to be examined. First, there is not a distinction between state and national interests. The research makes an assumption that political interests at both the national and state levels will act similarly. This might not necessarily be true. State political interests are embedded in state political communities. This may create an in-state political orientation, which causes state political interests to turn to the state courts more often than their national counterparts.

By not distinguishing between state and national political interests, prior research may not show correctly why political interests enter into the state courts. For example, prior research (Farole 1998) examines the participation of the state chapters of the American Civil Liberties Union. Yet, this research categorizes these state chapters as being part of the national organization. This conceptualization supports the author's assertion that political interests enter into the state courts when these groups have access to state legal resources, but overlooks the possibility these chapters were embedded in state politics and this state orientation motivated their participation in the state courts.¹

Additionally, much of the prior research is qualitative, raising questions about its representativeness (see King, Keohane and Verba 1994). Researchers studying

¹Should the state chapters of national political interests be viewed as independent? Arguably, yes, given that these chapters enter into the courts independently of their parent organizations.

political interests and the courts have taken qualitative approaches, often doing case studies. This is understandable, given the complexity of the legal environment and the difficulty in finding data. There exist hundreds of legal areas in American law that includes thousands of individual cases. Presently, it is very difficult for a researcher to include all of the cases. Researchers then must select samples that they believe are representative of the larger legal environment.

In previous research on political interests and judicial federalism, Farole (1998) took a qualitative approach. In his research, he found political interest participation in the courts using *Westlaw*, an online legal database used mostly by attorneys. He then gained further information on these political interests through qualitative interviews and other sources of information such as the *Encyclopedia of Associations*. In taking this approach, this research limited its sample size considerably. First it selected political interest participation from two legal areas: obscenity and eminent domain. Second, it sampled participation from the courts in five states: Colorado, Indiana, Minnesota, New Jersey and South Carolina. Third this research only sampled from the U.S. Supreme Court, state supreme courts and state courts of appeal. Fourth, this research only looked at the most active organizations in the courts. In limiting the sample, this research may not accurately represent the choices that political interests make. As Sorauf writes, “The strategic decisions of litigators yield only the sketchiest scholarly materials. There are rarely records of them, and one infers them from the histories of cases at the gravest risk” (Sorauf 1976, p. 144).

The decision to only examine the most politically active organizations especially raises questions. Many political interests do not enter into the courts as often as a public interest law firm, but these interests also help to influence the decisions that courts make. The activity of the groups that participate only occasionally is also more numerous. This is also true with issues like marriage equality, where court cases

saw the participation of many political interests, most of them not public interest law firms and other high-profile participants. It is important that research on political interests and the courts captures the participation not only of the more but also the less active political interests. Farole (1998) argues that less active participants do not make strategic choices in the courts. These groups most often participate in amicus curiae briefs, which are less costly than other types of participation. These briefs, nonetheless, can be expensive (Caldeira and Wright 1988). There are also reputational costs.

The existing literature also does not take into consideration relationships between judicial ideology, state judicial selection and the decisions to enter into the state or federal courts. These two factors might affect the choice between the state and federal courts. Judicial scholars have found that the ideology of judges matters. This is particularly true of the U.S. Supreme Court (Segal and Cover 1989; Segal and Spaeth 2002), but also federal (Epstein, Landes and Posner 2013) and state supreme courts (e.g., Hall and Brace 1992). Those who study the courts have also shown the effect of judicial selection methods (Hall and Brace 1992; Brace and Hall 1995, 1990; Langer 2002).

Prior research has not discovered the relationships between judicial ideology, state judicial selection methods and the decisions that political interests make in selecting state or federal courts (Farole 1998). Previous research, however, suggests that these connections do exist. Comparato (2003) found that political interests communicated different messages via amicus curiae depending on state judicial selection methods. Additionally, some political scientists assert that attorneys take their cases to the state courts when they believe that the Supreme Court will not give a favorable ruling (Sorauf 1976; Wasby 1984).

1.3 Purposes of this Study

New research on state political interests and American judicial federalism can address these challenges in two ways. First, it can consider other factors that cause political interests to turn to the state or federal courts. Second it can reevaluate some of the older research quantitatively. In doing so, this research can contribute towards the study of political interests and judicial federalism, but also public policy and judicial politics.

The title of this dissertation is *State Political Interests and American Judicial Federalism*. While this dissertation gives its attention to both state and national political interests, there is a unique emphasis on state groups. The reason for this is that this research asserts that state groups are politically bound to their home states and this state orientation fosters a special relationship with the home state courts. Existing research supports the notion that state political interests are bound to their home states. Nonetheless, this is novel, and much attention is given to developing this idea.

While this suggestion may be new, it's not entirely new. Farole (1998) argues that access to attorneys knowledgeable in state law is an important factor with the decision to turn to the state courts. One might assume that these attorneys knowledgeable in state law would most likely reside in their respective states, so there exists political embeddedness, yet this relationship is never elaborated on. This research suggests that state political orientation goes well beyond having access to attorneys with expertise in state law. State political orientation encapsulates the political proximity of those who work in state political communities. This research expects that judges and those who work for state political interests develop close relationships. They also cooperate and compete with political issues, and have intimate knowledge of state

political culture.

In addition to developing the notion of state political orientation, this study also examines the connection between judicial ideology, state judicial selection and the decision to turn to the state courts. Previous research in judicial politics has found connections between these two factors and the decisions that state judges make. Researchers have not however convincingly shown the relationships between judicial ideology and selection and the choices that the other actors including political interests make. This study attempts to do this and finds some important connections between these factors and the decision to enter into the state or federal courts.

This research considers how these factors in addition to legal advantage of state over federal law affects entrance into the state or federal courts. This dissertation, however, explores other areas of interest. One area is localism in the courts. If state political interests are oriented towards state policy then we also might expect that these groups enter into their home state courts more often than national groups and organizations from other states. Some state organizations, however, do enter into courts with no legal jurisdiction over their home states. This research explores their motivations, examining factors such as a purposive orientation, federated structure, and the interest group environment in their states. In examining these motivations this dissertation offers insights into political interests. One example is the impact that a federated structure has on group decision-making. Are state organizations perhaps more willing to make a politically risky decision and enter into an out-of-state court when the group holds a partnership with a national partner?

This dissertation then speaks to research not only on political interests and judicial federalism, but public policy and judicial politics. This study also contributes to the growing, fairly recent public policy literature exploring the connections and relationships between state and national interest groups. The literatures on national

and state interest groups have evolved separately (Gray and Lowery 2002). Yet, more recent research points to more connectedness between state and national politics, as well as state and national interest groups. As an example, Baumgartner, Gray and Lowery (2009) found a positive relationship between state lobbying registrations and Congressional legislation. If state and national interest groups cooperate in both the state and federal courts then this, too, argues for a more connectedness between national and state policymaking.

1.4 Theoretical Framework

This study conceptualizes political interests as rational actors. Political interest groups look for opportunities to win power in society. Political interest groups seek ways to become more involved in the political process, develop friends and connections in key areas, and, in doing this, ultimately, extend their political influence. Baumgartner and Jones (2010) propose that political interest groups do this two ways: via image and venue.

With image, political interests craft messages that appeal to the public, as well as the elites. These messages attempt to frame the debate or controversy in a particular context. This research, however, is interested in the second consideration: venue selection. Baumgartner and Jones (2010) show the rise and fall of nuclear energy in the United States as one example of this. They argued that the U.S. courts were more receptive to the opponents of nuclear energy than those in the pro-nuclear political subsystems; consequently, the courts represented the ideal venue. Vose (1959, 1972), similarly, showed how the courts were an ideal venue for the National Association for the Advancement of Colored People.

The punctuated equilibrium Baumgartner and Jones (2010) theory of interest group behavior borrows from rational choice theory, which holds that individuals

will make choices that are both rational and strategic. Individuals wish to maximize their gains or advantages, and they will work towards these goals, but also take into consideration the choices or expected decisions of those around them. Rational choice traces its origins to early works in economics and political science. Levi (2009) argues there are four main origins: The first is the spatial models of voting (Downs 1957; Black 1958), the second research on choice and social pluralism (Arrow 1963), which finds that these outcomes are not always optimal. Olson (1965) introduced the third influence, his collective action theory, which holds that individuals do not have an incentive to cooperate because the collective benefits can often be had without their participation. North (1981, 1990) gives the fourth, with his theory of economic institutionalism, which argues that institutions are advantageous because they reduce transaction costs.

The research on interest groups and the courts draws from this rational choice perspective. In this literature, political interest groups wish to maximize their influence, and—to accomplish this goal—these groups make strategic choices. This perspective is descriptive of much of the literature on interest groups and the courts. In the early research of Vose (1959, 1972), for example, the NAACP turned to the courts because the other branches of government were not receptive to the organization’s message. Later research also builds on the rational choice, strategic decision-making model. Political scientists argued that conservative interest groups began to see the courts as a viable policy venue following the early victories of the NAACP and other liberal interest groups (e.g. Epstein 1985). This research, too, builds on rational choice because the courts are viewed as an underused policy venue by conservative interest groups. The holds true for the most recent research, too. De Figueiredo and de Figueiredo Jr (2002) introduce a resource-based model where political interests maximize resources, either through a regulator or the courts.

1.5 Hypotheses

This dissertation ultimately asserts that there are four primary reasons why political interests, both state and national, turn to the state courts. This dissertation reaches the following conclusions from both original and prior research:

Hypothesis 1: Political interests will turn to the state courts when the jurisprudential structure of American law favors litigation at the state level. One excellent example of state law assuming precedence happened after *Miller v. California*, where the U.S. Supreme Court turned over the authority to decide what constituted obscenity to the states.

Hypothesis 2: State political interests will enter into the state courts more relative to their national counterparts. State political interests have better access to attorneys knowledgeable in state law. Additionally, these interest groups have greater familiarity with state lawmaking practice and the leaders and histories of their respective states. Many state interest groups emerged in response to state policy-making environments; consequently, these groups are more likely to advocate in areas of law, such as education, where the state courts hold more power than the federal courts. This does not necessarily mean that state interest groups will turn to state courts most often, only that relative to their national counterparts, state interest groups will use the state courts more.

Hypothesis 3: Political interests will seek out state courts when there is an ideological incentive to do so. The state and federal courts can often mimic each other ideologically. For example the Texas state courts and the Fifth Circuit Court of Appeals are both conservative. Yet, there are other state courts, some of them ideologically liberal, such as those in Vermont, Massachusetts or Hawaii, where groups that advocated for marriage equality went first.

Hypothesis 4: Political interests will seek out state courts when judges might come under political pressure to decide a case in a particular way because of how judges are picked. Hall (2001) showed that state judicial selection in combination with ideology affected the decisions of judges. Seemingly, the institutional selection of judges might also affect other actors, including the political interests.

1.6 Chapter Guide

This dissertation seeks to develop a new model for the choices that political interests make, paying especially close attention to state political interests. To accomplish this, this research draws primarily from an original quantitative data set but also some qualitative research. These chapters follow the introduction:

Chapter Two: Data Collection and Overview: This dissertation primarily draws data from an original data set of more than 3000 observations of participation with political interest groups. This chapter discusses the collection of these data in two legal areas: eminent domain and marriage equality, also why this research selected these legal areas. This chapter also gives a historical overview of both eminent domain and marriage equality to assist the reader in evaluating the research in political and historical context. This chapter provides details on sampling and on the meaning of “political interest.”

Chapter Three: The In-State Political Orientation of State Political Interests: This chapter develops the idea of state political orientation, the notion that state political interests are politically bound to their home states. To accomplish this, this chapter examines instances where state political interests enter into American courts with no legal jurisdiction over the home state and considers the groups’ motivations. In doing so, this chapter builds a model for political localism in the courts, which is absent from the public policy literature.

Chapter Four: In-State Political Orientation: A Qualitative Analysis:

This chapter continues the exploration of state political orientation found in Chapter Three. This chapter examines the reasons why state political interests enter into out-of-state courts, but does so with a qualitative analysis, with interviews of attorneys and leaders of state political interests. This chapter finds overlap between the qualitative and quantitative research, but also some original insights and observations.

Chapter Five: In-State Political Orientation and Judicial Federalism:

This chapter examines the impact of state political orientation on the decision to enter into the state courts. This chapter finds that state political interests enter into the state courts at a much higher rate than their national counterparts. Additionally, this chapter finds that state political orientation is an important factor in the decision to turn to the state courts.

Chapter Six: Judicial Ideology, State Judicial Selection and Court Choices: This chapter develops a new model for why political interests turn to the state courts. The research proposes four factors: legal advantage, state political orientation, judicial ideology and state judicial selection methods. This chapter tests the impact of these four factors on state court selection. This chapter also explores the connections between judicial ideology and state judicial selection.

Conclusions and Future Research: This chapter examines the contributions of this research to the study of political interests and judicial federalism, but also to public policy and judicial politics. This chapter also attempts to give direction to future research, pointing out ways to look at political interests and the courts more accurately as well as the meaning of some unexpected observations.

The following chapters will present a new perspective on why political interests enter into either the state or federal courts, with emphasis on state political interests, and how their unique relationships with their home states affect their choices. The

following chapters will also explore related areas such as localism in the American courts as well as the similarities and differences between national and state political interests and their interconnectiveness.

Chapter 2

DATA COLLECTION AND OVERVIEW

2.1 Research Design

This research has proposed that existing research shows an incomplete picture of how political interests interact with the state and federal courts. Prior research has not explored fully the relationships between important factors such as in-state political embeddedness, judicial selection and ideology have on the legal strategies that political interests adopt. This chapter gives readers a roadmap of the empirical strategies used, as well as a description of the data collected. It also provides a detailed historical account of the two legal issues adopted by this research so that readers can consider this research in legal and historical contexts.

The introduction describes the previous research and how it can be improved upon. Specifically, this research will focus its attention on two factors: the in-state political orientation of state political interests as well as judicial ideology and state selection methods. As previously noted, this research largely adopts a quantitative approach. It draws from a new data set of more than 3500 observations of political interests in the state and federal courts in eminent domain and marriage equality. This data creates the opportunity to consider the actions of different types of political interests over relatively long periods of time in two active legal controversies.

2.2 Political Interests and Political Interest Groups

First, this research will explain the meaning of the term “political interests.” Those who study groups and public policy, as well as groups and the courts, have

made choices about what organizations to include or not include in their studies. This is often problematic, as these studies are not directly comparable to each other (Baumgartner and Leech 1998). This study too had to make choices about what organizations to include and not include in its analyses. In public policy, there exists debate on the meaning of the term “political interest group” (Baumgartner and Leech 1998). This debate is understandable. While some political scientists only study membership based groups (e.g., Walker 1991), others include business, as well as non-membership groups (e.g., Epstein 1994; Olson 1990; Collins Jr 2008). This distinction is worth exploring.

Some political scientists study only organizations that have been labeled “political interest groups.” These organizations hold open membership, and these members vote on leadership and the actions that the group takes. Walker (1991) gives one useful typology. Walker begins with E.E. Schattschneider’s assertion that interest was either public or private (Schattschneider 1975, p. 118). Private interests included Walker’s “profit sector.” These are organizations that represented the interests of professionals in private enterprise. Walker would include an organization that advocated for the interests of bankers in Boston under this category. Walker labeled organizations that represented the interests of those in government as the “nonprofit sector.” Walker would include an organization that represents postal workers in this category. There are two other categories: mixed associations and citizen groups. Mixed associations included members from the public and private sectors. An organization that represents nuclear scientists would most likely include those who work for private industry. Sometimes membership is open to anyone who wishes to join the organization. The Sierra Club is one example of such an organization. One can sign up for the club, and assuming he or she pays his or her membership dues, is entitled to full participation. These types of political interest groups are often “citizen groups.”

This typology offers a starting point to consider how interest groups work to influence the American courts. However, many other organizations do not have open or voluntary membership, yet work to influence public policy much like their membership based counterparts. Such groups include public interest law firms, bar associations, non-membership groups, university law clinics and think tanks. Public interest law firms came into American politics during the 1960s and 70s. They are often purposive, like the Sierra Club or National Association for the Advancement of Colored People, yet unlike those organizations they have no members (Schlozman and Tierney 1986). These groups are very active in the courts (Farole 1998). University law clinics give students the opportunity to practice law, often for poor and underrepresented individuals. These organizations, too, will take political positions and attempt to influence the courts, often through amicus briefs. Bar associations are associations of lawyers that organize either for professional or purposive purposes. Membership in these organizations is voluntary, with the exception of a state bar, where membership is involuntary for an attorney who wishes to practice in a state. A state bar cannot take a political position in a court case, but a bar association with voluntary membership can (Burnham 1995). Non-membership organizations exceed the number of membership organizations (Salisbury 1984). These groups take on the persona of membership organizations and engage in politics in similar ways, yet lack members (Schlozman and Tierney 1986).

This study has selected to include both membership and non-membership groups and uses the term “political interests” to refer to both, unless membership groups are compared to non-membership groups directly, in which case “political interests” will refer to non-membership organizations and “interest groups” will refer to organizations with members. Many political scientists only study membership groups, so this research separates these groups in some of the statistical analyses. In this study

not all political interests were included, however. The exceptions were: businesses, religions and private individuals. This is because these political interests did not organize for a distinctly political or social purpose.

This dissertation considers both membership and non-membership groups for a number of reasons. For one, doing so creates a larger sample size, which is important in a quantitative study. A greater number of observations improves the validity of regression and other statistical analyses (e.g., King, Keohane and Verba 1994). Also, this approach creates a large enough data set to consider unique situations quantitatively. For example, Chapter Three examines state political interests that enter into courts with no jurisdiction over the home state—which this research can consider qualitatively because there are enough observations to do so. Finally, this approach creates the opportunity to consider the actions of membership and non-membership groups and see if differences exist.

2.3 Political Interests and the Courts

The American courts represent one venue in which political interests can take action. However, there are a number of actions that political interests can take to influence the decisions of a court. Legal and political interest scholars have identified four ways for interests to exert influence. These include: *amicus curiae*, direct sponsorship of test cases, legal aid and support and direct legal action through *intervener* status in a particular case (Collins Jr 2008). Political interests use *amicus curiae*, “friends of the court,” briefs the most. Yet, political interests use all of these tactics under different circumstances for different reasons (see Collins Jr 2008).

Some political interests attempt to influence policy by setting up test cases. This is accomplished either by challenging policy directly, or by approaching an individual or organization and giving them direct legal support and guidance in challenging

policy (Collins Jr 2008). Test cases often address constitutional questions (Wasby 1995). Test cases are expensive and time-consuming. Political interests pursuing this avenue generally must be able to generate publicity, have a narrow issue focus and have their own full-time staff and attorneys (Wasby 1995). Consequently, this is the least often taken route of action, yet the interest that do take this route are often “repeat players,” attempting to win as often as possible over a series of cases. This strategy is risky, as legal defeats often put the interest at a loss (Galanter 1974, 100).

A second approach is to sponsor a group or individual who brings a case to the court. This is similar to a test case, but different in that sponsorship does not begin until the case reaches the appellate level. So while with a test case sponsorship begins prior to legal action, with sponsorship, the interest involvement does not begin until much later. This tactic, like test case sponsorship, is costly, given that similar resources are often required, i.e. a full-time legal staff, narrow issue focus and the ability to publicize the case. Sponsorship can put a political interest at a greater disadvantage than if the group had sponsored the case as a test case, given that the case has already been structured in a way that may not maximize the policy advantage of the political interest (Collins Jr 2008).

Direct legal action represents a third approach. This is difficult, given that a political interest must have standing to participate as a party in case, and the courts have made it difficult to win this standing. To participate directly, an interest must show either that their interest would be directly affected by the outcome or that they hold the statutory right to participate. In legal practice, requests for direct participation are most often denied. The participation of third parties often complicates cases, given that the legal system is adversarial; consequently, judges are not apt to grant standing (Lowman 1991).

The fourth approach involves filing an *amicus curiae* or “friends of the court”

briefs. Political interests that fail to win standing often participate as amici curiae (Goepp 2002). This option is less cost-intensive than other forms of intervention. Caldeira and Wright (1988) estimated the cost of a brief filed by a reputable law firm between \$15,000 and \$20,000. Some scholars have suggested the costs might be far less. Smith and Terrell (1995) have estimated the costs to be as little as \$1,500. Inexperienced attorneys often write the briefs to gain experience (Ward 2007), while law professors often write the briefs pro bono (Moorman and Masteralexis 2001). Participating as amicus curiae does have its disadvantages (Collins Jr 2008). Unlike with a test case, a political interest cannot control the course of litigation (Epstein 1985, 148). The political interest has not been given the opportunity to influence either the facts of the case or the lower court record. Political interests can, however, introduce positions not introduced by the litigants, and give broader perspectives (Caldeira and Wright 1988; Spriggs and Wahlbeck 1997).

2.4 Areas of Law

Previous research (Farole 1998) asserts that political interests see legal advantage between the state and federal courts as the most important consideration when selecting the federal or state courts. Consequently, this research attempts to capture instances when the federal and state courts held a legal advantage. Farole sampled from two areas of law: eminent domain and obscenity. Regarding eminent domain, he found that judges looked to the U.S. Constitution's Fifth Amendment, which requires that property be taken for public use and its owners fairly compensated, in deciding cases. Many state constitutions include similar stipulations for takings, which the courts have interpreted as granting greater protections. Political interests can turn to the state courts in these cases. Nonetheless, Farole found that this was not often the case, and, as a result, he included eminent domain as an area of law where the

federal courts held the advantage. He selected obscenity as a second issue. This area of law was advantageous for his research because *Miller v. California* (1973) shifted the balance of power from the federal to the state courts at a point in time. As a result, the interaction between political interests and legal advantage could be clearly examined.

The dissertation considers the participation of political interests in the courts from two legal areas: eminent domain and marriage equality. In eminent domain cases, the federal courts hold the legal advantage. American courts have decided recent eminent domain cases on the basis of state law. State constitutions sometimes give greater protections for property than the U.S. Constitution. Yet, the takings clause of the Fifth Amendment of the U.S. Constitution remains powerful.¹ ² In marriage equality, the federal and state courts held the legal advantage for periods of time. Prior to *Perry v. Schwarzenegger* (2010), political interests advocating for marriage equality turned largely to the state courts, which afforded protections that the federal courts did not recognize in the U.S. Constitution up until that time. This reliance on the federal courts, however, changed when advocates for marriage equality challenged California's constitutional amendment on marriage, Proposition 8, on U.S. constitutional grounds in 2010. Prior to this point in time, advocates for marriage equality had certainly used federal arguments; yet, after this point in time their use often in federal courts was next to ubiquitous.

¹An argument can be made that state courts enjoyed the legal advantage following *Kelo v. City of New London*. Appendix C examines this possibility and reevaluates the results of this study by labeling eminent domain cases following *Kelo* as having state legal advantage.

²As with the previous regressions, the state legal advantage variable was omitted for eminent domain. This is because legal advantage was coded as federal in all of the eminent domain cases. This produced singularities that interfered with the inversion of the Hessian Matrix.

2.4.1 Eminent Domain

Certainly, today, eminent domain remains a contentious issue. Americans do not support government taking private property, even when fair compensation is given. Yes, surprisingly, this was not always true. In colonial America, there existed an expectation that government would appropriate property (*The Public Use Limitation of Eminent Domain: An Advance Requiem* 1949; Treanor 1985; Horwitz 1992; Stoebuck 1972).

There existed two reasons for this: The first is that the King of England had the right to appropriate property, often without compensation (Treanor 1985; Stoebuck 1972). The Magna Carta and subsequent English law explicitly lays out the powers of the King of England, which were: “dominion of the sea, control over navigation, foreign affairs, defense of the realm, enforcing acts of Parliament, dispensing justice, coining money, providing for his own household, granting offices and titles of nobility, and collecting taxes” (p. 553 Stoebuck 1972). The Magna Carta however, did not explicitly list the king’s powers. The king also had implicit “necessary and proper” powers to carryout the foregoing powers. In a time of war, the king could, for example, appropriate property to aid in the war effort.

Not only did the crown exercise direct, but also indirect authority over property. Feudal traditions conceptualized property as belonging to the sovereign, yet granted to individuals under certain conditions. If these conditions were violated, the sovereign could take back what was rightfully his (Treanor 1985). In Vermont, for example, farmers from neighboring New Hampshire settled the land. King George III, however, had given possession of Vermont to New York. Following the Revolutionary War, the New York legislature sought to evict the farmers because they had not been given the authority to settle by the original land grant (Treanor 1985).

Republicanism also influenced the American colonists' view of property rights (*The Public Use Limitation of Eminent Domain: An Advance Requiem* 1949; Treanor 1985). The American colonists prized the collective good over individual gain. The colonists support for the common good did not preclude citizens from owning property, as property ownership enabled one to contribute to the common good through politics, much as a propertied citizen of ancient Athens. Yet, the American colonists also saw the private ownership of property as destructive of the common good, as people were naturally selfish, and those with wealth would not spend it to benefit society. Consequently, government rightfully had the power to take property in the interest of the common good. In Pennsylvania, for example, it was expected that the state could use private property for the construction of public roads, which the Pennsylvania Supreme Court affirmed in *M'Clenachan v. Curwin* (1802).

Public attitudes towards government takings, however, changed after state representatives ratified the U.S Constitution into law (*The Public Use Limitation of Eminent Domain: An Advance Requiem* 1949; Treanor 1985; Horwitz 1992). When the U.S. Constitution was drafted, only Vermont, Massachusetts and the Northwest Territories had banned uncompensated takings. This change is best reflected in the Fifth Amendment to the U.S. Constitution, which declares that "private property [shall not] be taken for public use without just compensation." There are two parts to this clause: the first being that private property is taken for public use, and the second that fair compensation is required. Yet, other parts of the U.S. Constitution aid in protecting private property. Article I prohibits the U.S. Congress from regulating commerce wholly inside of the respective states. States also cannot lay duties on goods imported or exported except to generate the revenue necessary to maintain their inspection stations. Finally, the Third Amendment prohibits the quartering of soldiers in private homes, except in times of war. While many states had takings

clause requiring compensation, the Fifth Amendment did not also apply to the states until the passage of the Fourteenth Amendment, which was affirmed before the U.S. Supreme Court in *Chicago, B. & QR Co. v. Chicago* (1897).

Many citizens wanted greater protections against government takings, yet this right was far from absolute. The leaders of the industrialization and construction of transportation networks in the United States put pressure on the courts and lawmakers to limit compensation for takings (Horwitz 1992). The construction of railroads, canals, and public and private roads required the taking of private property. These projects, however, also damaged property that was not taken. American courts wrestled with the two parts of eminent domain law: direct and inverse condemnation.

2.4.2 *Direct Condemnation*

Direct Condemnation describes government actions that take private property, which Americans most often associate with eminent domain. The courts have given greater scrutiny to the “public use” requirement found in the Fifth Amendment. *Berman v. Parker* (1954) established the contemporary benchmark. In the case, the District of Columbia took blighted properties through its eminent domain power. The residents filed suit against the city, and the U.S. Supreme Court ultimately ruled in favor of the District of Columbia, but in doing so created a standard under which property could be taken. The court found that governmental takings could be in pursuit of a goal that was constitutionally permissible; this fulfilled the “public use” requirement. Associate Justice William O. Douglas captures this sentiment, wiring, “The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled” (*Berman v. Parker* 1954).

Two subsequent cases tested the limitations of *Berman v. Parker* (1954). In *Hawaii Housing Authority v. Midkiff* (1984) the U.S Supreme Court ruled in favor of the power of government to take private property and give it to private individuals. In the early 1980s, 22 private owners controlled more than two thirds of the land on the island of Oahu as the result of remaining vestiges of feudalism established under king Kamehameha I. As a result, the cost of housing was exceedingly expensive, given that a small number of individuals controlled the buildable land. The State of Hawaii intervened; taking control of building titles and giving them to the lessees in exchange for fair compensation. The U.S. Supreme Court ruled that this action was permissible under governmental eminent domain powers. Under this ruling, land did not have to be blighted or transformed; it could be transferred and this would fulfill the constitutional public use requirement.

The U.S. Supreme Court in *Kelo v. City of New London* (2004) further clarified the public use requirement. In the case the New London Development Corporation took property that was not blighted for economic development purposes. In response two tenants who were evicted filed suit against the city. As in *Hawaii Housing Authority v. Midkiff* (1984) the U.S. Supreme Court ruled in favor of the government taking. In this case, however, the Court found that the City of New London had the power to transfer ownership of private property to another private interest because the property did not generate enough tax revenue (see Peterson 1981).

Prior to the *Kelo* decision, American governments acquired a broad ability to take property through their eminent domain powers. Tax revenue alone gave ample justification for municipalities to seize property. Supporters of property rights, however, did win cases in state supreme courts, given that states can give greater protection for rights than the federal government. In *Norwood v. Horney* (2006), the city of Norwood Ohio had seized property for economic redevelopment much like New Lon-

don had done in *Kelo*. The case ultimately went before the Ohio Supreme Court, which ruled that the Ohio constitution prohibited *Kelo*-style takings exclusively for economic benefit.

2.4.3 *Inverse Condemnation*

Direct Condemnation cases have arguably not favored property rights advocates. With inverse condemnation cases, they have succeeded more often, particularly with the U.S. Constitution's requirement that government provide just compensation for property that was taken. Inverse Condemnation does not involve a physical taking of property, but rather the taking of the productive value of property. A government activity or regulation can result in an inverse condemnation. The Bureau of Land Management, for example, might close a gate, which, subsequently, limits a cattle rancher's access to his or her land. The rancher could then be expected to file suit against the government, claiming that this action took away from the value of the property.

Justice Harlan in *Mugler v. Kansas* (1887) established an early test on whether a takings claim was permissible under inverse condemnation, defining a police action as one that establishes rules on "public health, public morals, or the public safety" (*Mugler v. Kansas* 1887, p. 661). While claims against a police action were not permissible, claims against an action that involved a "physical invasion" were. According to Harlan, these actions had the same effect as physically taking the property. The U.S. Supreme Court in *Pennsylvania Coal Co. v. Mahon* (1922), nonetheless, ruled that suits could be filed against government regulatory actions or what Justice Harlan labeled "police actions." In the case, the Court struck down a Pennsylvania law that prohibited coal mining in areas that might damage physical structures like roads or houses. In doing so, Justice Oliver Wendell Holmes established a new test:

Government had the power to act, but if the economic consequences were too severe, the takings clause of the Fifth Amendment would come into effect. Holmes' conceptualization of inverse condemnation was entirely different from Harlan's. While Harlan saw the inverse condemnation power as dichotomous, Holmes constructed it as continuous.

The U.S. Supreme Court observed the *Holmes* test until the 1970s. Yet it was vague. Those in the legal community did not fully know the meaning of Justice Holmes' phrase "If the regulation goes too far" finding in *Pennsylvania Coal Co. v. Mahon* (1922). Passenger rail service in the United States fared poorly in the 1960s and 70s. American travelers embraced the new interstate highway system and air travel and took the train much less often. The Pennsylvania Central Railroad, as a result, sought to demolish Penn Central Station and build atop the underground tracks in New York City. The New York City Landmarks Preservation Committee, however, did not approve the plans. In response, the railroad sued the city in court citing eminent domain, and ultimately lost in the U.S. Supreme Court, which ruled that New York City's actions fell under its eminent domain power. In its ruling, the court, however, further refined Justice Holmes' balancing test. In his opinion, Justice Brennan identified three important considerations to determine whether the government had imposed too heavy a burden: first, the character of the government regulation, second the economic impact to the plaintiff and third the economy injury to economic expectations prior to the regulation taking effect (*Penn Central Transp. Co. v. New York City* 1978).

Following *Penn Central Transp. Co. v. New York City* (1978), the American courts further refined the interpretation of inverse condemnation eminent domain law in three areas (Farole 1998). The first area is compensation, where the U.S. Supreme Court ruled in *San Diego Gas & Elec. Co. v. San Diego* (1981) that government

must always provide compensation for takings. The supporters of government takings had argued that it was sufficient for the government to correct the offending statute; The U.S Supreme Court, however, disagreed, with Justice Brennan writing: "... once a court finds that a police power regulation has effected a 'taking,' the government entity must pay just compensation on the date the regulation ... (*San Diego Gas & Elec. Co. v. San Diego* 1981, p. 658-659). The U.S. Supreme Court upheld the precedent established in *San Diego Gas & Elec. Co. v. San Diego* (1981) in *First English Evangelical Lutheran Church v. County of Los Angeles* (1990), where the U.S. Supreme Court ruled that Los Angeles County's temporary prohibition against building in a recently flooded area constituted a taking and the plaintiff was eligible for compensation.

The American courts have also considered inverse condemnation in substantive due process. Municipalities and regional governments often impose stipulations for their approval of building permits. Governments can demand that building permit applicants contribute land, physical structures or money to compensate the governments for public infrastructure improvement that is necessary for the building project. In *Nollan v. California Coastal Comm'n* (1987) a California family wished to demolish an existing beachfront property and construct a larger three-story house. The California Coastal Commission required for their approval of a building permit a lateral easement. This would allow the public to see the beach despite the blockage created by a three-story house. In response, the Nollan family filled suit, claiming a violation of their Fifth Amendment eminent domain rights. Ultimately, the U.S Supreme Court agreed, asserting that governments must have a "legitimate state interest," also an "essential nexus" between the project and state interest to impose permit requirements, which the Court ruled that the California Coastal Commission lacked. In *Dolan v. City of Tigard* (1994), the U.S. Supreme Court similarly held

that an Oregon municipality had violated eminent domain rights as a condition for a building permit. In this case, the U.S Supreme Court added a third condition to the *Nollan* test: There must be a proportionate relationship between the requirement for the building permit and the impact of the projects. This third condition strengthened property rights

Finally, the American courts have elaborated on “per se” inverse condemnation takings. In (*Penn Central Transp. Co. v. New York City* 1978) the U.S. Supreme Court had introduced a balancing test between property rights and government interests. In “per se” cases the government action is exceedingly injurious; consequently eminent domain is applicable regardless of the urgency or importance of the government interest. The courts have discovered two instances when per se rulings have effect. The first is when a government regulation takes away the economic value of property. *Lucas v. South Carolina Coastal Council* (1992) illustrates this, where David Lucas, an owner of beachfront property filed suit against the commission in response to its prohibition on construction. Lucas claimed that the regulation deprived him of the value of his property. The U.S. Supreme Court agreed. The second type of per se cases happens when a government regulation physically intrudes into property. In *Loretto v. Teleprompter Manhattan CATV Corp.* (1982), the U.S. Supreme Court ruled in favor of property rights advocates in such a case. Loretto, an owner of New York apartments, filed suit against the city after the city New York required that he install cable in his apartment. Ultimately, the U.S. Supreme Court agreed, ruling that the cable installation requirement was equivalent to the government occupying his property.

2.4.4 Marriage Equality

The drive for marriage equality did not win significant momentum until the early 2000s (Becker 2015). At this point in time, the movement gained considerable momentum winning political victories in the legislative, executive and judicial branches of both state and national U.S. governments. This movement culminated in U.S. Supreme Court ruling in *Obergefell v. Hodges* (2015), which declared same sex marriage a right protected by the U.S. Constitution.

In the beginnings of the marriage equality movement, marriage equality supporters questioned whether marriage equality was a viable goal (Becker 2014). Up until this point in time, around 2008, marriage equality supporters had given their attention to overturning workplace discrimination and anti sodomy laws (Becker 2015). This approach made sense; homosexuals endured lawful discrimination in their daily lives. To give an example: In 1960 anti sodomy laws at the state and municipal levels policed private consensual acts in all 50 states.

Those who supported marriage equality, however, did challenge existing law in the courts. In 1971, a minister married a same sex couple in Minnesota. The clerk denied their request because it was unlawful in the state. In response, the couple filled suit in Minnesota, before appealing to the Minnesota and U.S. supreme courts. Their legal counsel argued that the Minnesota Constitution failed to state that marriage was only between a man and a woman. Also, the Minnesota Constitution violated the First, Eighth, Ninth and Fourteenth Amendments to the U.S. Constitution (*Baker v. Nelson* 1971). The state, Minnesota and U.S. Supreme courts largely dismissed these arguments. Nonetheless, the equal protection and due process clauses of the Fourteenth amendment would become essential to the efforts of those advocating for marriage equality.

The 1970s and 80 saw a limited number of unsuccessful cases (Klarman 2012). This changed in 1990, when Hawaii denied three same sex couples marriage licenses. Dan Foley, a lawyer with the American Civil Liberties Union brought the case before the Hawaii courts despite a lack of support from the ACLU. The plaintiffs appealed to the Hawaii Supreme Court after the trial court dismissed the challenge. The Hawaii Supreme Court also did not decide in favor of the plaintiffs. The court instead remanded the case to the trial court for a hearing stipulating that because the marriage law discriminated on the basis of sex, the law was subject to strict scrutiny under Hawaii's constitution; consequently, the state had to give a compelling reason(s) why discrimination on the basis of sex in marriage was necessary for it to retain effect (*Baehr v. Lewin* 1993). In 1996, judge Kevin Chang failed to find the state reasons for denying marriage equality sufficiently compelling under the strict scrutiny requirement of Hawaii's constitution, creating de facto marriage equality until Hawaii's legislature intervened (*Baehr v. Miike* 1996).

Seizing on the success in Hawaii, marriage equality advocates initiated legal test cases in Vermont, claiming that the state's prohibition on same sex marriage violated the Vermont's constitution common benefits clause. In *Baker v. Vermont* (1999), the state Supreme Court agreed; yet did not extend full marriage equality because the state viewed the transition as too dramatic. The court's ruling then went to the legislature, which passed legislation that created civil unions, to ensure that the benefits and protections of Vermont's marriage laws were extended to same sex couples.

The Vermont and Hawaii cases caused a political backlash. Opponents of same sex marriage attempted to stop the gains made by the proponents in state and federal governments (Klarman 2012). In response to the Hawaii case, the Utah legislature ordered its courts to not recognize same sex marriage, while the South Dakota House of Representatives voted for a bill prohibiting same sex marriage. Alaska passed a

Constitutional amendment prohibiting same sex marriage. Policymakers at the federal level had also responded towards the trend legalizing same sex marriage. In 1996, the U.S. Congress weighed in on the issue, passing DOMA, the Defense of Marriage Act, which did two things: First, it gave the states the power not to recognize same sex marriage in other states. Second, the Defense of Marriage Act withheld federal recognition to same sex marriages; consequently same sex couples were not eligible for federal marriage benefits (Klarman 2012).

Nonetheless the advocates of marriage equality continued to win important victories. By this point in time states could no longer enforce their sodomy laws. In *Lawrence v. Texas* (2003), the U.S Supreme Court ruled that a Texas sodomy law was unconstitutional on the grounds that it violated the due process clause of the Fourteenth Amendment, which the court interpreted as affording individuals a right to privacy, particularly in their homes. While this ruling was not directly tied to marriage equality, those who opposed same-sex marriage perceived it as a significant defeat. This momentum continued and in 2003, the allies of same sex marriage accomplished what they were not able to in Vermont: state recognition of same sex marriage. In the case GLAD, the Gay and Lesbian Advocates and Defenders filed suit on behalf of same sex couples denied marriage licenses. As in *Baker v. Nelson* (1971), the judges ruled *Goodridge v. Department of Public Health* (2003) on state constitutional law. In this case the judges turned to the “free and equal” clause, which they interpreted to grant marriage equality. A subsequent effort to oust the political leaders who gave their support failed.

As with the Hawaii and Vermont marriage equality cases, *Goodridge v. Department of Public Health* (2003) created a political backlash. Prior to the decision, three states, Alaska, Nebraska and Nevada had banned same sex marriage in their constitutions. Following this decision, the voters in many other states approved initiatives

that prohibited same sex marriage at the constitutional level, which included Proposition 8, a California initiative that generated media attention and much controversy.

Yet, pro marriage equality groups had continued to win victories. Following *Goodridge*, three states: California, Connecticut and Iowa allowed same sex marriage based on rulings in each of the states' supreme courts. In *In re Marriage cases* (2008); *Kerrigan v. Commissioner of Public Health* (2008); *Varnum v. Brien* (2009), the state supreme courts decided that same sex marriage was protected under state law. These victories continued in the federal courts. In *Strauss v. Horton* (2009), proponents of same sex marriage failed to overturn Proposition 8 in California's supreme court. They argued that state constitutional law ensuring fundamental rights could not be changed by citizen initiative. The petitioners in this case failed. Yet, the petitioners in *Perry v. Schwarzenegger* (2010) (later *Hollingsworth v. Perry* (2013)) succeeded. They petitioned the court under U.S. constitutional law and Judge Walker of the northern district of California ruled in their favor, finding that California's Proposition 8 violated the substantive due process and equal protection clauses of the U.S. Constitution's Fourteenth Amendment. Federal law, similarly, was used against DOMA; with the U.S. Supreme Court finding that section three, which asserted federal non-recognition of same sex marriages, of the law violated the due process clause of the Fifth Amendment in 2013.

When the U.S. Supreme Court invalidated section three of DOMA, the majority of states, 37, had legalized same sex marriage. The U.S. Supreme Court, however, had yet to rule on same sex marriages themselves. This changed in 2015 when six marriage equality cases in the sixth district of the U.S Court of Appeals were consolidated. The Sixth District Court of Appeals ruled against those in favor of marriage equality, and they appealed to the U.S. Supreme Court, where they won in on the grounds that the due process and equal protection clauses of the Fourteenth Amendment protected

same sex marriage in *Obergefell v. Hodges* (2015).

2.5 The Design of the Study

As described, this dissertation has adopted a quantitative approach, collecting more than 3000 observations. This approach is advantageous for different reasons. First a high number of observations creates the opportunity to consider the data both qualitatively and quantitatively. Farole (1998), for example, listed the number of cases where active political interests participated in the federal and state courts. With more observations, much of this qualitative research can be replicated, but also regression and other statistical techniques can be employed in order to examine the relationships between political interests and the courts. Second, study with a high number of observations creates the opportunity to study the less active political interests. While public interest law firms and the most active political interests make strategic decisions about whether to enter into the state or federal courts, the less active political interests, seemingly, do as well, given the often-high cost of participation in the courts, even for relatively inexpensive litigation strategies like *amicus curiae*. Next a quantitative analysis creates the opportunity to consider the effects both of judicial advantage and resources. Existing theory asserts that political interests will seek out the state court only when there is a legal advantage to doing so and the political interest has state level attorneys and other resources. He finds in obscenity cases following *Miller v. California* (1973) which gave legal advantage to the state judiciaries that state chapters litigated when they had access to state level attorneys and resources; nonetheless, this effect was only observed in a few cases. A qualitative approach gives the opportunity to examine this hypothesis.

This research generated data based on the information in *Westlaw*, which the text above describes. Entrance into a court by a political interest represents the unit of

analysis. The different litigation strategies, described above, include amicus curiae, test cases, sponsorship, direct participation and participation as a third party. For eminent domain and marriage equality, this study took approximately 20-year samples between January 1995 and June 2015. This research sampled from case families; consequently the data includes some cases prior to January 1995. For each act of participation in the courts, this research recorded the name of the organization, along with other important information such as the name of the court, litigation strategy, type of political interests, date, the political interest's side in the case and whether the political interest was a state or national group. This study organized related cases into case groups. In all this research collected 2072 observations in the marriage equality legal area, 1568 in eminent domain. Taken together , there are 3640 total observations.

In determining whether the federal or state courts held the advantage, this study employs two techniques. The first is an examination of the history of both marriage equality and eminent domain. With the legal areas that Farole selected, obscenity and eminent domain, and marriage equality there was a natural tendency for political interests to select the federal or state courts more often. As noted, with obscenity, the break between federal and state courts holding the advantage came with *Miller v. California* (1973). With marriage equality, this divide happened around the time that political interests challenged California's Proposition 8 on federal grounds.

The second technique comes from a coding of court cases. While federal courts are largely limited to the interpretation of federal law, state courts interpret both state and federal statutes. This creates ambiguity as to whether there was a federal or state legal advantage in the state courts, given that a state court can decide a case based on federal law. The U.S. Supreme Court considered this problem in *Michigan v. Long* (1983), and declared that cases were decided on federal law, unless the court

explicitly noted that the decision rested on state law. Scholars have applied these criteria to code whether cases were decided on the basis of federal law (Esler 1994; Latzer 1991; Fino 1987).

Farole establishes two criteria: First, did state law offer greater protection than federal law? Second, did state legal precedent give greater protection than federal law? This study, similarly, codes cases in the state courts as holding a state advantage if they rested on state law, e.g. a clause in a state constitution giving greater protection than the U.S. Constitution, or legal precedent. Ultimately, these data show that courts decided eminent domain cases with federal law and marriage equality cases on state constitutional law, up until legal efforts to invalidate California's Proposition 8.

This study distinguishes between state and national political interests, which proved to be challenging, as research cannot always place the organizations active in American politics into either category. For example, some political interests operated in more than one state. The Chesapeake Bay Foundation, for example, attempts to influence environmental policy in all of the states with shoreline on the Chesapeake Bay. To complicate matters further, some regional groups had grown and taken on a national political orientation. The Mountain States Legal Foundation gives one example. The group had once represented property owners in the American mountain west. The organization, however, was successful and is today a national actor. International political interests and non-governmental organizations, too, have a hand in American politics.

This research categorized political interests as state political interests if the name of the organization also included the name of a state. If the name of a state was not part of the group's title, this study categorized the political interest as a state group if it was clear that the organization was a political actor at the state level, or if it was clear that the organization did not have the resources to pursue policy

at the national level. An alliance of community centers in Los Angeles advocated for marriage equality, for example, most likely would not have the human or capital resources (see Gerber 1999) to pursue policy in Washington, D.C.

This dissertation classified the state chapters of federated interests as state political interests. This breaks with the current classification scheme (see Wolak et al. 2002), which categorizes state chapters as being part of national interests. This was done for two reasons: First, these groups are often semi autonomous, with the resources to enter into independent litigation. Second, these state chapters are embedded within state politics. Their members most likely live in these states and work through state political communities. True, the issues they confront might be national issues, like both marriage equality and eminent domain; nonetheless, because these groups are oriented to state politics they will most likely seek policy changes on these national issues in their state political communities.

These data were supplemented with more information. The name of the court and the judge(s) or justices who decided the case was noted, in addition to the party of the governor or U.S. president who appointed the magistrate, or the party label of the judge, if she ran in a partisan election. Other key pieces of information include the judicial selection method if the case was decided in a state court. These data were primarily taken from *Ballotpedia*, an online digital collection of information on elected officials and elections that can be accessed on the internet.

One key advantage of these data is that they were sampled from throughout the 50 states and at all levels of the U.S. courts, both federal and state. As noted prior research sampled from 5 states and the U.S Supreme Court, in addition to state appellate courts. These selection choices were most likely representative of the larger United States, yet one cannot be certain. This sample, while it does not account for all of the activity in the courts, does not experience this problem.

2.6 Conclusion

To examine the participation of political interests in the courts, this study has sampled from two areas of law: marriage equality and eminent domain. These issue areas will give the opportunity to retest the existing incentive structure yet also whether there is a state political orientation for state political interests, also whether this affects the relationship that political interests have with judicial federalism. These data are more complete than previous samples, taken from each of the different levels of both the federal and state courts and from court cases in all of the states. Consequently, these data give the opportunity to test the relationships that political interests have with judicial federalism more thoroughly, with both quantitative and qualitative analysis.

This study has chosen to sample from classically defined political interest groups, yet also political interests. This is consistent with the existing literature, given that Farole included public interest law firms in his sample, which do not meet most definitions for political interest groups. It is also necessary because much of the decision making with political interests and the courts originates from the public interest law firms, but also non-membership groups, which are becoming increasingly prevalent.

The next chapter turns to the concept of a state political orientation of state political interests. Existing research does not distinguish between state and national political interests, yet this study will argue that it is important. It will also lay the foundation to the following chapter, which will examine in-state political orientation.

Chapter 3

THE IN-STATE POLITICAL ORIENTATION OF STATE POLITICAL INTERESTS

3.1 In-State Political Orientation?

This research has argued that state political interests have a unique orientation to state policy making, and this unique orientation changes the incentives to take action in both the federal and state courts. Yet this concept of state policymaking orientation is not entirely clear. Does an in-state political orientation exist for state political interests? Do state political interests find themselves bound to the politics of their respective states? How does this orientation to state politics shape the way that state political interests interact with their national counterparts on political issues? Also, if state political interests do hold a state orientation to politics, does this matter, and does this matter when considering the actions that state political interests take in the American courts?

Some previous research on political interests has concluded that national and state political interests are very similar, and argue that there are no important differences between these types of groups (Hunter, Wilson and Brunk 1991; Nownes and Freeman 1998; Morehouse and Jewell 1981). Other researchers have found differences. Rosenthal (2001) for example finds that state lobbyists place much greater emphasis on cultivating personal relationships than their national counterparts. Yet even if state political interests are similar to their national counterparts, this does not mean that their political orientations are as well, given their embeddedness in state politics. Groups then may be structurally the same. These groups, however, find themselves

in different environments. Consequently, one might expect that their actions would be different because of their political embeddedness.

Yet does this embeddedness create a state political orientation? The existing literature is not conclusive. It give reasons why state political interests may or may not be oriented towards state politics. Nonetheless, understanding the orientation of state political interests to state politics will become increasingly important as more recent studies have begun to examine more closely the relationship between policy creation at the state and national levels (e.g., Baumgartner, Gray and Lowery 2009). Consequently, understanding state political orientation becomes increasingly important, as it can explain differences between the actions taken by state and national groups. This study is not an exception.

In considering state political orientation, there is little research. One place to begin is with studies on nationalization, which asserts that political groups, both state and national, are becoming more alike. Generally, nationalization suggests the opposite of a state political orientation. With nationalization the political interests show greater similarities. With a state political orientation political interests show important differences as a result of their location. One might expect that these forces are antagonistic. Greater localism creates less nationalization and vice versa.

The nationalization of state politics has taken on three meanings (Wolak et al. 2002). In the first definition, nationalization refers to the increasing tendency for political interests to become more alike. At one point in time the forces that drove the creation of state political interests were more dissimilar because the states were separated by different cultures (e.g., Elazar 1972), economics (e.g., Hrebentar 1987) and geographic distances. Nonetheless, these political interests are becoming more similar because the forces acting on the states are becoming more similar. For example, the economies of states are becoming increasingly homogeneous. This drives

the creation of state political interests (Lowery and Gray 1994), which are more alike than dissimilar.

The second meaning of nationalization concerns the professionalization of political interests. Initially, state political interests were not highly professionalized unlike their national counterparts. Rather, these groups were close knit, and lacked the capabilities of political interests in the national capital (Gray and Lowery 1996; Hrebenar 1987; Thomas and Hrebenar 1991, 1999). Yet, state political interests became more professionalized, especially following policy devolution beginning with U.S. President Richard Nixon (Rosenthal 2001). During this time, national political interests helped to create multi-state lobbying firms, which in many ways resembled their national counterparts, with access to sophisticated surveying techniques and data analysis capabilities (Jacobson 1997).

The final meaning of nationalization examines the political actors within a particular state. If the political interests originate from the state, then there is less nationalization than if the actors came from other states or the national level. This is distinct from the first meaning in that it does not ask if the actors are becoming more similar, but rather are the actors tied to the states themselves.

3.1.1 Why State Interests Might have an In-State Political Orientation

Wolak et al. (2002) consider localism within this third context. Ultimately, they find that most political interests had only registered in a single state. Also, at the state level, in 21 out of the 50 states, the majority of organizations had only registered in that particular state, with the modal number of registrations for political interests that did register in more than one state as two. This evidence supports their conclusion that American politics is in fact local, which supports a lack of nationalization and an in-state political orientation. Otherwise, there would have been more

out-of-state lobbying registrations.

This is nonetheless not the only evidence. Most of the existing literature argues strongly for what this study has labeled an in-state political orientation. One early theory holds that the strength of state political interests were inversely proportional to the strength of political parties (Zeller 1954; Morehouse and Jewell 1981; Zeigler 1983; Hrebendar 1987; Hrebendar and Thomas 1992, 1993, 2010). The political orientation of these state political interests, then, would very much be local, given that their rise or decline would depend on state parties. Early research also discovered a business connection, arguing that the strength of political interests was directly proportionate to the strength of business (Zeigler 1983; Zeigler and Van Dalen 1976; Thomas and Hrebendar 1990). Here too internal state factors helped to shape the internal makeup of political interests in a state, which argues for an in-state political orientation. Zeigler (1983) also observes that the wealth of states was inversely related to the strength of political interests. Again, the internal characteristics of the states, here wealth, created the groups within the state political communities.

Studies by Hrebendar (1987); Hrebendar and Thomas (1992, 1993, 2010), beginning with *Interest Group Politics in the American West* also argue that the makeup of state interest group communities are very much the result of state characteristics. In their studies, Hrebendar and Thomas employed scholars and experts to write about the interest group communities in the states and the unique economic and often historical circumstances that may have created the communities of political interests. The authors considered interest group power in the context of the theories described above. Interestingly, however, the researchers of the individual states often found the existing theories to not be true. For example, Syer (1987) found that California's interest groups were strong in spite of party strength in the California legislature. The states themselves then created a unique set of conditions which produced a unique

set of political interests.

Population ecology too suggests that state political interests are embedded in their home states. In the population ecology model, each of the three factors that drive the creation of state political interests—energy, stability and area—are tied to the states themselves, albeit imperfectly (Gray and Lowery 2000). This is especially true with area. A state with a high number of farmers, for example, would be expected to also have many groups representing them. Conditions within the states then drive the creation of the interests with the states.

3.1.2 Why State Interests Might Not have an In-State Political Orientation

While the existing literature argues for a strong in-state political orientation, it does not suggest that this nesting in state politics is perfect. State political interests' policy orientation can reach well beyond the state level. One example comes from Gray and Lowery's (2000) ESA model, where political interest and enthusiasm causes the formation of political groups. This energy does not necessarily have to come from state politics, as Baumgartner, Gray and Lowery (2009) found when they discovered a positive relationship between U.S. Congressional hearings and the lobbying registrations of star political interests.

Other research also gives reasons why in-state political orientation might be less than perfect. Political scientists have shown the co-evolution between political interests at the state and national levels. Baumgartner (2004) illustrated how social movements both at the state and national levels led to greater Congressional attention to the environment, civil rights and other issues. Mettler (2005) described the rise of state and national interest groups following WWII and the G.I. Bill, while Campbell (2005) showed the evolution of senior citizen interest groups throughout society following the passage of Social Security. A number of other studies show these linkages

both at the national and state levels. These include: Baumgartner and Jones (2010), Skocpol (1992) and Soss (2002).

3.1.3 In-State Political Orientation and the American Courts

Wolak et al. (2002) concluded that much of state politics was still local, given that most of the political interests in their sample were only registered in a single state. Yet does this observation also hold true in the American courts? Seemingly, if state political interests have an orientation to local politics they will enter into out of state courts infrequently. While this question was considered in the context of lobbying registrations (Wolak et al. 2002), it has yet to be considered in the context of the courts. If state political interests enter into out of state courts frequently, then, they hold a political orientation that is like their national counterparts—one that is more national than local.

The institutional structure of the American courts, however, complicates this analysis. What exactly does entering into an out-of-state court mean? A state political interest might act in a court that has the power to affect policy in more than the home interest's state. If a political interest in Washington State appeals a case to the Ninth Circuit Court of Appeals, the ruling of that court would affect all the states that belong to the Ninth Circuit. Yet, this progression is to be expected, given that the federal district courts in western and eastern Washington belong to the Ninth Circuit. The legal actions of state political interests in the U.S. Supreme Court also fit this definition. This might be called an example of unintentional influence.

There are cases, however, when state political interests act in courts in which the decision has no effect on policy in the political interest's home state. This is an example of extraterritorial influence. If a political interest from Iowa, for example, took a legal action in Michigan, the decision of that court would have no effect in

Iowa. Also there are no direct institutional channels from the Iowa to the Michigan courts. A court case that originates in Iowa does not naturally progress to Michigan. The same holds true for the federal courts. State political interests can enter into legal action in a federal circuit that does not include the political interest's home state, yet there is not a natural progression to this court.

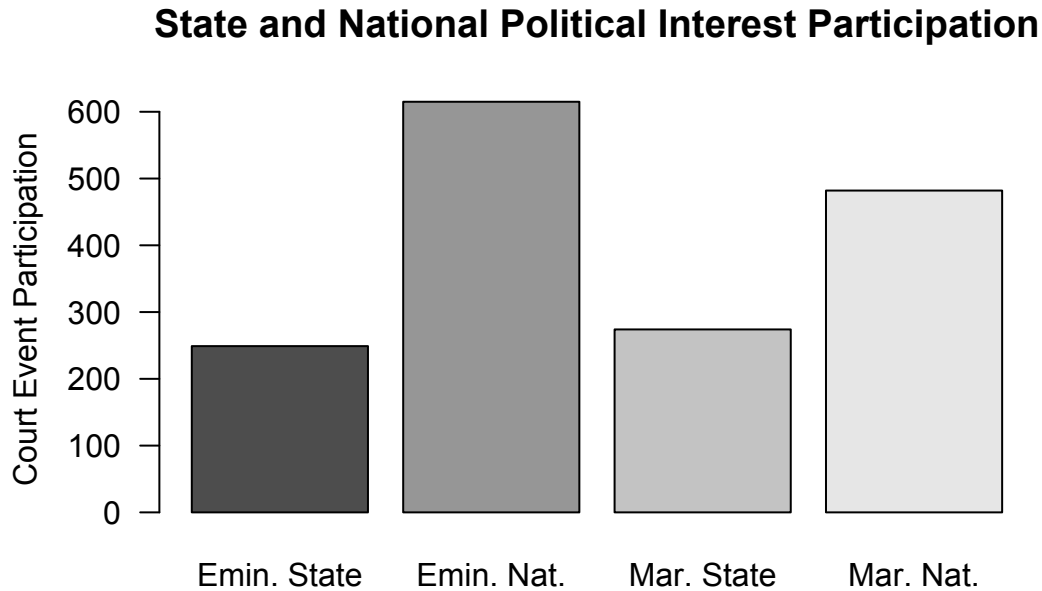
3.2 Investigation of In-state political orientation

This research will examine in-state political orientation three ways: First does an in-state political orientation matter? If state political interests are active in political issues with their national counterparts then this orientation arguably could. Second does an in-state political orientation exist? If state political interests take most of their legal actions in their home state courts and federal courts with jurisdiction over the home state then arguably these interests do hold a state orientation. Third what are the reasons why a state political interest might pursue policy outside of its state or federal district court that holds jurisdiction over the interest's home state? This may help to identify exceptions to the in-state judicial orientation of state political interests. To answer these questions this research will draw on the data collected and described in the previous chapter.

3.3 Does an In-State Political Orientation Matter?

Ultimately, this research attempts to answer the question whether an in-state political orientation matters in the context of political interests and judicial federalism. But, for now, perhaps the question to ask isn't does an in-state political orientation matter, but rather does an in-state political orientation have the potential to matter. This question can be informally assessed by examining the rates of participation of national and state political interests in marriage equality and eminent domain.

Figure 3.1: Court Participation by State and National Political Interests



This figure shows the number of times both state and national political interests took legal actions in eminent domain and marriage equality cases.

Figure 3.1 shows that state political interests are very active relative to their national counterparts. In eminent domain cases, state political interests took 249 out of 849 legal actions, slightly less than a third of the total count. In marriage equality cases, actions taken by state political interests comprised 274 out of 770 instances of legal participation. This represents slightly more than a third of the policymaking activity in the courts in this legal area.

Clearly, both issues—eminent domain and marriage equality—are national issues and have policy effects beyond the borders of any one state. If state political interests are active in high numbers relative to their national counterparts, then, a state orientation clearly has the potential to matter.

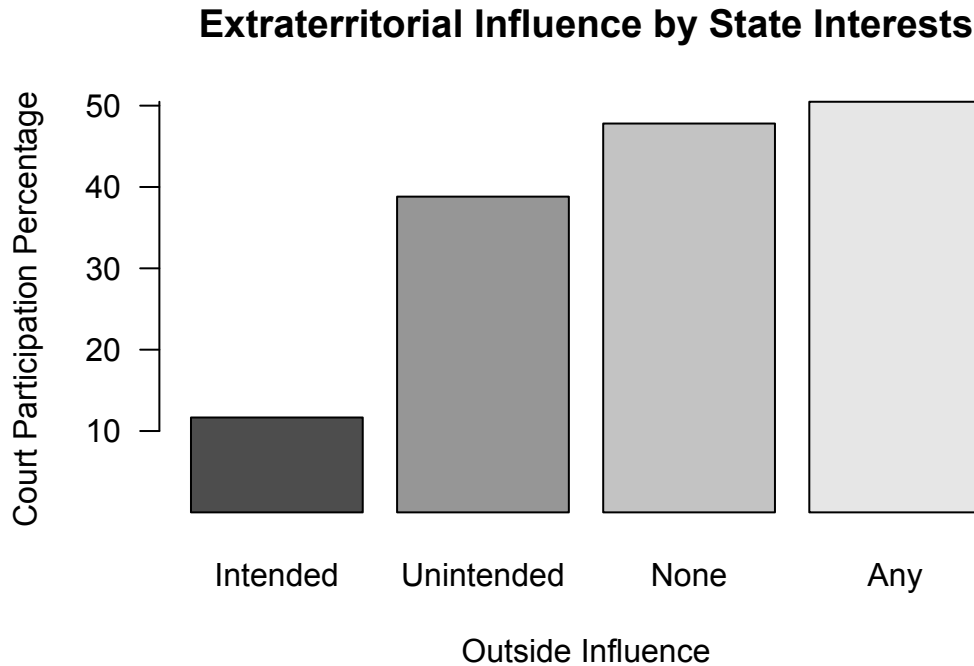
3.4 Do State Political Interests Have an In-State Political Orientation?

The second question asks whether state political interests are state political actors, or whether these interests become national policy makers, either intentionally or unintentionally? Earlier the difference between intentional and unintentional influence was described. In unintentional scenarios, state political interests enter into federal courts of appeals where the outcome of the case has the potential to affect policy beyond the borders of the political interest's home state. Nonetheless, this influence is unintentional because this court holds jurisdiction over the interest's home state. Intentional influence is when a political interest seeks legal outcomes in a court that has no jurisdiction over the political interest's home state. This can be because the political interest has entered into another state court or a federal court of appeals that lacks jurisdiction over the political interest's home state.

This question, too, can be examined with the data collected. There were 523 instances of participation by state political interests in the courts. In slightly more than half of these legal actions, the decision of the court may have influenced policy outside of the borders of the political interest's home state. This is shown as a percentage in Figure 3.2 under "Any." These data suggest that state political interests are often national policy actors, given that more than half of the actions took place in courts where the decision had the potential to create national policy.

Nonetheless, this is somewhat misleading because 40% of the total instances of interest participation falls under the "unintentional" category, where the institutional structure of the American courts forced the political interest into the position of national policymakers, given that the federal court holds jurisdiction over the interest's home state. This is shown under the "unintentional" bar. The "intentional" bar shows that about 10% of the court activity took place in courts where there were no

Figure 3.2: Out of State Court Participation by State Political Interests



This figure shows when state political interests are in the position to influence policy in the courts. The “Intended” bar shows the percentage of legal actions taken in out of state and U.S. Courts of appeals without jurisdiction over the “home” state court. The “Unintended” bar shows the percentage of legal actions taken in federal courts with jurisdiction over the “home” state. The “None” bar shows the percentage of legal actions taken in the political interest’s “home” state. The “Any” bar combines the first and second bars, and shows the percentage of cases where state political interests were in the position to affect policy beyond the borders of their home state.

policy consequences in the home state.

These results very much suggest that state political interests hold a state orientation to policymaking via the courts. In approximately 90% of the observations the state political interest acted in a court which was tied with the interest’s home state, either because the action took place in a court belonging to the interest’s home state or a federal court with direct jurisdiction of the state political interest. There appears to be a relatively low incentive to act in outside courts. The rate of extraterritorial influence, about 10%, is very similar to the percentage of lobbyists that registered in more than one state (Wolak et al. 2002). Nonetheless, this statistic is not substan-

tial. Also it doesn't include participation in the U.S. Supreme Court, which holds jurisdiction over all of the states. When the observations in the U.S. Supreme Court and Federal Court of Appeals are not included in the observation pool, the rate of extraterritorial influence increases to 16%, which is almost exactly the same as "unintended" influence, or the cases where the political interest entered into a federal court of appeals with jurisdiction over the interest's home state.

3.5 Why State Political Interests Leave their Home State

Most often state political interests turn to either state courts or federal courts with jurisdiction over the home state. Nonetheless, there seems to be instances when state political interests willingly become out of state actors. This research proposes that understanding these instances when state political interests leave their home states will help in better understanding localism and the American courts. The existing literature has not addressed why a state political interest might enter into out of state courts. The literature does however offer suggestions as to why state political interests might do this.

Group or Political Interest: American politics is populated not only by classical interest groups but by non-membership organizations (Salisbury 1984). These organizations have access to resources that rival and often exceed their membership counterparts (Schlozman et al. 2015). Representation within the organization, too, is different. Those who make strategic decisions for political interests often must take into account the wishes of their members (Holyoke 2003). Yet, the participants in non-membership organizations are not like the members of membership organizations; they most likely do not vote or elect their leaders. As a result, they have less ability to object to the decisions made by those on top. It is reasonable to assume then that these organizations would be more inclined to pursue policy in out of state

courts because their leaders have more power to do so without interference.

Purposive vs. Material Organizations: Purposive organizations work towards a purposive goal. Material organizations, on the other hand, protect the material interests of their individual members or businesses. This research proposes that purposive organizations would be more likely to enter into out of state courts because these organizations might see achieving a purposive goal in a different state as being equally valuable as it is the home state. Past research supports this assertion. Zeigler (1983) and Thomas and Hrebenar (1999) observed that state political interests increasingly shared resources, often through interstate political action committees, which, in turn, could be used to fund elections or influence policy in multiple states.

Participation: Political scientists have found that political interests respond to conflict, as a moth is drawn to light (see Holyoke 2003; Olson 1990; Scheppele and Walker Jr 1991). This happens two ways: First a political interest is more likely to enter into a venue with a partner group in a coalition. Second, political interests will more often enter into a political venue with their opponents (Holyoke 2003).

Federated: National political interests have taken a much greater interest in state policy, especially following U.S. President Richard Nixon's efforts to give greater policymaking power to the states Rosenthal (2001). For example, national political interests have formed close relationships with their state-level counterparts and established local chapters. This federated structure was advantageous for the state political interests because their national counterparts could help these organizations, resulting in greater professionalization. Yet, it was also advantageous for the national political interests because these groups gained the local expertise of their state counterparts. In the courts, this partnership gave national political interests greater access to state attorneys, knowledgeable in state law (Farole 1998).

Density and Diversity: In states there exists unique makeups of political inter-

ests (e.g., Gray and Lowery 2000). Gray and Lowery consider the makeup of political interests largely in two ways: density and diversity. Researchers have examined how density and diversity influence the makeup of state political communities (e.g., Lowery and Gray 1993; Gray and Lowery 1993) Political scientists have also connected these measures with the actions taken by groups. Wolak et al. (2002) found that political interests from states with high density were more likely to register to lobby in more than one state. Their density measure represents the number of political interests in a state, while diversity represents the different types.

The density and diversity of states might cause state political interests to enter into out of state courts. First, there is crowding in states with high densities of political interests (Gray and Lowery 1998). The literature suggests that political interests overcome the “crowded room” problem through partnerships with similar groups. A state political interest might also enter into a different state to win attention in a different niche. With diversity a state political interest might be more likely to go out of state when the group can uniquely speak to a particular case or controversy in that state. In states with greater interest group diversity, there would seemingly be more opportunities for this to happen.

State political interests might also enter into an out of state court because a policy event has motivated the group to do so. The population ecology model (Gray and Lowery 2000) argues that groups emerge and respond to policy events. Baumgartner, Gray and Lowery (2009) found that Congressional hearings affected state lobbying in three ways: contemporaneously, substitution and simulation. The substitution effect conceptualizes American federalism as political venues. If political interests cannot pursue policy at the federal level, these groups can always turn to states. This would also hold true for state interest groups. These groups can turn to other states or the federal government if these groups believe that they cannot effectively

change policy in their respective states. This pattern has been well documented in the national context. Walker (1991), for example, observed that citizen interest groups did not emerge until after the U.S. government implemented redistributive government programs prior to and following World War II. These organizations were created because there was demand to safeguard these recently won benefits like Social Security.

Judicial Ideology and State Judicial Selection: Political scientists often study judicial ideology and state judicial selection methods with the courts. State political interests may enter into out of state courts where the leaders of the organization believe that it is advantaged, either by the judicial ideology of the court or the state's judicial selection method. Ideology is a powerful determinant of judicial behavior, particularly the U.S. Supreme Court (e.g., Segal and Cover 1989; Segal and Spaeth 2002), but also among federal judges (e.g., Epstein, Landes and Posner 2013) and state Supreme Court judges (e.g., Hall and Brace 1992). States also select their judges or justices differently. These selection methods include: partisan elections, non-partisan elections, the Missouri Plan, and legislative selection. Under partisan elections, judges or justices have the least independence from the electorate, while under legislative selection, judges have the most, given that they are not popularly elected and do not have to stand for reelection. State-level judicial selection methods have been shown to have an effect on judicial behavior (Hall and Brace 1992; Langer 2002). If political interests know this, there is an incentive to use judicial selection to their advantages (Comparato 2003)

3.6 Operationalization

This study generated these data from information in *Westlaw Next*. From a larger sample of 3639 observations, this research took a smaller sample of 523 observations

where a state political interest was on the side of the party that brought a suit before a court, either as an appellant, petitioner or plaintiff. This research included interest groups, in addition to other organizations active in the courts such as nonprofit organizations without members, public interest law firms , university groups, unions, think tanks and bar associations, both state and private. This dissertation examined political interests rather than interest groups alone to capture a large enough sample size for quantitative analysis. The data show that membership organizations, i.e., interest groups, participate less often in the courts than did non-membership groups. The unit of analysis is an act of participation in the American courts. This research coded the important variables as follows:

Out of State Court Action: This measure represents the dependent variable. This research marked legal actions in the courts as 0 if the action took place in a state court, federal district court or court of appeals associated with the political interest’s home state, in addition to those cases in the Supreme Court or a federal specialty court, like the U.S Court of Federal Claims. If the action took place in an out-of-state court or a court of appeals that does not have jurisdiction over the interest’s home state, then the observation was coded as 1, showing an extraterritorial action.

Group or Political Interest: This research based its measure on Walker’s (1991) typology, categorizing “interest groups” as those that Walker included in his typology. Otherwise, this research labeled the organizations as “political interests.”

Purposive versus Material Organizations: This research categorized state political interests as purposive if the organization advocated for purposive rather than material goals.

Conflict: This measure captures the amount of conflict between political interests. The measure represents the total number of acts of participation in a legal case

Federated: This research categorized state interests as federated if the group met one of two criteria: First, the political interest was a chapter of a national interest. The San Francisco Bay Chapter of the Sierra Club is clearly a local affiliate of the Sierra Club, yet, this organization can and does enter into its own litigation. These examples were usually obvious, as the name of the state organization often included the name of the parent organization and the state to which it belonged. Second, this study categorized state interests as federated if it was clear that the state interest maintained close ties with a national counterpart, yet the organizations were independent. The Alabama Policy Institute, for example, is a state level partner with Focus on the Family, a national political interest. This was determined by entering the name of the suspected national counterpart and the phrase “state affiliates” into Google, an Internet search engine.

Density and Diversity: Gray and Lowery (2000) describe density two ways: density in the electorate and density before government. This study adopts the second measure, density before government, in considering localism and the courts, which is created by taking the number of lobbying registrations for a state in a single year. Prior research on state localism also adopted this measure (Wolak et al. 2002). This study also considers the impact of diversity. Gray and Lowery created their measure using a Herfindahl index, which showed the probability that lobbying registrations in the economic sector will belong to a particular guild, like mining or banking, for example. A lower Herfindahl score signals greater diversity. This research calculates the density and diversity measures this way, but with newer data, from 1997 and 2007, with the 1997 scores being used with court cases before 2003 and the 2007 scores after.

Ideology: Political scientists have created increasingly sophisticated measures of ideology, both for political interests (Bonica 2013; McKay 2008), for judges or justices

at the state level (Bonica 2013), and federal, for the U.S Supreme Court Segal and Cover (1989), and federal courts of appeal and district court (Giles, Hettinger and Peppers 2001*a,b*; Epstein et al. 2007). Unfortunately, despite recent efforts, there still does not exist common measures for the ideology of political interests, the U.S. Supreme, federal and state courts.

This research considers ideology in the context of out-of-state legal actions. This research operationalized ideology as the ideological advantages or disadvantages between either states or U.S. courts of appeal. To give an illustrative example: A liberal political interest in Washington State might take a legal action in California if there is an ideological incentive to do so. Yet, this incentive might not exist because Washington State is also liberal. An ideological incentive, then, requires that the state court visited be a stronger ideological match than the home state. A political interest might remain in the home state for ideological reasons as well. Yet this is much more difficult to construct, given that there is not a single alternative for comparison other than all of the remaining states. It is also unlikely that a political interest would stay in-state primarily for ideological reasons because the chances of there being a more liberal or conservative state available to litigate in is high.

The ideological advantage measure requires three other measures: political interest, state and federal court ideologies. To begin with the political ideology of interests, this research coded organizations on a -1 to 1 scale, with 1 showing a conservative organization, -1 a liberal orientation and 0 a group where the ideology was unclear, or where the group was oriented less towards politics. For most political interests, particularly those involved in the marriage equality debate, it was clear whether these groups were liberal or conservative. Professional organizations were generally assigned a 0 score.

For the ideology scores for the federal courts, this chapter adopted scores from

the Common Space Judicial Project Epstein et al. (2007). These researchers based their scores on measures originally created by Giles, Hettinger and Peppers (2001*a,b*), and are compatible with NOMINATE Common Space scores. Giles, Hettinger and Peppers (2001*a,b*) based their scores on senatorial courtesy.

For state courts, this research adopted Bonica's (2013) Cf-scores, which Bonica based on campaign contributions and are scaled the same as NOMINATE ideological scores. Bonica generated his Cf-scores in three ways: political contributions to the judge, campaign contributions made by the judge to other candidates and the ideology of the governor who appointed him or her if he or she is not elected. Congressional ideology can also be estimated with CF-scores. Bonica (2013) uncovered a strong statistical correlation between CF and DW-NOMINATE Congressional scores, which give greater validity to the measure.

This research created ideological advantage scores from these three measures. For state courts, this chapter found the ideological mean of the state supreme courts by averaging the ideological scores of each of the justices for a particular year. This study then used this score as an ideological proxy for all of the state courts for a particular year. For federal courts this research employed a similar strategy, averaging the ideological means of the judges in each of the federal circuits. This chapter then adopted these means as proxies for the lower federal district courts directly beneath a circuit.

This research then coded ideological scores the following way: If a political interest was liberal, the ideological advantage score was coded as one if the visited state or circuit court was more liberal than the home state alternative; the analogous procedure was followed for conservative organizations. Entrance into the U.S. Supreme Court and specialty federal courts was coded as 0 because these courts do not offer alternatives. Groups that were coded as ideologically neutral also received neutral

ideological advantage scores given that these groups are categorized as equidistant between conservative and liberal courts.

State Judicial Selection: State political interests might enter into different state courts if they believe that a particular state’s judicial selection method might advantage them. State judicial selection is tied to ideology; consequently judicial selection cannot be considered independently. To evaluate judicial selection, ideological advantage was interacted with four judicial selection methods: partisan election, non-partisan election, Missouri Plan and legislative appointment. Political interests, then, should seek out state courts that are ideologically favorable in conjunction with judicial selection methods that expose judges to popular opinion that favors the position of the political interest.

3.7 Reasons why Political Interests Enter Outside Courts

What, then, motivates state political interests to enter into out of state courts? This question was tested using logit. Table 3.1 shows three results from different equations, with the first combining state political interest activity for both eminent domain and marriage equality. Legal area, a dichotomous variable, either marriage equality or eminent domain, was used to control for variation introduced by the legal areas. The second and third models only test cases in marriage equality and eminent domain, respectively; as a result, the legal area term was not included. In each of the models, the dependent variable is extraterritorial action. In all, there were 60 instances of extraterritorial participation, 51 in marriage equality and 9 in eminent domain.

Table 3.1 shows that a number of the independent variables showed positive associations with extraterritorial legal actions. With a Maximum Likelihood Estimation logit model, the coefficients are not as easily interpretable as in logistic regression.

To give readers a sense of the impact of the significant explanatory variables, the log odds, an alternative way of expressing probability, are included in the discussion below in instances where there was a statistically significant relationship.

Interestingly, the group or political interest variable did not reach statistical significance in any of the models. Political interests clearly outnumbered classical interest groups (52 to 9), yet they did not show a positive relationship with legal actions in out-of-state courts. Seemingly, political interests would be more likely to enter into out of state courts, given that these organizations lack in state membership to discourage them from taking potentially actions that would not directly benefit their in-state membership, yet these data do not suggest this.

These regressions do not show a statistically significant relationship between non-membership groups and the decision to enter into out-of-state courts. The coefficients in the combined and marriage equality models nonetheless are signed in the correct direction and come very close to reaching statistical significance.

The regressions show that purposive political interests are positively associated with entrance into out of state courts. Purposive political interests were positively associated with extraterritorial legal actions in both the combined and eminent domain models. This relationship was especially strong in the marriage equality model. The eminent domain model did not reach significance, yet is signed in the correct direction. This research has argued that purposively oriented groups should be more likely to enter into out-of-state courts because these groups work towards a purposive goal which may be achieved in a different state. In the combined model, the log odds show the probability of a purposive group entering into an out-of-state court is 1.07, or 7% greater.

The conflict variable achieves statistical significance in the combined and marriage equality models. Prior work argues that political interests are attracted to conflict

Table 3.1: Causes of Out of State Court Participation by State Political Interests

Variable	Model 1:	Model 2:	Model 3:
	Combined	Marriage Equality	Eminent Domain
Legal Area (Marriage Equality)	0.006 (0.03)		
Group or Political Interest (Interest)	0.04 (0.02)	0.08 (0.04)	-0.01 (0.02)
Purposive vs. Material (Purposive)	0.07* (0.02)	0.16* (0.04)	0.04 (0.02)
Conflict x 100	0.07* (0.01)	0.1* (0.02)	-0.05* (0.03)
Federated	0.06* (0.02)	0.07 (0.03)	0.04 (0.02)
Density x 100	-0.004* (0.001)	-0.01* (0.002)	-0.001 (0.001)
Diversity	2.04 (1.14)	6.06* (1.95)	0.8 (1.1)
Ideological Advantage	0.7* (0.08)	0.6* (0.09)	
Missouri Plan	-0.8* (0.03)	-0.03 (0.05)	
Ideological Advantage * Missouri Plan	0.2 (0.17)	0.24 (0.20)	
N	523	272	251
AIC	78.25	121.87	-121.79

* $p < 0.05$

The dependent variable shows instances when state political interests entered into courts with no jurisdiction over the “home” state. It’s coded as 1.

in different government venues. Conflict then seemingly is one important factor in whether political interests choose the federal or state courts. The measure did not however reach significance in the eminent domain model. Competition then may help to drive legal venue choices in some issues more than others.

Density and Diversity may impact the decision to enter into an out-of-state court. The state political density of interests is negatively associated with the decision to enter into out of state courts. This finding is consistent with prior research on state political interests and localism, which observed that the density of state political interests is negatively associated with out-of-state lobbying registrations (Wolak et al. 2002). It does not support the contention that state political interests are more likely to leave their home state when there exists a higher concentration of political interests. With marriage equality, this model shows that diversity is positively associated with entering into out-of-state courts. This research has proposed that there is a greater chance that a group from a politically diverse state would be able to speak to a particular case. Perhaps the marriage equality results show this.

This research proposed that state political interests would be more likely to enter into out of state courts. In the combined model, the results show a positive association between federated partnerships and political interests entering into out-of-state courts. The other two models do not show this relationship, but each comes very close to reaching statistical significance. In the combined model, the log odds show that a federated structure increases the likelihood of a political interest entering into an out-of-state court by 7%.

The ideological measure could be tested in the marriage equality and combined models. In eminent domain, there existed no examples of state political interests selecting an out-of-state court where their ideological advantage was greater than in the home state. Ideological advantage showed a positive relationship with out of

state legal actions in both the marriage equality and combined models. These results are consistent with the argument that state political interests seek out courts that are ideologically more advantageous. For the marriage equality model, the odds of a political interest going out of state when there is an ideological advantage are 83% higher than when there does not exist an advantage; whereas with the combined model, the odds are 202% higher.

With judicial selection, the state political interests that entered into out-of-state courts did so in Missouri Plan States. These data did not then give the opportunity to test the effect of judicial selection in states that elect their judges. The Combined model does show a negative relationship between Missouri Plan States and state political interests entering into an out of state court. This suggests that the selection of judges may impact the choices that political interests make. The combined model shows that likelihood of state political interests entering into an out-of-state court where the judges are chosen by the Missouri Plan are 4% lower. The interaction between judicial selection and political ideology does not produce statistically significant results.

3.8 Conclusions

This chapter has asked three questions: The first is there enough participation from state political interests to make research on the relationship between state political interests and judicial federalism worthwhile. The answer is clearly yes. From the sample, state political interests took approximately a third of the legal actions. Clearly, this percentage is not small and shows that state political interests are active participants in policymaking in both the national and state courts. If state political interests are active participants then a state policy orientation clearly has the potential to matter, given that it may change the incentive structure for where and how

these interests participate in the American courts structure.

The next question considers whether state political interests have a national or in-state political orientation. This question was examined by considering instances when state political interests had entered into court without jurisdiction over the political interest's home state, whether in the federal or state courts. In all, state political interests entered these extraterritorial courts about 10% of the time. This figure is large and small, depending on one's perspective. Most of the time state political interests either remain in the courts in either their home state or a federal court with jurisdiction over the home state. This argues for an in-state political orientation. Yet, this also included Supreme Court cases. When these cases plus those in federal specialty courts are excluded, the percentage increases to 17%. State political interests can and do become actors in other states. In both subsamples, entrance into home state courts was high, beginning at about 50%.

Finally, why do state political interests enter into courts without jurisdiction over their home states? Under what conditions, then, would we expect that state political interests would be more likely to become national as opposed to state policy actors? Ultimately, the results of a logistical regression did not point to any one factor; nonetheless, some were especially powerful. These included a purposive policy orientation, high levels of participation by political interests, ideological advantage and a dense political environment in the interest's home state. These findings may show instances when we can expect state political interests not to show a home-state policy orientation in the courts.

The next chapter will examine qualitatively the last part of this chapter, which considered why state political interests turn to courts with no jurisdiction over the home state. This represents an underdeveloped area of public policy research, which a qualitative analysis can improve on.

Chapter 4

IN-STATE POLITICAL ORIENTATION: A QUALITATIVE ANALYSIS

In Chapter Three, this research considered why state political interests enter into courts that hold no jurisdiction in their respective home states. Ultimately, this research found that there is not one cause, but rather a number of different reasons often acting in combination with one another that cause state political interests to leave their home state courts. The groups that enter into out of state courts represent the exception to the idea of state political orientation. Understanding their reasons for doing so will help to better understand this concept.

Nonetheless, quantitative research alone might not give the most clear analysis because this particular area of inquiry remains theoretically underdeveloped. Previous work on the nationalization of political interests touches on localism (e.g., Zeigler 1983). Yet this work is often more descriptive of the phenomenon of nationalization rather than its motives. Using a population ecology framework (Gray and Lowery 2000) Wolak et al. (2002) found that state political interests in politically dense states with strong economies were less likely to register to lobby in other states.

Yet, is localism with the courts the same as with state legislatures? Also could there be other reasons why state political interests take political actions in other states—especially in the courts? In Chapter Three, for example, this research suggested that state judicial selection methods and ideology might affect the decisions of political interests, as it does with judges (e.g., Hall 1992). Localism, then, is a concept that remains theoretically empty, without much prior work to point future researchers in a direction.

Thus, the study of localism remains in the theory-building stages. While quanti-

tative techniques are well equipped to test existing theory, these techniques are not well suited to theory creation. Qualitative case studies, however, are very helpful for a number of reasons (Gerring 2006): One, case studies offer proximal evidence, hence the “relationship discovered among different elements of a single case have a prima facie causal connection: they are all at the scene of the crime” (Gerring 2006, p. 474-475), There is a good but not certain chance then that what is observed holds a relationship with the outcome of interest. Two, qualitative case studies can give light to causal mechanisms. Quantitative analysis, then, while it can establish statistical relationships between causal agents and outcomes, it often is not descriptive of the processes themselves. Case studies, on the other hand, are well suited for exactly this task.

Chapter Three tested a number of different explanations why state political interests might enter into a state or federal court that lacks jurisdiction over the interest’s home state. Briefly these explanations included: groups vs. political interests, material vs. purposive orientation, conflict, a federated structure, density and diversity, as well as ideology and state judicial selection methods. These explanations were rooted in theory. Yet these explanations did not speak directly to research on localism in the courts. It would be helpful then to make use of qualitative case studies for two reasons: First, these case studies can examine the validity of the explanations that this study has proposed. Two, these case studies might suggest causal explanations that were not previously considered. This chapter then aims to show how the explanations that this research has proposed are theoretically appropriate. Also this chapter can help to lay the groundwork for future research on localism, at least in the context of the American courts.

To accomplish these objectives this research conducted a number of case studies of state political interests that were active in both the eminent domain and marriage

equality issues. This study selected groups from the subset of data that was used in Chapter Three. Each political interest took a legal action hoping to favorably influence the decision of a court. In all six groups agreed to interviews, three that entered into out of state courts, three that did not.

To select the political interests for study, this research has chosen the diverse case approach (Gerring 2006; Seawright and Gerring 2008). In diverse case selection, a researcher selects cases that represent the values of the dependent, independent variables or different relationships between the explanatory variables and outcomes. A researcher generally selects extreme values for continuous and one from each category for categorical variables. Starting from a large-N dataset, researchers often use discriminant analysis to select cases for continuous, while random sampling is used with categorical variables. Generally, this approach does well at finding cases that are representative of different categories of theoretical interest.

This research has chosen to sample cases where state political interests both decided and did not decide to enter into courts with jurisdiction over the home state. This obviously is the dependent variable and is dichotomous. This approach avoids the problem of selection on the dependent variable. This research clearly shows interest in state political interests that go out of state. Nonetheless, in selecting only these cases, there is a greater chance of misrepresenting the motivation to enter into out-of-state courts. Those groups that stayed in their in-state courts too have insights to contribute as the counterfactual. In words, the motivation for a state political interest not leaving courts with jurisdiction over the home state helps differentiate to why an otherwise similar group might do so.

In selecting cases, letters were sent via email to organizations that were active in both the eminent domain and marriage equality issues, the names of which were found from the data collected and described in Chapter Two. Only state political interests

were considered, and these were the same groups examined in Chapter Three. The correspondence asked that the organization select a person knowledgeable about the organization. Often this individual was the director or head of the organization; sometimes this person was an attorney or legislative affairs coordinator. The initial response was very low and a second attempt was made to contact these organizations. Ultimately, six organizations agreed to the interview.

Each interview lasted about half an hour and was completed on the telephone. The semi-structured interviews consisted of 15 to 17 questions. The questions were constructed around the explanatory variables in Chapter Three, and were designed to help determine the motivations for that political interest entering into out-of-state courts or only in-state courts. This study has included these questions in the appendix. The representatives of each of the political interests was asked a slightly different set of questions based on whether the group did or did not stay in their in-state courts. The reason for this is that a group that entered into only in-state courts may have had the motivation to pursue its policy goals out of state, yet the opportunity to do so may have not presented itself. Consequently the representatives of these groups were asked if their organization would be willing to do so.

Ideally, this study would have selected a group to interview from each division in the dichotomous and the extremes of the continuous independent variables. Unfortunately, finding organizations that fit each of these categories was challenging. Yet, there was more diversity in groups than may have been expected for only six organizations. For example, this research proposes that purposive organizations should enter into out of state courts more often than their material counterparts. Both types of organizations are represented in the case studies. The Texas Municipal League, for example, is a material organization; it advocates for the material interests of its members while the Palmetto Family Council is a purposive group, pursuing its purposive

policy goals.

4.1 Political Interests

This chapter now gives its attention to the groups themselves. This research gives a brief description of each of the organizations and how each is either consistent or inconsistent with the theoretical expectations in its decision to either enter into out-of-state courts or stay in-state. These interviews were also used to consider how the explanations shown in Chapter Three could be incomplete. The analysis of the groups is organized around each of the independent variables in the regression in Table 3.1. For each organization, this research considers whether the interview responses support each variable contributing to the model proposed in Table 3.1. Also, this research considers whether the responses support the outcomes of the model, e.g., one would expect that purposive organizations would be more likely to enter into out-of-state courts. This research also provides a brief description of each organization and the cases that each was involved with.

4.1.1 *Palmetto Family Council*

The Palmetto Family Council is a non-membership organization in South Carolina that advocates for conservative policy, with a focus on issues that are perceived to affect families. The organization emerged in 1994 during a 20-year period of time between 1980 and 2000 when many conservative organizations formed to represent the interests of a growing conservative movement in the United States. The Palmetto Family Council is an independent state-level organization. It maintains strong ties with many national-level family-oriented conservative organizations including Focus on the Family and the Family Research Council, but also other state-level family policy advocacy organizations. Dr. Oran Smith, the president of the organization,

was interviewed.

The Palmetto Family Council participated in an amicus brief in *Perry v. Schwarzenegger* (2010), a case in a larger series of cases that are often collectively referred to as *Hollingsworth v. Perry* (2013). The case originated in the U.S. District of Northern California, where the plaintiffs brought suit against the State of California. In 2008 California voters approved Proposition 8, a state constitutional initiative that defined marriage as between a man and a woman. The plaintiffs filed suit on the grounds that this definition violated the equal protection given to individuals under the Fourteenth Amendment in the U.S. Constitution. The Palmetto Family Council signed an amicus brief that went before the 9th District of the U.S. court of appeals, which holds no jurisdiction over South Carolina. This is the only recorded instance of court participation by the Palmetto Family Council.

Group vs. Political Interest: According to Smith the Palmetto Family Council maintains close ties to many churches and congregations; nonetheless the group does not have open membership and cannot be categorized as a political interest group. Members do not make policy decisions. Consequently, the leadership has greater autonomy than a political interest group to take political actions that includes entering into out of state courts, which the Palmetto Family Council did in *Perry v. Schwarzenegger* (2010).

Purposive vs. Material: The Palmetto Family Council advocates for conservative, family oriented policy in South Carolina and is clearly a purposive organization. Their decision to enter into the California cases then is consistent with theoretical expectations.

Participation: Smith said that supporters and associates often put pressure on the Palmetto Family Council to take political action in many controversies. He emphasized that most of these controversies were state controversies that touched

on morality, family and ethics. These issues included the confederate flag, clearly a political issue that is specific to the Southern states. While there seems to be support for participation in political issues that are specific to South Carolina, this does not preclude support for participation in national issues, particularly those that affect both national and South Carolina politics. The marriage equality controversy is clearly an example of this.

Federated Structure: The Palmetto Family Council cooperates with both Focus on the Family and the Family Research Council. This research has categorized state interests with strong national partnerships as federated interests. The Palmetto Family Council's decision to enter into the Ninth Circuit Court of Appeals is then consistent with this study's theoretical expectations. Dr. Smith said that state organizations often have counterparts in other states. These sister organizations communicate and act on each other's behalf. In a federated structure, communication and resources do not only move between the state and national interests but also between the state political interests themselves. This, according to Smith, was key in the Palmetto Family Council's decision to enter into a California court. The research in Chapter Three did not anticipate this lateral cooperation between partner state-level political interests.

Density and Diversity: The data show that South Carolina does not have high interest group density (Gray and Lowery 2000, p. 87). Smith's perception of the density of conservative, family-oriented organizations in South Carolina was consistent with the data. Smith said that while there was slight competition for contributors, there were very few state organizations in South Carolina like the Palmetto Family Council and with political issues there often was a greater incentive to cooperate than to compete. Political density, then, was not a factor in the Palmetto Family Council's decision to take an out-of-state political action. South Carolina does rank high on

political diversity (Gray and Lowery 2000, p. 98). Yet this too does not seem to be a factor in the Palmetto Family Council's decision to enter into the Ninth Circuit Court of Appeals. Smith said that there were many state-level organizations like the Palmetto Family Council in other states. The organization then could not speak to the issue in ways that other state-level conservative policy organizations could not.

Ideology and Judicial Selection: Smith emphasized that the Palmetto Family Council rarely entered into the courts. Consequently, this was not an area of expertise to his organization. The Palmetto Family Council does not have in-house attorneys, instead relying on friends and associates. Nonetheless, Smith did not rule out the possibility that the Palmetto Family Council and other groups could be strategic. It does not appear, however, that the Palmetto Family Council was judicially strategic in its decision to enter into the California Courts, which are liberal, the Ninth Circuit Court of Appeals especially. Also the U.S. President and not the voters selects judges who sit on the Ninth Circuit. Judicial selection, then, was not a consideration.

Other Considerations: Smith said that the Palmetto Family Council does not wish to become involved in the politics of other states, asserting that states should make governance choices without the interference of political interests in other states. Smith nonetheless said that in *Perry v. Schwarzenegger* (2010) the decision was merited because California voters had approved Proposition 8. The Palmetto Family Council then saw itself as acting on behalf of the California voters in its entrance into the California courts.

4.1.2 Louisiana Family Forum

The Louisiana Family Forum, like the Palmetto Family Council, is a non-membership, conservative, family-oriented political interest. The Louisiana Family Forum focuses its attention on Louisiana politics and works to influence policy outcomes through ed-

ucation, lobbying and the courts. The Louisiana Family Forum was started between 1998 and 1999, the same as Palmetto Family, during a period of increased conservative activism. This research spoke with the Rev. Gene Mills, the president of the organization. The Louisiana Family Forum, like the Palmetto Family Council, participated in an amicus brief in *Perry v. Schwarzenegger* (2010), which was described in the prior description of the Palmetto Family Council.

Group vs. Political Interest: The Louisiana Family Council does not hold open membership. Consequently, its leadership can take actions without interference from members. Their choice to take action in the California courts was then consistent with theoretical expectations.

Purposive vs. Material: The Louisiana Family Forum pursues a set of policy goals that are articulated in its mission statement, which is “to persuasively present biblical principles in the centers of influence on issues affecting the family through research, communication and networking” (Louisiana Family Forum N.d.). The Louisiana Family Forum is then purposive. Its decision to take action in the Ninth Circuit Court of Appeals is consistent with theoretical expectations.

Participation: Mills said that friends and associates put pressure on the Louisiana Family Forum to take political action on various political issues. The Rev. Mills, however, said that the Louisiana Family Forum makes decisions based on the organization’s core values and is not “peer-driven.” So while the organization might take a political action in a high-profile case, the group would not act because of the attention given to a controversy or outside pressure. The high level of political participation in *Perry v. Schwarzenegger* (2010), then, does not seem to be a factor in their decision to file an amicus brief in the California case.

Federated Structure: The Louisiana Family Forum holds partnerships with Focus on the Family and other national conservative family-oriented political inter-

ests. Rev. Mills did not say that his group’s relationships with national political interests contributed to their decision to out-of-state courts. He instead emphasized the Louisiana organization’s autonomy in its decision-making. The Louisiana Family Forum’s partnerships with Focus on the Family and other national political interests did not seem to contribute to its decision to enter into the California courts.

Density and Diversity: The data show that Louisiana has moderate political interest density (Gray and Lowery 2000, p. 87). This research expects competition between political organizations for resources and out of state political participation. Mills did say that there were other state-level conservative family organizations like the Louisiana Family Forum. He did not, however, see the Louisiana Family Forum as competing with these other organizations, saying that there was not “a limited pie”. Density does not then seem to be a factor. With diversity, the data show Louisiana as having a higher diversity of political interests. The Louisiana Family Forum, however, only entered into one case, *Perry v. Schwarzenegger* (2010) where participation was high. While the diversity of political interests in the state is high (Gray and Lowery 2000, p. 98), the Louisiana Family Forum was not in the position to speak uniquely to the case. Diversity, then, does not appear to be a factor in its decision to enter into the California courts.

Ideology and Judicial Selection: Mills said that the organization was strategic about the courts that the organization took legal actions in. The Louisiana Family Forum’s participation in *Perry v. Schwarzenegger* (2010), however, shows that the Louisiana Family Forum was willing to enter courts that were not strategically advantageous, as the Ninth Circuit Court of Appeals is liberal (see Epstein, Landes and Posner 2013) and judicial selection does not hold an advantage, as the U.S. President selects federal judges. This research cannot then assert that ideology or judicial selection motivated this organization to enter into courts with no jurisdiction over the

home state.

Other Considerations: Mills said that the Louisiana Family Forum, while a state organization, could not give its attention to only politics in the home state. He said that judicial decisions in other states had effects in Louisiana and consequently he considered it appropriate for the Louisiana Family Forum to take political actions in other states. The Rev. Mills said that he watched Texas and its judiciary closely, which could be expected, given that Texas, like Louisiana, is part of the Fifth District Court of Appeals. Texas is also large both geographically and in population. California too has these qualities and is often seen as a bellwether state for future shifts in American policy. The organization's decision to enter into the California courts is logical in this framework.

4.1.3 *Vermont Freedom to Marry Taskforce*

Vermont attorneys Susan Murray and Beth Robinson co-founded the Vermont Freedom to marry Taskforce in 1996. The organization spearheaded the drive for marriage equality and achieved partial victory when the Vermont Supreme Court ruled that same sex couples were entitled to the rights and privileges of those in traditional marriages in *Baker v. Vermont* (1999). The high court, however, did not mandate full marriage equality; instead it gave the Vermont legislature the option of changing Vermont law to either grant marriage equality or civil unions. The Vermont legislature did the later, creating an important yet unsatisfying victory for marriage equality proponents. Today, the organization does not exist, having disbanded recently in 2015 following the *Obergefell v. Hodges* (2015) ruling. This research spoke with co-founder Beth Robinson, who now sits on the Vermont Supreme Court.

The Vermont Freedom to Marry Taskforce challenged the Vermont law on marriage through test cases. In 1997, three same sex couples filed for marriage licenses in

Vermont. The court clerks declined their requests. In response the couples initiated legal challenges in trial court with the sponsorship of the Vermont taskforce, with the ultimate goal of an appeal to the state supreme court, which heard the case in *Baker v. Vermont* (1999) . Following the court’s decision the Vermont Freedom to Marry Taskforce remained active on the state legislative response to the ruling. The groups also participated in amicus briefs in other similar state challenges to marriage, which included *Li v. State* (2005); *Andersen v. King County* (2006); *Lewis v. Harris* (2006); *Varnum v. Brien* (2009).

Group vs. Political Interest: This research cannot classify The Vermont Freedom to Marry Taskforce as a political interest group. The organization did have a number of active participants who attended organized meetings and contributed their efforts to the taskforce’s political goals. The group’s membership, however, does not appear to have been formalized. Robinson said that she considered anyone who had signed a statement affirming her personal support for marriage equality to have been a member. Nor does it appear that these potential members directed the actions of the organization. Robinson said that litigation was the strategy, as an appeal to the Vermont legislature was untenable at the time.

Purposive vs. Material: The Vermont Freedom to Marry Taskforce was clearly a purposive organization. Robinson emphasized that the organization’s name included the word “taskforce” because the group existed to achieve the goal of marriage equality. It is clear then that the group did not exist to represent the interests of its members but rather to achieve a specific political goal.

Participation: This research considers calls for participation to potentially be an important factor in the taskforce’s decision to enter into out-of-state courts. Robinson said that the Vermont High Court’s decision in *Baker v. Vermont* (1999) was unsatisfying. Consequently, the group wanted to share the experience that it had gained in

the Vermont case in the state cases that followed. Like *Baker v. Vermont* (1999), the subsequent state court cases were high profile and high stakes. These cases obviously had the potential to advance marriage equality and the Vermont Freedom to Marry Taskforce actively participated in these cases.

Federated Structure: The Vermont Freedom to Marry Taskforce did not have a federated structure. In *Baker v. Vermont* (1999) Mary Bonauto, an attorney with GLBTQ Legal Advocates & Defenders, a New England organization, did participate in the case as co-counsel. There does not, however, appear to be a national-state structure in place. The Vermont Freedom to Marry Taskforce's decision to enter into out-of-state courts then does not seem to be influenced by a national partnership.

Density and Diversity Vermont has a low political density, with many fewer political interests than California, Texas and other large states (Gray and Lowery 2000, p. 87).¹ Robinson said that there existed only a few organizations at the time that advocated for marriage equality, which included the Vermont Coalition for Gay Rights. She said that the Vermont Freedom to Marry Taskforce did not compete with other organizations for members or resources. Political density then does not seem to be a factor in this group's decisions to enter into out of state courts. The data show that Vermont has a moderate diversity of political interests (Gray and Lowery 2000, p. 98). Robinson said that she perceived Vermont to be a politically active state, with political interests organizing around a number of issues. Robinson did say that the Vermont Freedom to Marry Taskforce gained unique experience from *Baker v. Vermont* (1999) and the group was able to uniquely speak to marriage equality in other states; consequently, Vermont's political diversity may represent one factor, given that a Vermont organization had the unique experience and knowledge to speak

¹Vermont arguably is a very politically engaged state. Gray and Lowery (2000) however measure density two ways: density before government and density in the population. Wolak et al. (2002) selected the first measure, which this study did also to be consistent.

to this issue.

Ideology and Judicial Selection: Robinson said that the Vermont Freedom to Marry Taskforce made strategic decisions. She said however that the organization only made choices about which trial courts where the plaintiffs would file against the state. These courts did not need to have liberal judges. Rather, the taskforce looked for courts where the decision could be quickly appealed to the Vermont Supreme Court—which was liberal.

Following *Baker v. Vermont* (1999), the task force filled amicus briefs in many out of state courts. Robinson did not say that these decisions were strategic. It's true that many of these states are politically liberal—including Oregon, Washington State, New Jersey and to a lesser extent Iowa. So, there most likely would not have been litigation had these state courts not been liberal. Robinson as previously noted asserted that marriage equality advocates found Vermont civil unions compromise not satisfying. This seems to represent the driving force behind the group's out of state court actions.

Regarding state judicial selection, Oregon, Washington State, New Jersey and Iowa do not elect their judges in partisan elections; Washington State and Oregon do hold nonpartisan elections. Following the Iowa courts' decision affirming same sex marriage, Iowa citizens voted not to retain three Iowa State Supreme Court justices. This however represents conservative and not liberal political pressure—which would not have aided the Vermont Freedom to Marry Taskforce. In Oregon and Washington State might liberal political pressure have affected the choices that the justices made? Both the Oregon and Washington high courts ruled against same sex marriage in 2005 and 2006 respectively. This research also does not find that any of the justices lost their seats in in spite of their conservative rulings in liberal states. It does not seem that—even in liberal states—there was enough public support for

marriage equality at the time for voters to have taken the seats away from justices ruling conservatively; consequently the connections between state judicial selection and the Vermont Freedom to Marry Taskforce's decision to enter into out of state courts is not clear.

4.1.4 *Texas Municipal League*

The Texas Municipal League represents the interests of Texas cities before the Texas state legislature and in the courts. This research spoke with Scott Houston, the deputy executive director and general counsel for the organization. The Texas Municipal League traces its origins to 1913, when Austin mayor A.P. Woodbridge invited neighboring cities to form an organization that acted in their collective interests.

The Texas Municipal League did not enter into state or federal courts that did not have jurisdiction over Texas. The organization is active in eminent domain cases. The data collected show seven instances in six separate cases when the Texas Municipal League entered into the courts. In each instance, the Texas Municipal League participated in amicus curiae before the Texas Supreme Court. The organization, then, only entered into the Texas state courts.

These cases involved monetary claims against Texas municipalities. For example, in *City of Houston v. Trail Enterprises, Inc.* (2012) a landowner had filled suit against the City of Houston for an ordinance prohibiting drilling for gas and oil wells on Lake Houston, the main source of drinking water for the city. The landowning organization claimed that the city restrictions on oil and gas drilling had violated its legal rights under eminent domain. Consequently, it was alleged, the city of Houston had a legal obligation to compensate the clamant. In *Town of Flower Mound v. Stafford Estates* (2004) a land developer filed suit against the City of Flower Mound for requiring

that the developer make improvements to a public street as a condition for approving the development permit. The developer claimed inappropriate takings under eminent domain protections given by both the Texas and U.S. constitutions.

Group vs. Political Interest: Political interests may be more likely to enter into outside courts because the leaders of the organization do not have formalized membership. A political interest may then be more likely to enter into an out-of-state court because had it had members, these individuals might see an out-of-state legal action as not in their best interests. Consequently, there would be greater freedom to act. With the Texas Municipal Association, Houston said that its members decided the organization's political agenda annually. This supports the notion that membership groups are less likely to enter into out-of-state courts.

Purposive vs. Material: The Texas Municipal League strictly represents the interests of its members. Consequently, it is a material and not purposive organization, and would be expected to enter into out-of-state courts less. The Texas Municipal League did not deviate from this expectation. As noted the organization only took legal action in the Texas courts. Also, Houston strongly emphasized that it would be highly unlikely that the Texas Municipal Association enter into out-of-state courts. Houston said that its members had strict control over the organization's legislative and legal agendas.

Participation: Houston said that its members often expect that the Texas Municipal League will participate in high-profile cases. The Texas Municipal League's decisions to enter into only Texas courts were then inconsistent with this research's expectations. Houston said that the Texas Municipal League might leave the Texas courts, but most likely the organization would defer these cases to its partners at the federal level.

Federated Structure: This research has suggested that federated state inter-

ests might be more likely to enter into out-of-state courts. Their parent organizations might give these groups the resources to act in other states. Also, the parent organizations might put pressure on these groups to act in other states. Also state groups might be more likely to enter into other states because the states themselves are becoming more politically similar. The Texas Municipal League's actions were not consistent with these expectations. The Texas Municipal League does not have a parent organization; nonetheless it holds strong political partnerships with both the National League of Cities and International Municipal Attorneys Association. Houston said that Texas Municipal League's national and international partnerships incentivized greater state political participation. When national cases arise, Houston said that the Texas Municipal League could defer these cases to its national affiliates.

Density and Diversity: This research has argued that state political interests would be more likely to participate in out-of-state court cases when there are more as opposed to fewer political interests. In dense interest group systems, group death is more likely (Gray and Lowery 1998), and entering into the courts while out of state might bring greater attention to a political interest that would otherwise be obscure. Texas, despite its size, has moderate to low political interest density (Gray and Lowery 2000, p. 87). Houston's perception of the density of political interests in regards to municipal associations was consistent with this data. Houston said that there were very few groups that advocated on behalf of cities at the state level, so while Texas might have many competing interests, there are relatively few that represent cities. This would then be consistent with these theoretical expectations.

This research has also proposed that diversity might also be a factor. Chapter Three argued that when there are more types of groups, there are more opportunities for a group to speak to a case in another state. Texas ranks moderately on the diversity scale (Gray and Lowery 2000, p. 98). Houston said that he saw Texas as a

politically active state, with groups engaged in different political areas. The Texas Municipal League, however, did not take any legal actions outside of Texas, and the political diversity in the state did not compel it to do so. This observation is consistent with the outcomes of the regression in Table 3.1, where diversity did not reach statistical significance.

Ideology and Judicial Selection: This research has suggested that ideology and judicial selection play roles in interest groups' decisions to enter into out-of-state courts. Houston asserted that the Texas Municipal League did make strategic decisions about both judges and the courts where the group leaders believed that the judgments would be favorable. Nonetheless, Houston also asserted that this was not common in Texas cases given that the state and judiciary was mostly conservative and not enough to compel the group to go out of state, given its in-state orientation to Texas politics. The Texas Municipal League does not illustrate how ideology and judicial selection impact the decision to influence policy in out-of-state courts.

4.1.5 *League of Oregon Cities*

The Oregon League of Cities was founded in 1925 to represent Oregon cities before the state legislature and courts. The organization strongly advocates for municipal home rule. In Oregon, cities retain much autonomy from the Oregon legislature, which The Oregon League of Cities vigorously defends. This research spoke with Sean O'Day, the lead counsel with the group.

The Oregon League of Cities participated in an amicus brief in *West Linn Corporate Park, LLC v. City of West Linn* (2011), a case that went before the Oregon Supreme Court. In the case *West Linn Corporate Park, LLC*, an incorporated development group, filed inverse condemnation charges against the city of West Linn. The group claimed that land use improvements required by the city for the development of

a corporate park were not permissible under both the Oregon and U.S. constitutions. This is the only case in the data where the Oregon League of Cities was a participant. The group then did not take any legal actions in courts that lacked jurisdiction over the home state of Oregon.

Group vs. Political Interest: The Oregon League of Cities represents the interests of its member cities. The organization then can be classified as a political interest group and not a political interest. The members of the group meet annually to set the policy agenda for the year. The group's decision not to enter into courts that lack jurisdiction over Oregon is then consistent with theoretical expectations. The members of the organization might see litigation outside of Oregon as being wasteful of resources.

Purposive vs. Material: As noted the Oregon League of Cities holds broad political goals such as protecting the home rule of its member cities. There is then a purposive element to the group. Yet the members also meet annually to create the legislative and legal agendas, which the group's participation in eminent domain cases suggest often protect their member cities from greater financial liability. The Oregon League of Cities can then be classified as material and not purposive organization. Their decision not to enter into out-of-state courts is theoretically consistent with this.

Participation: O'Day said that the members of the Oregon League of Cities expect that the group will participate in high profile legal cases. He also said that the League of Oregon cities mostly focuses its attention on home rule and the political autonomy of its towns and cities so it would be unlikely that calls for participation would compel the organization to enter into out-of-state courts. Calls for participation nonetheless are theoretically inconsistent with the Oregon League of Cities decision to only remain in the Oregon courts.

Federated Structure: The Oregon League of Cities is autonomous; nonetheless it maintains ties with the National League of Cities. O’Day said that his organization remains in close contact with the National League of Cities and the Oregon League of Cities often defers cases to the National League of Cities when the group believes that the outcome will ultimately affect policy beyond the Oregon borders. This research has suggested that a federated structure might encourage a state group to enter into out-of-state courts. The Oregon League of Cities’ decision to remain in the Oregon courts is inconsistent with its partnership with the National League of Cities. This observation suggests that a federated structure might decrease out-of-state legal actions, since partner organizations specialize in other jurisdictions.

Density and Diversity: The data show that Oregon has high political density (Gray and Lowery 2000, p. 87). There are a number of political interests that lobby the state legislature and attempt to influence policy in Oregon. The research might expect then that there would be an incentive for groups to enter into out-of-state courts. The Oregon League of Cities, however, remained exclusively in the Oregon courts. This is less consistent with these expectations. The data show that Oregon has low political diversity (Gray and Lowery 2000, p. 98). Their decision to only remain in the Oregon courts is then consistent with this research’s expectations because it would be less likely that a political interest could speak uniquely to a particular case in another state.

Ideology and Judicial Selection: O’Day said that the Oregon Municipal League was strategic about the courts that the group litigated in. O’Day, nonetheless, said that the organization took legal action almost exclusively in the Oregon state court of appeals and state supreme court. Ideology and judicial selection then do not appear to be factors in the Oregon Municipal League’s decision to remain in the Oregon courts. O’Day said that in the Oregon courts there were few opportunities

for legal venue shopping.

4.1.6 *Michigan Environmental Council*

In 1980, environmental leaders in Michigan created the Michigan Environmental Council to aid in their efforts to protect the Michigan environment and the larger Great Lakes region. The council is a peak association, with more than 70 individual membership groups. The organization participates in Michigan politics in different ways: lobbying the legislature, public education, giving expertise to issues and participation in the courts. This research spoke with James Clift, the organization's policy director.

The Michigan Environmental Council participated in an amicus brief in *K & K Const., Inc. v Department of Natural Resources*, a case before the Michigan Supreme Court. In the case, the company sought damages under eminent domain following the Michigan Department of Natural Resources' decision to deny a construction permit on wetlands owned by the company. In its ruling the Michigan Supreme Court considered the impact of the Michigan Department of Natural Resources' decision on the entirety of the land, not only the wetlands. This was a novel interpretation, and it attracted much public attention.

In the data for this project, the Michigan Environmental Council did not enter into any courts that lacked jurisdiction over the home state of Michigan. Clift said that the organization took an especially strong interest in issues that affected the Great Lakes, which span a number of states and Ontario, a Canadian province. As a result, the organization might enter into a neighboring states court, yet, to his memory, had not done so, and would most likely remain in the Michigan courts.

Group vs. Political Interest: The Michigan Environmental Council sets its annual legislative agenda with input and aid from its members. Consequently, members

play a role in deciding what political actions the organization takes. The Michigan Environmental Council's decision to only enter into the Michigan courts is consistent with its membership-based structure. Clift said that the leaders of the organization enjoyed much autonomy in making day-to-day decisions. Nonetheless, this autonomy did not contribute to any decisions to enter into out-of-state courts, perhaps because its members might see such a choice as outside Michigan politics.

Purposive vs. Material: The Michigan Environmental Council is purposive, advocating for the protection of the Michigan and Great Lakes environment. The group's participation in only the Michigan courts is not consistent with its purposive orientation. Clift, however, strongly emphasized the importance of the larger Great Lakes environment and said that the organization might enter into the courts of a neighboring state.

Participation: The Michigan Environmental Council is very politically active, Clift said, and its members expect that the organization will participate in high-profile issues in different policy venues. Nonetheless, this organization has not entered into courts that lack jurisdiction over the home state of Michigan. Clift said that the Michigan Environmental Council might pursue its goals in an out-of-state court; so in the future pressure to participate might cause the organization to enter into out-of-state courts, particularly with Great Lakes issues. He did however also say that the Michigan Environmental Council was strongly embedded in Michigan politics and would most likely only take legal actions in the Michigan courts.

Federated Structure: The Michigan Environmental Council does not have a federated structure, at least in the traditional sense. It does have in-state member organizations. The council is not however part of a larger national organization nor does it hold strong partnerships with one. This research has proposed that state groups with a federated structure will be more likely to enter into out of state courts

and the Michigan Environmental Councils choices to remain in the Michigan courts are consistent with this prediction

Density and Diversity: According to the data, Michigan holds a high number of political interests that are registered to lobby the state legislature (Gray and Lowery 2000, p. 87). Consequently, Michigan groups might be more likely to enter into out-of-state courts. Clift said that there are many environmental groups in Michigan. Nonetheless he also said that he did not think that the Michigan Environmental Council competed with these other organizations for members or resources, with the Michigan Environmental Council being somewhat unique in that it is an organization of organizations. High political diversity (Gray and Lowery 2000, p. 98) has not seemed to inspire the Michigan Environmental Council to look to outside state courts. Clift said that he saw political diversity in Michigan as well. Clift said that the Michigan Environmental Council could give important insights into environmental issues affecting the Great Lakes. The group nonetheless has remained in Michigan's courts so political diversity does not seem to be a factor.

Ideology and Judicial Selection: Clift said that the Michigan Environmental Council made strategic choices about the courts that it wished to enter into. Clift said that the group often consults with outside attorneys who “Undoubtedly do a little bit of judge shopping.” Many perceive the Sixth District Court of Appeals to be liberal (Walsh 2012), and it is likely that people perceive the Michigan state courts similarly. The Michigan Environmental Council then may not have an incentive to enter into other state courts, which it has not done, given that the Michigan courts are a close ideological match.

Table 4.1: Interests and Out of State Courts

	Palmetto Family	Louisiana Family Forum	Vermont Freedom to Marry Taskforce
Group v.			
Political Interest	Interest	Interest	Interest
Purposive v. Material	Purposive	Purposive	Purposive
Participation	Yes	Yes	Yes
Federated Structure	Yes	Yes	No
Density	Low	Middle	Low
Diversity	Low	High	Middle
Ideology	No	No	No
Judicial Selection	No	No	No

The table above shows the three political interests that entered into courts with no jurisdiction over the home state. The table cells indicate the values this research assigned for each of the independent variables based on interviews, outside sources and historical facts.

Table 4.2: Interests and In State Courts

	Texas	Oregon	Michigan
	Municipal	League	Environmental
	League	of	Council
		Cities	
Group v.			
Political	Group	Group	Group
Interest			
Purposive v.			
Material	Material	Material	Purposive
Participation	Yes	Yes	No
Federated			
Structure	Yes	Yes	No
Density	Middle-low	High	High
Diversity	Middle	Low	High
Ideology	No	No	No
Judicial Selection	No	No	No

The table above shows the three political interests that remained in courts with jurisdiction over the home state. The table cells indicate the values this research assigned for each of the independent variables based on interviews, outside sources and historical facts.

4.2 Results and Conclusions

Having examined six political interests and their choices, this research now concludes this theory building exercise by following the instructions of Professor John Gerring and examining what was at the scene of the crime—which in this chapter is the decision of political interests to enter into out of state courts. Table 4.1 shows the three political interests that entered into out-of-state courts. Table 4.2 shows the three political interests that did not.

Examining Table 4.1, some clear patterns emerge. The political interests that entered into out of state courts—and in doing so became national policymakers—shared certain attributes. For one, these organizations lack(ed) formalized membership structures. All of these political interests have or had ² active participants. Yet, these participants did not elect the organizations’ leaders, nor did these individuals have the power to make sure that the leaders followed their wishes. In Table 4.2 we see that the groups that remained in courts with jurisdiction over the home state had members. True, the Michigan Environmental Council is an association of associations, yet the leadership in each of these groups follows the wishes of their memberships, who decide the direction of the groups in annual meetings.

A similar pattern shows itself with purposive groups, which, with the exception of the Michigan Environmental Council, all entered into out of state courts. With material organizations, both groups in the sample remained in home state courts. This research has proposed that purposive organizations might see their political goals achievable in other states and these observations do not contradict this.

Taken together—membership and a purposive orientation—represent the strongest factors. Nonetheless, the other factors are worthy of discussion, especially given that the previous chapter discovered statistically significant relationships between these independent variables and the decision to enter into an out of state court. To begin with federated interests, the number of organizations that remained in their home state courts equals the number that did not, suggesting that federation does not play an important role. This nonetheless does not mean that federation is not an important factor. Oran Smith pointed out that federated state-level sister organizations often communicate, and come to each other’s aid. This represents one real world example of how a federated structure contributes to the decision to enter into out of

²The Vermont Freedom to Marry Taskforce has ceased to exist.

state courts.

Do calls for participation in political controversies motivate state political interests to enter into out of state courts? In the interviews the leaders of organizations, most said that members and those outside of the organizations encouraged participation in high profile legal cases and debates. So, calls for participation are not exclusive to those groups that enter into out of state courts and this may not be an important factor.

Lowery and Gray look to external causes to explain the makeup of political interest communities as well as their actions. Density and diversity may have limited power to motivate political interests' decisions to enter into out of state courts. The problem is statewide density and diversity is not always descriptive of the density and diversity of political interests acting on a particular issue. Most of the group leaders this research spoke to said that there were few groups like theirs. Moreover, these leaders said that they did not see their organizations in competition with each other for resources or members.

Finally, the qualitative part of this research did not discover definitive connections between judicial ideology, state judicial selection and the decision to enter into out of state courts. This does not mean that these connections do not exist. All of the leaders of the organizations that this research spoke to said that their organizations were strategic. Attorney Scott Houston for example said the Texas Municipal League acted strategically yet there were few opportunities to do so in Texas, with both conservative federal and state courts. Yet they found it difficult to give examples of how their groups were strategic. Indeed political interests may not make choices so much as they seize opportunities (see Kingdon 1984). The Vermont Freedom to Marry Taskforce, according to Beth Robinson, did not select the Vermont Supreme Court because the court was liberal in *Baker v. Vermont*. Rather the group entered

into the court because it happened to be liberal and this represented an opportunity that was not present in other states.

This research now concludes its discussion of state political orientation. Both Chapters Three and Four argue for in state political orientation. In this qualitative consideration of state political orientation, the leaders in the state organizations that this research spoke with—both liberal and conservative—expressed some measure of discomfort with having crossed state lines. All felt the need to justify their choices. This research now turns to state political orientation and its effect on the decision to enter into the state and federal courts.

Chapter 5

STATE OR FEDERAL COURTS: POLITICAL INTERESTS AND THEIR CHOICES

The previous chapters attempted to illustrate how state political interests are uniquely embedded in their respective states. In the context of the American courts, this research discovered that state political interests were actively engaged in the marriage equality and eminent domain debates. Nonetheless these political interests were unlikely to enter into other state courts or federal circuit courts that lacked jurisdiction over their home states.

This chapter explores whether this state orientation of state political interests affects the choice of whether to pursue policy goals at the level of the state courts versus in the federal courts. This research has proposed that it does: place matters. State political interests develop unique relationships with their respective state courts, and these relationships ultimately affect venue choices. The mechanism remains unclear. Nonetheless, the literature does make some suggestions as to how a state political orientation might compel a state political interest to seek policy via the state courts.

First, state political interests might be in a better position to litigate at the state level because these groups are more likely to have the political connections to do so. A political interest would be more likely to find attorneys knowledgeable in the laws of a particular state residing in that state rather than in Washington, D.C. There would seemingly also be more opportunities for social interaction between the leaders of state level political interests and these attorneys, given that these people would share political and possibly physical space. These interactions would produce partnerships that give state political interests a unique advantage over their national

counterparts in litigating at the state level. Clearly, a national political interests can hire an attorney skilled in state law, yet they might be less inclined to do so without having cultivated these social and political bonds first.

Yet, these social and political bonds might reach beyond the state political interests and attorneys with specialized knowledge of state law. These bonds might extend to the state judges themselves, who, seemingly, would also share political and physical and political space. Judges wish to present themselves as judicious, and independent of outside influence (e.g., Gibson and Caldeira 2009).

Nonetheless, judges, most likely, cannot escape outside influence, especially in the states where interactions between state judges and state political interests would seemingly happen more frequently than with their national counterparts. Political interests may attempt to leverage these relationships that develop over time. These interests, also, most likely have a unique awareness of the political vulnerabilities of state judges and may be attracted to the state courts because these groups believe that they can use this information. Comparato (2003), for example, found that political interests send targeted messages to state judges through amicus curiae briefs depending on the state judicial selection methods in that particular state.

Next, individuals might put pressure on state political interests to participate in cases in their home states. Cases bring media attention, which the members of state political organizations are exposed to. These members may then call on the state organization to participate in these cases as a symbolic gesture (Holyoke 2003). Additionally, national political interests might encourage their state level counterparts to participate in these cases because they believe that these groups will be socially and politically closer to the people and consequently have a greater chance of building support and momentum for a particular cause. Yet, why would one expect that these cases would play out in the state courts? Entrance into the federal courts has become

increasing difficult following New Judicial Federalism (Porter and Tarr 1982). As a result, more cases that originate in the states will be adjudicated in state courts, which state political interests might come under political pressure to participate from their in-state members (Holyoke 2003).

Finally, state political interests can enter into federal courts, yet these courts might be perceived as out of bounds or outside of the realm of the influence that state political interests should have. Farole (1998) found that many political interests that pursued policy at the national level were not comfortable entering into the state courts. Many of those representatives of national political interests told Farole in his interviews that these organizations felt uncomfortable in the state courts because these groups did not possess the inside connections that their state counterparts did. The aversion that national political interests have for state courts might also prove true for state political interests, yet in the opposite direction. State political interests might avoid national courts because these groups lack the social connections and “comfort factor” that they have in their respective state judiciaries.

5.1 Examining the Impact of State Political Orientation

Does a state political orientation, then, affect the choices that state level political interests make with judicial federalism? There are a number of ways to test this proposal. One way to consider the impact of a state political orientation is by examining the rate at which state and national political interests enter into the state and national courts. If state political interests have a state political orientation and this orientation compels state political interests to select state courts as a political venue then one would expect that state political interests do so at a disproportionately high rate relative to their national counterparts. Using the data described in Chapter two, this can be accomplished by examining instances when state and national political

interests entered into the state and national courts. These data can be used to compare relative proportions. If a state political orientation positively affects the decision to enter into the state courts then state political interests should enter into the state courts more often than national political interests.

The data collected give the opportunity to make some important observations and gain unique insights. As previously described these data were collected in two distinct legal areas: eminent domain and marriage equality. Eminent domain is largely driven by questions of federal law. These cases often ask the courts to interpret the level of protection given to private property by the Fifth Amendment of the U.S. Constitution. Marriage equality cases, on the other hand, show instances when both the federal and state courts are advantaged. Prior to (*Perry v. Schwarzenegger* 2010), where political interests challenged California's same-sex constitutional prohibition under federal law, the data collected show that political interests largely challenged prohibitions on same sex marriage on state constitutional grounds. Thus, examining these two areas of law provides instances when both the federal and state courts held a legal advantage.

The federal or state legal advantage is important. Political interests should turn to the state courts only when state law is advantaged (Farole 1998). If state political interests turn to the state courts in instances when federal law is advantaged, this argues for state political orientation, given that the federal-state legal advantage is cast as the most powerful predictor of legal actions in the state or federal courts. A state political orientation, then, has the power to incentivize participation in the state courts in spite of the advantages bestowed by the balance of power between the federal and state courts. A state political orientation might also incentivize the participation of state political interests when the state courts hold the legal advantage. A state political orientation then could propel state political interests to turn to the state courts even more in relationship to their national counterparts when there is a

state legal advantage. Conversely, national political interests might have the ability to change their legal strategies quickly, so the state political orientation might only apply mainly to instances when the federal courts hold the advantage.

Groups with traditional membership structures might also make different choices than those without them. This study observed in Chapters Three and Four that groups without members were more likely to enter into courts with no jurisdiction over the home state. State organizations with members then might hold a stronger in-state political orientation. This orientation might cause these groups to not only remain in courts that hold jurisdiction over the home state, but also in the state courts themselves. The data collected creates the opportunity to only consider political interest groups—which this research does.

5.2 Participation in the Federal and State Courts

5.2.1 *Eminent Domain*

This research recorded the participation of political interests in eminent domain cases in both the federal and state courts. The cases observed in this area of law all held a federal legal advantage, so this factor cannot affect the rate at which state and federal interests turn to the state and federal courts. Table 5.1 shows that the difference between the participation rates of national and state political interests and interest groups in the state courts achieves statistical significance . Examining the percentages, for state political interests, their rates of participation in the state courts are much higher than their national counterparts, 31% versus 7%. The same relationship held true for state political interest groups; their participation in the state courts was also relatively high, 20% versus 6%.

The judges in these cases decided most of them on the basis of federal law. Seem-

Table 5.1: State and National Organization Participation Rates in State Courts in Eminent Domain

Political Interests or Groups	National or State Groups	Percent State Court
Political Interests*	National	7%
	State	31%
Political Interest Groups*	National	6%
	State	20%
* $p \leq .05$		

The above figure records individual act of participation, e.g., submitting an amicus brief, of both political interests and interest groups in the state courts. The column labeled “Percent State Court” shows the percentage of participation in the state courts. With eminent domain cases, these cases were categorized as all having a federal legal advantage.

ingly, the state political interests understood this, yet were nonetheless inclined to make federal arguments in state rather than federal courts. Clearly, their national counterparts did not show the same enthusiasm for choosing the state courts. How can we explain these different tactics, given that state law doesn’t seem to be very much of a consideration? The personal relationships and connections that state political interests develop with their state courts in addition to their embeddedness in state political communities provides one explanation. Seemingly state political interests decided to make federal arguments in state courts because these groups were more comfortable doing so in these particular cases.

5.2.2 *Marriage Equality*

Next, this study examines the rate of participation by political interests and groups in marriage equality cases. Unlike with the eminent domain cases, these cases include periods of time when both the federal and state courts held a legal advantage. This gives the opportunity to consider the state political orientation of groups both ways, both when there is a state legal advantage and when there is not. The results can also be compared against the results for eminent domain, given that both legal areas

have periods of time when federal law is advantaged.

Table 5.2 shows the results for political interest participation in state and federal courts in marriage equality cases. These data show that state political interests participated at a higher rate than national interests when the cases with a state and federal legal advantage were combined, with a 60% to 40% difference in participation for national and state interests. State political interest groups similarly participate at a disproportionately high rate. The difference of means between the participation rates of national and state political interests in both the political interests and political interest group categories reaches statistical significance. A similar pattern emerges when examining only the cases where there existed a federal legal advantage. In these cases, state political interests turned to the state courts at a disproportionately high rate, 8% to 1% for state political interests and 12% to 0% for state political interest groups. While the difference of means test achieves statistical significance for political interests, it does not do so for political interest groups.

State political interests and state political interest groups, however, did not enter into the state courts more often when there existed a state legal advantage, as shown in Table 4.2. With these observations, the differences of means tests did not achieve statistical significance. Examining participation, state political interests turned to the state courts at exactly the same rate as their national counterparts. So while the observations in the observations in the mixed and federal legal advantage categories parallel those found in eminent domain, the marriage equality observations having a state legal advantage did not. These findings do not contradict the idea of state political interests having a state political orientation. Rather it suggests that national political interests will turn to the state courts when they are compelled to do so by legal advantage. In cases where this advantage did not exist, where there was a federal legal advantage, national political showed a much greater hesitation to enter into the

Table 5.2: State and National Organization Participation Rates in State Courts in Marriage Equality

Political Interests or Groups	National or State Groups	Percent State Court
Combined Federal and State Legal Advantage		
Political Interests*	National	7%
	State	31%
Political Interest Groups*	National	6%
	State	20%
State Legal Advantage		
Political Interests	National	96%
	State	96%
Political Interest Groups	National	100%
	State	100%
Federal Legal Advantage		
Political Interests*	National	1%
	State	8%
Political Interest Groups	National	0%
	State	12%
* p ≤ .05		

The above figure shows individual act of participation, e.g., submitting an amicus brief, of both political interests and interest groups in the state and federal courts. The “Percent State Court” column shows the percentage of participation in the state courts. The “Legal Area” row shows periods of time when the courts favored federal or state law.

state courts, as shown by their proportionately low entrance rate compared to their state counterparts.

It would seem that a state political orientation impacts the decision to turn to the state courts when the law offers a choice. While state courts can interpret state and federal law, the federal courts primarily interpret federal law. Clearly, national political interests cannot go to the federal courts when the legal question focuses on state law, so they will turn to the state courts. Yet, cases that focus on federal law, do present a choice, given that the state courts can interpret both federal and state laws. In these cases, the perceived comfort with either the federal or state courts matters. State political interests seemingly venture towards the state courts because these groups are embedded in the same legal and political communities as those in

the state judiciary. National political interests, however, are not, and it is logical to assume that these groups would veer towards the national courts, given that these groups lack the in state connections of their state counterparts.

5.2.3 Case Families

The measures shown in Tables 5.1 and 5.2, however, may not accurately capture the choices that political interests and groups make to enter into the state or federal courts. The participation in some individual cases was higher than in others, especially the marriage equality cases leading up to *Obergefell v. Hodges* (2015). A second way to examine the participation of political interests in the state and federal courts is to examine the participation in case families. As described in Chapter 2, legal cases make their way through different courts. Individual cases, then, are often part of larger case families. It is helpful to examine the participation of political interests in these families because the participation of political interests in some case families is disproportionately high. Multiple acts of participation in a case family, however, can be condensed into a single observation. This approach gives equal weight to the case families, which, arguably, is more representative of the actions that political interests took in the courts.

To create this measure, this research applied the same rules that were used with the previous two measures. This measure, however, captures participation in case families, so the entrance into a group of associated cases counted as one observation regardless of the number of times the political interest or group decided to participate in that family. There is one exception, however: If in a case family, a political interest entered into the federal and state courts then there are two observations, one for the state and federal courts. To qualify for inclusion in the measure, a political interest must have entered into at least one individual case on the side that brought the case

before the court, as with the previous two measures. The counts may seem high, given that participation in a family of cases only counts as one observation, but this is to be expected, given that most of the case families were small, with only one or two cases.

Table 5.3 gives the results of this analysis. This tabulation of case participation produces the same results as counting each instance of participation as a single observation. This particular analysis bolsters the previous findings. These data suggest that state political interests are embedded within state legal and political communities and will pick the state courts at a much higher rate than the political interests at the national level, given this orientation. Examining participation in case families rather than individual cases does not change the outcome. In instances where there was a federal legal advantage state political interests turned more often to the state courts than similar groups at the national level. This does not hold true for state legal advantage, yet in these instances there is really not so much of an option between the federal and state courts, given that state courts largely have jurisdiction over state legal matters.

5.3 Regression Analysis

It would seem that state political interests and groups enter into the state courts more often than those that focus on national policymaking. Yet, is state political embeddedness a powerful determinant to enter into the state courts? This research suggests that it is. State political interests are embedded in state political communities and this compels these groups to turn to the state courts at a disproportionately high rate. This hypothesis can be tested with regression, with the choice to enter into either the state or federal courts as the outcome variable of a logit regression.

Clearly, to test this proposal, this study must also take previous research (Farole

Table 5.3: State and National Organization Participation Rates in State Courts in Legal Case Families

Political Interests or Groups	National or State Groups	Percent State Court
Eminent Domain: Federal Legal Advantage		
Political Interests*	National	7%
	State	31%
Political Interest Groups*	National	7%
	State	21%
Marriage Equality: Combined Federal and State Legal Advantage		
Political Interests*	National	43%
	State	61%
Political Interest Groups*	National	32%
	State	64%
Marriage Equality: State Legal Advantage		
Political Interests	National	96%
	State	96%
Political Interest Groups	National	100%
	State	100%
Marriage Equality: Federal Legal Advantage		
Political Interests*	National	2%
	State	9%
Political Interest Groups	National	0%
	State	12%
* $p \leq .05$		

The above figure shows instances when political interests and groups entered into case families, which are associated legal cases. For an act of participation to count, the political interest must have entered into a legal case on the side that brought the action to the court in at least one of the cases. The “Percent State Court” column gives the percentage of participation in the state courts.

1998) into consideration, which argues that political interests turn to the state courts for two reasons: The first is that there is a legal advantage in doing so. As described previously, the structure of the law can create strong incentives for participation in either the state or federal courts. *Miller v. California* (1973) offers a good example of this, when the U.S. Supreme Court in *Miller v. California* (1973) gave the states the power to set community standards on pornography. The second requirement is that the group has the resources such as attorneys knowledgeable in state law

to do so. This is why national political interests with a federated structure were advantaged, because their local level partners gave these groups greater access to state level resources. Existing theory argues that both conditions are necessary together; so for a political interest to enter into the state courts both requirements must have been fulfilled—a group must have a legal incentive and the resources to litigate in state courts.

Chapter Two described the variables, but, briefly, the important variables including the two just mentioned were collected as follows: For legal advantage, this research marked individual cases as either having a federal or state legal advantage based on the criteria the U.S. Supreme Court established in *Michigan v. Long* (1983), which declared that legal cases are decided on federal law unless the decision explicitly points to state law as its basis. This study then observed time periods where most of the cases were decided by federal or state law and coded the individual cases falling inside of these periods as having a federal or state legal advantage.

The state legal resources variable was challenging to operationalize. This variable was constructed as follows: State political interests, the state chapters of national political interests and national political interests with state chapters were marked as having the resources to litigate in the state courts. Ideally, the resources that each group had would be known; yet, gaining this information is difficult without asking each political interest to provide what would might be perceived as sensitive information. This measure is less than perfect because it will include groups that lack state resources; nonetheless, it captures the political interests that have the greatest potential to have these resources, state political interests and national interests with federated structures.

The final measure is state political orientation. This study marked groups as having a state political orientation if the group was either a state organization or a

chapter of a national political interest. This measure included those organizations in the state legal resources, with the exception of national political interests, as these groups are not embedded in the states themselves.

For the logit regression, there are three independent variables: legal advantage, resources and state political orientation, with this study having take the first two variables from existing theory. Previous research (Farole 1998) argues that both legal advantage and state resources are necessary; consequently, this research interacted these two variables in the regression. This study included state political orientation in the regression independently. As noted the outcome variable is whether the legal action took place in a state or federal court with the outcome being an action in a state court. Only cases where the political interest or group entered into the court on the side that brought the case were considered, consistent with prior research on political interests and the courts (e.g., Olson 1990).

With logistic regression multicollinearity represents one area of particular concern. Multicollinearity occurs when two or more independent variables are linearly associated with each other in a regression model. Multicollinearity does not bias a logit model. It can however increase the variance in the coefficients and the size of the standard errors. Additionally, multicollinearity can produce a less than efficient model. Ideally, the predictor variables should be correlated with the outcome but not each other (Chatterjee and Hadi 2015).

In this research, multicollinearity shows itself to be one area of particular concern because the state political orientation and state legal resources variables include many of the same observations. The variable inflation factor (VIF) is one way to observe multicollinearity. VIF indexes how much the variance for the variable estimates increases as a result of multicollinearity. Generally a VIF score greater than 10 indicates that multicollinearity is unacceptably high (Kutner, Nachtsheim and Neter

2004). This study did VIF tests in three of the regressions: the combined, marriage equality and eminent domain models. In the combined and marriage equality models the VIF scores for each of the variables did not exceed a value of 5, with the legal advantage variable showing the highest scores. In the eminent domain model the legal advantage variable showed perfect multicollinearity, but this is acceptable because this variable was not included in the regression.

5.3.1 *Political Interests*

Table 5.4 shows five separate regressions. In Model One, the observations from Marriage Equality and Eminent Domain were combined, with issue area (Marriage Equality) being introduced as a control variable. Models Two and Three examine Marriage Equality and Eminent domain independently, while Models Four and Five examine Marriage Equality cases during time periods when either the federal and the state courts held a legal advantage. For the State Political Orientation variable, each model generated coefficient values. On Table 4.4, some cells, however, do not have values. In the eminent domain model, as well as the marriage equality models—where the cases with only a federal or a state legal advantage were considered, the legal advantage variable had one value, making this variable and its interaction with resources perfectly collinear with the other independent variables. As a result, the logit did not include the legal advantage variable in its results.

The first row shows State Political Orientation. For each of the models, with the exception of Model Five, state political orientation is strongly associated with the decision for political interests to enter into the state courts. This is what the previous findings that state political interests enter into the state courts at a higher rate than their national counterparts suggested. It is also important to note that state political orientation was not strongly associated with the decision to enter into the

Table 5.4: Causes of Political Interests Entering into State Courts

Variables	Model 1:	Model 2:	Model 3:	Model 4:	Model 5
	Combined	Marriage Equality	Eminent Domain	Equality Federal Advantage	Equality State Advantage
	Coefficient (Error)	Coefficient (Error)	Coefficient (Error)	Coefficient (Error)	Coefficient (Error)
State	1.59*	1.01*	1.72*	1.94*	0.29
Orientation	(0.19)	(0.45)	(0.25)	(0.72)	(0.58)
State	0.17	0.17	0.20	-0.41	-1.22
Resources	(0.23)	(0.62)	(0.25)	(0.73)	(0.69)
Legal Advantage	7.84* (0.66)	7.55* (0.73)			
Resources x Advantage	-0.72 (0.70)	-1.59 (0.88)			
Legal Area (Equality)	-1.58* (0.30)				
N	1620	756	864	396	360
AIC	857	239	632	123	114

* $p \leq .05$

Entrance into a state court by a political interests represents the dependent variable. The variable of interest is state political orientation, the results of which are on the first line of the regression table. In all but Model Five, the results show that state political orientation shows a positive relationship with entrance into the state courts.

state courts in Model Five. This is to be expected, given that this model included only observations that were coded as having a state legal advantage. The prior tabulation of results in cases where there was a state legal advantage showed that in these cases state political interests did not enter into the state courts more than their national counterparts. The regression results support this prior observation, failing to show a relationship between state political orientation and entrance into the state courts.

It is interesting to observe that the strong relationship between state political orientation and the use of the state courts was consistent across issues. While eminent domain can be described as a material issue, marriage equality is purposive, with individuals organizing to achieve a social rather than political goal. Nonetheless, state political interests in both legal issues seem to act in very similar ways, preferring to enter into the state courts at a much higher rate than national political interests on federal questions. There is reason to believe that this pattern would be found in other legal areas, given the differences between the marriage equality and eminent domain issues.

5.3.2 Interest Groups

These data also create the opportunity to look not just at political interests but also political interest groups. Do state political interest groups act in ways that are dissimilar to the larger community of political interests? These groups do arguably have different internal dynamics given their membership bases (Walker 1991; Olson 1965), and the members can put pressure on the organization to take actions that leadership in the organizations might not see as a good use of limited resources, one example being symbolic participation in court cases (Holyoke 2003). There exist arguments for state political interest groups both remaining and leaving the state courts. For the state courts, the members of a state political interest group might

see the state courts as a venue where the group should take action, given the ties that the state courts might be expected to have with state politics. Conversely, the members of a political interest group might push the leaders of the group to take action in the federal courts because the impact of the decision might be perceived as being greater because the decisions of the federal courts often reach beyond the borders of the home interest's state and may have a greater potential of bringing greater publicity and attention to a particular issue.

This research constructed Table 5.5 exactly the same as Table 5.4, with each of the five models included in a column. Again, the models regress political participation in the state courts on state political orientation and control variables for both eminent domain and marriage equality, which is also divided into time periods when the federal and state courts held a legal advantage.

As with the regressions in Table 5.4, there are a number of empty cells in Table 5.5. In Models Three, Four and Five, once again, the Legal Advantage variable takes on a single value and is perfectly collinear with other predictors. As a result, the logit does not include this variable. There was a second challenge. The interest group regressions also had separation and quasi separation problems. This happens when a variable either predicts binary outcomes strongly or perfectly (Institute for Digital Research and Education: UCLA 2013). One solution is to use Firth logistical regression, which is what was done for the interest group regressions (Heinze and Schemper 2002).

The first row of Table 5.5 shows the same pattern of results as for Table 5.4. For each model with the exception of the Fifth Model, there exists a strong relationship between state political orientation and the use of the state courts. As with the regression models for political interests, the fifth model, where the state courts held the legal advantage, did not achieve statistical significance. It would seem then that

Table 5.5: Causes of Political Interest Groups Entering into State Courts

Variables	Model 1:	Model 2:	Model 3:	Model 4:	Model 5
	Combined	Marriage Equality	Eminent Domain	Equality Federal Advantage	Equality State Advantage
	Coefficient (Error)	Coefficient (Error)	Coefficient (Error)	Coefficient (Error)	Coefficient (Error)
State	0.10*	0.06*	0.12*	0.13*	-4.72
Orientation	(0.02)	(0.02)	(0.03)	(0.03)	(4.27)
State	0.13*	-0.01	0.19*	-0.03	3.89
Resources	(0.02)	(0.02)	(0.03)	(0.03)	(6.46)
Legal Advantage	1.06* (0.09)	0.95* (0.04)			
Resources x Advantage	-0.16 (0.10)	-0.001 (0.052)			
Legal Area (Equality)	-0.14 (0.03)				
N	579	175	404	103	72
AIC	128	-217	196	-78	-4681

* p ≤ .05

Entrance into a state court by a political interests represents the dependent variable. The variable of interest is state political orientation, the results of which are on the first line of the regression table. In all but Model Five, the results show that state political orientation shows a positive relationship with entrance into the state courts.

political interest groups employ similar tactics and strategies as political interests such as public interest law firms. This does not preclude the possibility that the members of political interest groups put pressure on their leaders to act in ways that perhaps political interests do not; nonetheless, the regression shows that state political interests and interest groups acted in ways that were similar. As with the regressions shown for state political interests, state political orientation was positively associated with the use of the state courts, except in Model 5, where the state courts held the legal advantage.

5.4 Conclusions

This research has argued that state political interests develop strong relationships with the political and legal communities that these groups are embedded in. Existing qualitative research has not shown this relationship. Nonetheless, the public policy research beginning with Truman et al. (1951) strongly suggests that state political interests are strongly bound to their in-state political communities (e.g., Zeller 1954; Zeigler 1983; Hrebenar 1987; Gray and Lowery 2000). Farole (1998) also observes in his qualitative work that national political interests often felt uncomfortable in the state courts, citing an in-state bias towards in-state political interests.

This dissertation asserts that this embeddedness or state political orientation affects the decisions that state political interests make to turn to the state or federal courts. The evidence strongly suggests that state political orientation represents one important factor when considering political interests and judicial federalism. National political interests will turn to the federal courts more often. State political interests, on the other hand, will enter into the state courts more often

The regression analysis and tabulation of instances of political participation in the federal courts buttresses this conclusion. In cases that were expected to turn on

a federal question, state political interests entered into the state courts at a much higher rate than national groups. In contrast, when a case was more likely to be decided with state law, state and national political interests entered into the state courts at about the same rate. Yet cases that turn on state law do not really provide a venue choice, given that the federal courts largely cannot interpret state law. The state courts, however, can interpret state and federal law, and there is a real choice. The data show that national political interests do not seem to have the same comfort or confidence in the state courts that their state partners do. This could be for a number of different reasons: National political interests may not have the personal contacts and connections to state judges and attorneys knowledgeable in a particular state's laws, also the legal and political norms, history and culture (Elazar 1972).

National political interests, too, might not experience the pressure that their state counterparts experience to act in a state when a national issue affects those who live in a state in a direct way. While the reasons why state and national political interests enter into the state and national courts at different rates, the evidence suggests that the groups do exactly this.

This research also offered evidence for the concept or the idea of state political orientation. This study operationalized this concept in a number of different ways: First, instances of participation in the federal and state courts were examined. State political interests entered into the state courts more often and this argues for state political orientation because it is an explanation that makes the most intuitive sense. It does not seem likely that state political interests would turn to the state courts more often for reasons other than that these groups are socially and politically embedded within their respective states. Conversely, these state groups are less likely to take legal actions in the federal courts because these groups are less familiar with the courts and consequently more fearful of them. In the first sets of regressions this

research operationalized state political interest by assigning state groups this value. Operationalizing state political interest this way gave the expected results in two different legal areas. Finally, this study operationalized state political orientation by examining only state political interests and labeling those state groups that had taken legal actions in different state courts or federal circuits lacking jurisdiction over the interest's home state as not having a state political orientation. This approach too, gave the same results as the previous research: the regression showed that state political interests that lacked a state political orientation were negatively associated with the use of the state courts. Seemingly, then, state political orientation exists, given the consistency in the results and the different ways that the concept was operationalized.

Yet while having a state political orientation tells part of the story, it does not tell all of it. There exist two significant challenges. The first is that there may be gaps in existing theory, which does not take into consideration either judicial selection methods or judicial ideology, as described in Chapter Three. With judicial selection methods, political interests and groups may turn to the state courts because these groups believe that judges might come under electoral pressure to grant favorable rulings. As noted previously, Comparato (2003) observed in his research that political interest groups send implicit messages to state judges about their personal electoral or political vulnerabilities. State judges, then, are seemingly targetable and this might give reason for political interests, state and national to turn to the state courts.

Ideology represents a second unexplored linkage between political interests and judicial federalism, which, seemingly, would incentivize political interests, both state and national, to turn to the state courts when there is a closer ideological match between the group and the judges or justices on the court. As noted in Chapter Three, the attitudinal (Segal and Cover 1989; Segal and Spaeth 2002) and the strategic

judicial (Epstein and Knight 1997) models hold that U.S. Supreme Court Justices hold attitudinal preferences. While the judges in the lower federal and state courts may not have the same ability to implement their attitudinal preferences because they can be overruled (Segal and Spaeth 2002), this does not mean that these lower court judges will not try when given the opportunity to do so. A state court, then might offer a political interest a more desirable venue than the federal courts if the ideology between the group and the judge is a closer match.

Finally, existing theory (Farole 1998), which requires a legal and resource incentive for groups to turn to the state courts, might be incomplete. This study's data shows that legal advantage is a powerful variable in predicting whether state or national political interests turned to the state or federal courts. The state resource variable, however, showed a positive association between resources and legal actions in the state courts sporadically, and the interaction between these terms did not produce any meaningful results.

The following chapter will attempt to address some of these challenges using the data that was collected for this study. This study may not be able to answer all of the remaining uncertainties, particularly the relationship between state resources and the decision to litigate in state courts, because this is difficult information to get, given that the information is sensitive and the sample captures the actions of more than 1000 unique interests. Nonetheless, the data collected gives the opportunity to paint a more complete picture of the relationship between political interests, both state and national, and judicial federalism.

Chapter 6

JUDICIAL IDEOLOGY, STATE JUDICIAL SELECTION AND COURT CHOICES

The previous chapter examined state political orientation and discovered that the embeddedness of state political interests in state political communities positively affected the decision to turn to either the state or national courts. State political interests, it would seem, are much more at ease when turning to the state courts than their national counterparts when a federal question will most likely decide the case.

Yet, as the previous chapter pointed out, the data collected for this project can help with many of the unanswered and incompletely answered questions on the relationship between political interests, also interest groups, and the American courts. This sample, as described in Chapter Two, includes numerous observations of the actions of political interests in both the state and federal courts, also at each level from trial to the highest appellate courts. These data, then, may be helpful for aiding the understanding of political interests and the courts.

Generally, there are two challenges. The first challenge is to consider reasons why political interests turn to the state courts that previous research has not considered fully. Here, two important variables exist: judicial ideology and judicial selection. Prior research has struggled to find the connections between ideology, judicial selection and interest group behavior; nonetheless, judicial ideology can weigh heavily in the decisions that judges make, especially for those who sit on the U.S. Supreme Court (e.g., Segal and Cover 1989; Segal and Spaeth 2002).

Political scientists have shown that judicial selection methods affect the decisions that state judges make (Hall and Brace 1992; Langer 2002). State judges, particularly

those who were elected to office under party labels, can come under electoral pressure to decide a case for a particular side (e.g., Hall and Brace 1992; Langer 2002). Nonetheless, even those judges who were not elected to their jobs can find themselves under political pressure to decide a case for a side. Comparato (2003), in his research, argues that state judges appointed to office can come under pressure from the state legislature, which can in effect overrule a case by changing the state law.

Yet questions also remain with the existing research by previous scholars. The quantitative research done in this study in Chapter Five raises questions about the importance of state legal resources and the interaction between resources and legal advantage, which prior research (Farole 1998) asserts as true. First—in this research—the state legal resources variable did not always show a statistically significant relationship with the decision to turn to the state courts. This should be expected. Farole (1998) argued that both state legal resources and legal advantage were both necessary for a political interests to turn to the state courts. Yet, the interaction between these two variables did not achieve significance in any of the regressions. This research can examine the importance of legal resources and its relationship with legal advantage.

These are clearly two areas where the data may help to improve existing theory. This chapter will first focus on the potential impact of ideology and judicial selection methods on the decision of political interests to take legal actions in the state courts and then reexamine existing theory using quantitative methods. Once this is completed, this research will then offer its own assessment of why political interests, both state and national, pursue their policy goals in the state or federal courts. Clearly, there is much that the data collected cannot capture; nonetheless, it offers a unique

opportunity to perhaps gain original insights.

6.1 Judicial Ideology and State Selection of Judges

Political scientists have long argued that political interests attempt to influence court decisions (e.g., Bentley 1967; Truman et al. 1951). Judges' personal ideologies help shape their rulings for the U.S. Supreme Court (e.g., Segal and Cover 1989; Segal and Spaeth 2002), federal appellate courts (e.g., Epstein, Landes and Posner 2013) and state Supreme Court Judges (Hall and Brace 1992; Brace and Hall 1997). Political interests, then, have a powerful incentive to seek out judges and justices that share their ideological views. Ideology, then, should not be ignored when examining the relationships that political interests have with the courts.

Early research on interest groups and the courts shows that political interests seek out courts that were ideologically receptive. The disadvantage theory suggests exactly this, arguing that organizations that represent the disadvantaged sought out the courts and more specifically the federal courts because these venues were most receptive to their positions (see Cortner 1968; Sorauf 1976; O'Connor 1980; Berry 2015; Greenberg 1974; Dhavan and Jacob 1978; Truman et al. 1951). Case studies on the National Association for the Advancement of Colored People (NAACP) illustrate this. The NAACP has long advocated for the rights and liberties of black Americans beginning with efforts to end lynching (Francis 2014), yet the organization has achieved the most success in the courts, not the legislature or other more traditional political venues (Vose 1959, 1972). While the disadvantage theory doesn't directly assert that liberal groups sought out liberal courts, it is nonetheless suggested given that these organizations can be characterized overall as liberal as well as the federal courts at the time, especially under Chief Justice Warren. ¹

¹Political scientists disagree on how liberal the Warren court was. Segal and Spaeth (1989) for example found that the Warren court was more liberal than the Burger court on civil liberties, but

More recent research also finds that political interests seek out courts that are ideologically advantageous. De Figueiredo and de Figueiredo Jr (2002) examined interest groups and their decisions to either pursue policy in the legislature or the courts. In their model, when courts were unlikely to change the status quo, the decision to enter into the courts was highly influenced by the ideology of the courts. Ideology, then, as modeled by De Figueiredo and de Figueiredo Jr (2002), was a factor in the decision to turn to the courts.

Such research has examined the effect that ideology might have on the decision of a political interest to turn to the courts in general. In these studies the alternative choice is often between lobbying the legislature or the courts (e.g., Holyoke 2003; De Figueiredo and de Figueiredo Jr 2002). Ideology, nonetheless, might also incentivize the choice between individual courts. A political interest may be attracted to a court for ideological reasons alone; the interaction between judicial selection methods and ideology might produce an even greater incentive for a political interest to enter into a particular court. Hall and Brace (1992), for example, found that judges in the liberal minority on conservative courts were more likely to side with the majority in death penalty cases when they were elected from a single member district. Clearly, the liberal judges in these cases felt pressure to conform to the majority because they were in the ideological minority, but also because the voters could remove them from their offices. Political interests recognize this, and send signals to judges about their political vulnerabilities (Comparato 2003).

6.2 Testing the Impact of Ideology and Selection

The data collected for this research creates the opportunity to test the impact of ideology on the decision of political interests to turn to either the state or federal

not economic issues.

courts. Chapter Two also examined the impact of ideology and found that ideology was positively associated with state political interests turning to courts, either state or federal, that lacked political jurisdiction over the interest's home state. This test is similarly constructed, yet instead of measuring the impact on the decision to turn to a state or out-of-state court, it examines the decision to turn to the state versus the federal courts.

6.2.1 *Judicial Ideology*

This research constructed the judicial ideology measure for this chapter in a similar way to the ideology measure in Chapter Three. First, this study coded political interests either as -1 for liberal, 1 for conservative and 0 if the group did not take a clear ideological position. For most political interests, particularly those involved in the marriage equality issue, it was clear whether the group was liberal or conservative. Liberal organizations obviously tended to support marriage equality and this research coded them as such. In eminent domain this research coded groups as conservative if these political interests supported property rights and government compensation for takings.² Prior work in political science has also taken this approach.³

Second, this research assigned ideological scores for the federal and state courts. For the federal circuit courts, the common space project assigned ideological scores based on measures created by Giles, Hettinger and Peppers (2001*a,b*), which used senatorial courtesy scores to generate ideological scores. Senatorial courtesy scores were constructed the following way: If at least one U.S. Senator shared the same

²Previous eminent domain research categorized property rights actions as both liberal and conservative. This research labels these actions as conservative and actions that favor government takings as liberal.

³McCarty and Poole (1998); Bonica (2013, 2014) assigned ideological scores based on group contributions. While seemingly simplistic, this measure is arguably valid, given that political interests' ideology tends to be bimodal, falling on one side or the other of the political spectrum (Bonica 2013).

party as the U.S. President who appointed the judge, then the NOMINATE score of that senator or the average between two senators belonging to the same party as the President was used. Otherwise, the NOMINATE score of the President was used. These scores were then changed into scores compatible with NOMINATE. For the U.S. Supreme Court, the judicial common space project transformed Martin-Quinn scores (Martin and Quinn 2002), which are ideological measures of U.S. Supreme Court justices that were based on their voting records. These scores, similarly, were transformed into scores that are interchangeable with NOMINATE. For the state courts, this study used CF scores from Bonica and Woodruff (2012). These scores are like the common space scores in that they are scaled the same as the NOMINATE scores on a -1 to 1 scale, and can also be substituted for NOMINATE. The measurement of Campaign Finance (CF) scores, however, is different. Bonica based his CF on three criteria: campaign contributions in partisan and nonpartisan elections, their own private campaign contributions if they did not run for office or the governor who appointed them if they did not run for office or make campaign contributions.

Next, this research considered what the alternative legal venue would have been. If the political interest entered into a state court, the alternative venue was the federal court with jurisdiction over where the case originated. For cases in the federal courts, the state alternative was the state courts from where the case originated. The institutional structure of the American courts complicates this analysis. Cases in the D.C. Federal Circuit were not included. While a federal court, the D.C. Circuit functions as a state supreme court. There is no state alternative for the District of Columbia. If the D.C. Circuit were to be seen as a state court in this research, there would be no federal alternative because most cases can only be appealed to the U.S. Supreme Court from the D.C. Circuit. There were a select number of cases in the federal courts where a state alternative could not be decided on. For example a

corporation that operates in multiple states may have brought a case before the U.S. Federal Circuit where the facts of a case were not associated with any particular state. Here, it was too difficult to assign an alternative state. Cases originating with the American Indian tribes, too, were not included, as these are semi sovereign territories under U.S. not state legal jurisdiction.

This research then used these scores to create ideological scores for the federal and state court pairs. It was done this way: the ideological averages of the courts were taken for each of the years in the sample. The averages were taken by dividing the summed ideological scores by all the judges on the court in a year. Obviously, this is not a perfect measure, given that it includes the scores of recently retired and new judges for a year, yet this was the best that could be done, given that the appointment and retirement dates are shown by year and not month. In this manner ideological scores were constructed for the U.S. Supreme Court, each of the U.S. Courts of Appeal and each state supreme court for each year in the sample. Using this data, a matrix of state-federal alternative pairs could be constructed. While ideological scores could be assigned to most courts, similarly scaled ideological data for judges was not available for the lower federal and state courts. To address this, this study used the ideological data for U.S. Circuit Courts as a proxy for the U.S. District courts and similar data for state supreme courts for all state courts beneath it.

This methodological choice is clearly not ideal. Nonetheless, political scientists have not assigned ideological scores to federal district judges that are directly comparable with U.S. Supreme, federal circuit and state supreme court judges. Also political interests in the data collected took far fewer court actions in the federal district courts than they did the circuit, U.S. Supreme and state courts. Additionally, the federal district courts are part of the circuits and one might reasonably expect that these lower courts are ideologically similar, particularly given that the circuit

judges directly above will be first to review the appeals to the judges' rulings. Research has found that federal judges are less likely to make decisions based on their attitudes the further down they are in the judicial hierarchy (Epstein, Landes and Posner 2013).

Finally, this research constructed the ideological advantage measure. For liberal political interests, if the state court ideological score was lower than the score assigned to the federal courts then the measure was marked as holding an ideological advantage. The state could have been conservative like its federal counterpart, yet if the court was less conservative than the federal match then it was coded as having this advantage. For conservative political interests, the observations were coded as having a state ideological advantage if the state court had a higher, i.e., more conservative, ideological score. For political interests that were neither coded as being conservative or liberal, the state ideological advantage was always marked as 0.

6.2.2 Judicial Selection

In addition to ideology, the institutional structure of state courts is also very important. The United States is unlike many countries in the world in that it elects many of its judges. This has generated controversy since the early American republic, with Alexis de Tocqueville commenting that, "these innovations will, sooner or later, have disastrous results" (De Tocqueville 2003, p. 314), asserting that judicial integrity and electoral accountability were not compatible. Judicial scholars have framed their research on judicial elections this way, as a debate between accountability to the electorate and the independence of judges (e.g., Dubois 2014; Gibson and Caldeira 2009; Hall 1987; Brace and Hall 1997).

The conflict between judicial independence and accountability was not lost on American lawmakers, particularly those in the Progressive movement, who attempted

to put greater political distance between the electorate and judges (Dubois 2014). These lawmakers implemented nonpartisan judicial elections, where judicial nominee does not run under a party label, and the Missouri Plan. Typically, in the Missouri Plan, the governor of a state selects a nominee from a list of candidates assembled by a state panel knowledgeable about the qualifications of judges and the skills necessary to do the job well. The judges will typically then stand for reelection either in districts or at the state level.

A number of studies have explored the relationship between the institutional structure of the state judiciaries and judicial independence (Hall 1987; Hall and Brace 1992; Hall 2001; Brace and Hall 1997; Brace, Langer and Hall 2000), and concluded that state judges do come under pressure to decide cases in ways that are inconsistent with their attitudes and judicial philosophies. A number of these studies have examined the rulings of liberal judges in conservative states on the death penalty issue; where there is often pressure to conform to the rulings of the conservative judges (Hall 1987; Hall and Brace 1992; Hall 2001; Brace and Hall 1997; Brace, Langer and Hall 2000). Institutional features like partisan elections (Brace and Hall 1997) or electoral districts (Hall and Brace 1992) and competitive state politics limits the political distance between the judges and the electorate (Brace and Hall 1997). While many judicial politics studies focus their attention on the threat from the electorate, there also exists a threat to judicial independence from legislators who can write law that overturns their rulings (see Comparato 2003).

The construction of the ideology measure was described above. For the judicial selection variable, this research coded observations where the state court elected its judges under a partisan label as 1 and 0 otherwise.⁴ Some judicial politics research

⁴Other judicial politics research has operationalized judicial selection methods this way. Brace and Hall (1997) assigned a 1 to courts where the judges were selected in partisan and nonpartisan elections.

has concluded that state judges are as political vulnerable under reformed judicial selection systems like the Missouri Plan (e.g., Hall 2001). This research, nonetheless, will agree with the prior research that holds that state judges are most politically vulnerable under elections, and in particular elections where the judicial candidates run under party labels (Dubois 2014; Brace and Hall 1997). Brace and Hall (1997) coded both partisan and non-partisan courts as 1. This research coded only courts where the judges were elected under party labels as 1 and groups non-partisan and Missouri Plan judicial elections together, as reformed state judicial election methods. This is justifiable, given that non-partisan elections, like the Missouri Plan were created as a reform measure (Herndon 1962). Non-partisan elections also have different electoral dynamics. Clearly non-partisan elections deny voters party label and force them to rely instead on incumbency as a cue (Schaffner, Streb and Wright 2001). Additionally, these elections suppress voter turnout (Dubois 2014; Schaffner, Streb and Wright 2001).

6.3 Multivariate Analysis

Table 6.1 shows the results of three logit regressions, one for eminent domain, one for marriage equality and one that combines data from these two legal areas while controlling for legal area. These regressions have included the control variables from the previous chapter, legal advantage and state legal resources, as well as the state political orientation variable described in the previous chapter. The regressions include ideological advantage and partisan election variables, as well as the interaction of these variables. It is expected that the ideological differences between the state and federal courts might incentivize a political interest, whether state or federal, to turn to the state courts. Nonetheless, state judicial selection methods and partisan elections in particular might further incentivize entry into the state courts by political

interests. A political interest that supports the death penalty would be aware that the Texas courts are politically conservative but also that a liberal judge would most likely make herself or himself politically vulnerable if he or she voted against what would be expected to be a conservative judgment. Once again the dependent variable is dichotomous and shows entry into the state courts. The samples, however, have slightly fewer cases because federal-state court pairs could not be established for all of the observations, as described previously. In model three coefficients are missing for the legal advantage variable and its interaction with resources. Again, for eminent domain, legal advantage was marked as federal for all of the observations.⁵ This produced singularities that interfered with the inversion of the Hessian Matrix.

In Table 6.1, the control variables showed similar levels of statistical significance as in the previous regressions. Both legal advantage and state political orientation were very strong predictors of the decision for political interests to turn to the state courts. The variables of interest, legal advantage and partisan elections, showed mixed results, both as stand alone variables and when interacted. The ideological advantage variable showed a strong relationship with the outcomes in the combined and marriage equality models, one and two. The partisan election variable, on the other hand, was positive in the combined and eminent domain models. The interaction between ideological advantage and partisan elections did not achieve statistical significance. The conditional impact of partisan elections on entry into the state courts when there was an ideological advantage did not show a strong relationship with entry into the state courts. Partisan elections, then, did not seem to enhance the prospects of state political interests turning to the state courts when there existed an ideological incentive to do so.

⁵Appendix C examines the possibility that states enjoyed a legal advantage following *Kelo v. City of New London* and reevaluates the regression results of this chapter.

Table 6.1: The Effects of Ideological Advantage and Judicial Selection in Entering Into State Courts

Variables	Model 1:	Model 2:	Model 3:
	Combined	Marriage Equality	Eminent Domain
	Coefficient	Coefficient	Coefficient
	(Error)	(Error)	(Error)
State	1.80*	1.22*	1.88*
Orientation	(0.21)	(0.48)	(0.24)
State	0.14	-0.27	0.30
Resources	(0.24)	(0.67)	(0.27)
Legal	8.63*	8.09*	
Advantage	(0.69)	(0.82)	
Resources x	-1.98	-1.58	
Advantage	(0.71)	(0.91)	
Legal Area	-2.19*		
(Equality)	(0.33)		
Ideological	1.28*	2.49*	0.37
Advantage	(0.27)	(0.55)	(0.42)
Partisan	1.80*	0.14	2.10*
Election	(0.25)	(0.76)	(0.27)
Advantage x		-0.57	0.21
Election		(1.10)	(0.68)
N	1610	755	855
AIC	800	215	564

* $p \leq .05$

*This regression examines the effect of ideological advantage and partisan elections on the decision to enter into out of state courts.

The table offers interesting results for ideological advantage and judicial selection methods. When there was an ideological advantage, political interests involved in the marriage equality issue were seemingly more responsive to the ideological differences between the federal and state courts than those interests active in eminent domain. The reasons for this are not entirely clear, but it is possible to offer informed speculation.

With marriage equality cases, success, at least early on, seemed highly unlikely (Becker 2015). Political interests then may have been uniquely sensitive to the differences in ideology between the federal and state courts because the probability of success was very low at the time. In this context, liberal political interests needed to take advantage of every opportunity for success. The possibility also exists that the state judiciaries reflected the ideologies of the states themselves (Brace and Hall 1997). The political interests then may have selected liberal states, which the judiciaries happened to mimic. Additionally, liberal states would seemingly have constitutions giving greater protections of the rights of same sex couples to marry.

Clearly, this was not the only strategic choice. Much of the initial litigation took place in politically liberal states like Hawaii, Vermont and Massachusetts. Also, many of these state constitutions could be interpreted to grant equal if not greater protections than the U.S. Constitution.⁶ Yet these advantages were seemingly not enough and the above regressions suggest that the political ideologies of the federal and state courts may have been taken into consideration.

With eminent domain there might not exist a strong incentive to closely weigh the

⁶Obviously the U.S. Supreme Court had not established a federal standard on same sex marriage during these early cases. Nonetheless, there seems to be a sense in the legal community of how legally powerful the state and the U.S. constitutions were in relationship to each other. As an example, Massachusetts Supreme Court Chief Justice Margaret Marshall, penning the majority opinion in *Goodridge v. Department of Public Health* (2003), writes, “The Massachusetts Constitution protects matters of personal liberty against government incursion as zealously, and often more so, than does the Federal Constitution, even where both Constitutions employ essentially the same language.” (p. 329 *Goodridge v. Department of Public Health* 2003)

ideological differences between the federal and state courts. The data show that 1315 out of 1568 observations took place in the federal courts, which is to be expected, given that most of the decisions are based on an interpretation of the U.S. Constitution's Fifth Amendment. Following the U.S. Supreme Court's rulings in (*Pennsylvania Coal Co. v. Mahon* 1922) and (*Penn Central Transp. Co. v. New York City* 1978), the U.S. Supreme Court established a clear federal standard, one that would meet the requirements for a jurisprudential regime (Richards and Kritzer 2002). There was less legal ambiguity in eminent domain than in the marriage equality cases; consequently, political interests may have been less sensitive to the ideological differences between the federal and state courts because they could be more certain that the case will be decided according to these established rules of interpretation. The U.S. Supreme Court has called for strict scrutiny in state decisions to take property (see Gieseler and Gieseler 2010). This, according to Bartels (2009), could compel judges to follow established legal protocol rather than deciding cases based on their ideology.

It would seem then that political ideology is sometimes an important factor. Political interests then enter into the federal or state courts on the basis of ideological advantages, but not necessarily. The structure and interpretation of American law affects whether political interests enter into the state or federal courts on the basis of ideology. When there are strong jurisprudential structures already in place perhaps there is less of an incentive to decide based on ideological differences between federal and state courts because the interests can count on the judges in this case to be limited by the structure and expected interpretation of the law (Bartels 2009; Richards and Kritzer 2002).

The partisan election variable reached statistical significance in the combined and eminent domain models. This variable then is like the ideological advantage variable in that it showed strong results in some but not all of the models. Perhaps one reason

why this variable is not positively associated with the entrance of political interests into the state courts in marriage equality cases is that the issue was largely driven by liberal interests (e.g., Klarman 2012; Keck 2014). The states, however, with partisan elections of state judges— with the exception of perhaps Illinois and New Mexico— tend to be politically conservative. There is then little political incentive for state political interests to select these courts as legal venues. Partisan election, however, does show a positive relationship with the decisions of political interests to enter into the state courts. One reason for this might be that the states with partisan elected judges are mostly politically conservative. Conservative political interests advocating for property rights then had a number of states to turn to.

In the models the conditional impact of partisan elections on the choice to enter into the state or federal courts when there was an ideological incentive did not reach statistical significance in any of the models. One might expect that political interests would seek out courts where the judges would be ideologically friendly and the institutional structure of the courts might compel those judges in the ideological minority to take their side. Yet, the results do not support this. These results disagree with some previous findings (e.g., Brace and Hall 1997), found that the interaction between judicial ideology and state judicial selection affected judicial decision making in state supreme courts.

With the eminent domain cases, one explanation for the lack of findings in this regression is that these cases may be more likely to emerge in conservative states, which elect their judges directly more often than their liberal counterparts. Consequently, liberal groups make pursue legal actions in eminent domain in conservative states because that is where these legal controversies erupt. These liberal organizations would most likely forgo any judicial ideological advantage.

Judicial ideology and selection methods appear to have the power to affect the

choices that political interests make in selecting the federal or state courts. Yet, these effects do not appear to be consistent across different legal issues. There seem to be other factors that cause judicial selection and ideology to have an effect on the courts that political interests enter into. A limited number of states have partisan elections and these states tend to be conservative. Consequently judicial selection methods may not be helpful to liberal interests. Judicial ideology and judicial selection can become important factors in the choice to enter a state or federal court, but there is less consistency than with the state political orientation and legal advantage variables identified earlier.

6.4 A Simplified Model of Political Interests and Judicial Federalism

What then is the best model of political interests and the courts? This research will now turn to putting together a model that predicts whether political interests enter into the state or federal courts. As noted previously, the existing model of judicial federalism is incomplete: it fails to take into account the differences between state and national political interests; it also fails to consider both judicial ideology and state judicial selection, which are important factors. Yet, there are also challenges with existing theory. Table 6.1 shows that the state legal resources variable does not achieve statistical significance in any of the models. Also the conditional impact of state political resources on the decision to enter state courts when there is a state legal advantage also does not reach statistical significance in any of the models. There could be two reasons for this: First, the state political resources variable includes many groups that lack these resources. Second, state political resources are not a necessary condition for political interests to enter into the state courts.

The prior qualitative work was better able to measure state political resources because unlike this research there were a limited number of interests in the qualitative

data set. Farole (1998) examined the most legally active interests in obscenity and eminent domain. He assessed state litigation capacity primarily through interviews with members of the organizations, who provided information on the number of in-house and volunteer attorneys. This previous research asserted that political interests with a federated structure often had access to these state attorneys. The Sierra Club for example had both staff and a network of volunteer attorneys; so did the American Civil Liberties Union, whose network of state attorneys facilitated the organization's state litigation.

This research labels national political interests with state affiliates as having state litigation resources based on this earlier research. Yet, this linkage between federated political interests and access to state level attorneys may not be certain. Farole (1998) in his qualitative research only interviewed the most active political interests. These interests, like the American Civil Liberties Union, the Sierra Club and the American Farm Bureau, are large national organizations with seemingly well-funded state chapters that in the data collected for this research entered into litigation semi-independently of their national offices. Can we then expect that less well-developed organizations can do the same? While a federated structure might provide a national litigation-oriented political interest like the Sierra Club with the state level attorneys that it needs, this most likely does not hold true for other types of interests, even with a federated structure.

This research also included state political organizations in the state political resources category. If national political interests with state chapters have access to state level attorneys and litigation resources, then, seemingly, state political interests do as well. Yet, assigning state political resources to state groups might not be correct. National organizations like the Sierra Club or American Civil Liberties Union may have the ability to bring state attorneys into their organization because these

organizations are well known and have a national political reach. An environmental attorney in San Francisco then might be more willing to volunteer his or her time with the Sierra Club because the organization has national name recognition and might seem like a better use of the attorney's time than a state group that has the same purpose.

The national, federated groups are probably also usually much better funded than the state-level groups. In the qualitative part of this research, many of the leaders in state political organizations said that they often turned to local attorneys that they knew personally. State groups then do not gain access to state-level attorneys through resources but rather their relationships and embeddedness in state political communities. There are then potentially two different mechanisms at play. For state organizations gaining access to state legal resources seems to be more a function of state political orientation.

Next, state political resources might not be a necessary condition for legal participation in the state courts. In cases that were decided on the basis of state law, national political interests were just as likely to enter into the state courts as state political interests. This makes perfect sense for national political interests with state chapters, given that these chapters might have access to state level litigation resources, yet many of these federal groups lacked a federated structure and still were able to enter into the state courts at roughly the same rate as their state counterparts. This observation shows that political interests lacking state legal resources can find these resources if the group chooses to enter into the state courts. While state political interests and federated national interests with state affiliates may have greater access to state attorneys, this does not appear to limit national non-federated interests from doing this.

It is true that state political interests entered into the state courts when there was a

federal question, yet this arguably had more to do with their state political orientation rather than their state political resources. In cases with a federal legal incentive, the national political interests were not put in the position where these groups felt that they had to choose the state courts. Consequently, it would seem that these groups turned to the federal courts because they lacked this political embeddedness and identified more with the federal courts.

Finally, the costs associated with state litigation are different. The least costly way for a political interest to enter into the courts is through an amicus brief, yet this method of entering into the courts may even be less costly than that if the group signs on to an existing amicus brief, in which case, state level resources would not appear to be especially important.

As a result, the data collected suggest the following variables most affect the decisions of political interests to turn to the state courts: legal advantage, state political orientation, judicial ideology and state judicial selection methods. This research selected logit to test the relationship between these variables and the decision of political interests to take legal actions in state courts.

The regressions in Table 6.2 do not show any unexpected results.⁷ With the exception of the interaction term, each of the variables in the proposed model achieves statistical significance in at least one of the regressions. The most influential factor is clearly legal advantage, which holds statistical significance in the first and second models. The next variable ranked in importance is state political orientation, which shows a statistically strong relationship with entrance into the state courts in each of the models. As with the regressions in Table 6.1, the ideological advantage and partisan election variables reach statistical significance, but in separate legal areas.

⁷As with the previous regressions, the state legal advantage variable was omitted for eminent domain. This is because legal advantage was coded as federal in all of the eminent domain cases. This produced singularities that interfered with the inversion of the Hessian Matrix.

Table 6.2: Preferred Model of Political Interests' Choice of the State Courts

Variables	Model 1:	Model 2:	Model 3:
	Combined	Marriage Equality	Eminent Domain
	Coefficient	Coefficient	Coefficient
	(Error)	(Error)	(Error)
State	1.79*	0.90*	1.95*
Orientation	(0.20)	(0.41)	(0.23)
Legal	7.46*	7.44*	
Advantage	(0.43)	(0.52)	
Legal Area	-2.10*		
(Equality)	(0.31)		
Ideological	1.22*	2.31*	0.45
Advantage	(0.27)	(0.55)	(0.41)
Partisan	1.77*	0.009	2.08*
Election	(0.25)	(0.76)	(0.27)
Advantage x	-0.58	-0.37	0.18
Election	(0.52)	(1.10)	(0.68)
N	1610	755	855
AIC	805	220	564

* $p \leq .05$

*This regression tests the model that this research believes to how the most explanatory power of why political interests turn to the state and federal courts. The "Combined" model takes together the observations from both marriage equality and eminent domain legal areas; consequently, legal area was used as a control.

Ideological advantage achieves statistical significance in the marriage equality legal issue, while partisan elections shows a positive relationship with entry into the state courts in eminent domain. The conditional impact of partisan elections on the decision of political interests to enter into the state or federal courts after taking into account the effect of ideological advantage did not produce statistical significance in any of the models, so, at least with eminent domain and marriage equality, judicial selection methods did not appear to create an enhanced effect in selecting the state courts. The choice not to include the state legal resource variable and its interaction with legal advantage did not change the results shown in earlier regressions.

6.5 Conclusions

In this research the availability of data created new opportunities. First, prior research could be considered quantitatively. Second, this research could examine previously untested explanations for why political interests enter into either the state or federal courts could be tested.

Judicial ideology and state judicial selection represent two important causes for why political interests choose either the state or federal courts. This research found that both judicial ideology and selection methods affected the decisions of political interests to turn to the state or federal courts; nonetheless, this effect was mixed. In marriage equality cases ideological advantage was a strong predictor of entering the state courts, while partisan elections showed a strong relationship with the state courts in eminent domain cases. Unlike in previous research on death penalty cases (e.g., Brace and Hall 1997), there were no interactions between the effects. In other words, the conditional effect of partisan elections when there existed an ideological advantage did not reach statistical significance.

The reasons for the lack of a conditional effect are not entirely certain. This

research has, however, proposed that with eminent domain cases, liberal political interests have little choice but to enter into ideologically conservative states because these states often elect their judges directly. Consequently, these groups forgo judicial ideological advantage.

This research also found that the legal advantage and state political orientation variables were consistently strong. Political interests make decisions about whether to turn to the state or federal courts based on what legal basis, federal or state, these groups expect the courts to decide on. Prior qualitative research showed this, and so did this quantitative research. This factor, then, it would seem to be very important. Political interests pay close attention to the courts and how these courts decide cases and orchestrate their responses accordingly. State political orientation, too, showed a strong statistical relationship with legal actions in the state courts in both eminent domain and marriage equality. When thinking about political interests and their actions in the state or federal courts it is necessary to distinguish between these types of interests. State political interests are embedded within state political communities and develop special bonds with their state courts; as a consequence, state political interests are much more likely to pursue legal actions in the state courts, especially their own state courts.

This model finds that legal advantage, state political orientation, ideological advantage and partisan elections have strong explanatory power across both eminent domain and marriage equality legal issues. It is very reasonable to infer that this model would explain the interactions between political interests and the state and federal courts in other legal areas, as well because similar forces could be expected to be at play. Political interests would be expected to seek out the state courts when there was a legal incentive to do so, also when these groups had a unique attachment to the state courts. Judicial ideology and partisan elections are important, yet these

factors affect court selection in ways that are more complex and may be ideologically specific, e.g. the states with partisan elections are mostly conservative.

Chapter 7

CONCLUSIONS AND FUTURE RESEARCH

7.1 Outcomes

This dissertation has examined political interests and American judicial federalism, focusing much of its attention on state political interests. In doing so, this research has made a number of contributions to a number of different areas in political science. Hopefully, this dissertation has also opened a number of different avenues for further research. The courts, arguably, have become increasingly important in American politics. Political interests in the near and distant future will make decisions about whether to pursue their policy goals in the state or federal courts. It is not unreasonable to expect that the state courts will become an increasingly attractive political venue in a polarized, hyper-competitive political environment. Hopefully this research sheds more light on this particular choice.

Much of this research has focused its attention on the importance of place. American federalism, both in the courts and in the larger society, creates an interesting dynamic. On one hand, those in the federal government—the U.S. President, the Congress and the U.S. Supreme Court—construct and build policy for the nation as a whole. Yet Washington D.C. is but one political community—in the United States there are tens of thousands of them—and these communities are different. The issues might be the same, but the actors in these communities can be expected to respond differently to them, given their unique political orientations. It makes sense to recognize that state political interests are working to shape policy along with their national counterparts in ways that reflect their political communities.

This research has attempted to do exactly this. It has proposed that state political interests are oriented towards their political communities and these orientations ultimately affect their choices to turn towards the state or federal courts. Results of this dissertation's analyses suggest exactly this: State political interests turned to the state courts at a higher rate than their national counterparts. Also, this research finds that state political embeddedness is positively associated with the decision to enter into the state courts, when other factors are taken into consideration in both eminent domain and marriage equality, two political issues that are arguably very distinct from each other, one being issue-driven and the other by material interests. This finding hopefully gives a fuller picture of political interests and judicial federalism.

This finding also touches on research on the relationships between state and national political interests. Unfortunately, as previously noted, the research on state and national political interests diverged. Political scientists used national political interests to study theoretical issues, e.g., collective action or political subsystems. On the other hand, researchers examined state political interests in comparative state studies that often focused their attention on the makeup of state political communities. American policy, however, is dynamic and researchers have now taken a greater interest in the relationships between state and national political interests, and their unique policy contributions to political issues. A state political orientation affects the choice of state or federal courts, but it is most likely also important in other policy choices. For example, state political interests sometimes lobby in more than one state. A weak state-level political orientation might very well be one factor in this choice.

This research has also examined the effect of judicial ideology and state judicial selection methods on the choice to enter into the state or federal courts. Previous research has shown that these are two important factors in the decisions of judges. To

date existing research, however, has not shown how ideology or judicial selection affect the decisions made by political interests in the courts. While this research did not find a positive interaction between judicial ideology and state judicial selection methods, it did find a positive relationship between judicial ideology and the decision to litigate at the state level in the marriage equality cases and a similar positive relationship with state judicial selection and state courts in the eminent domain cases. This connection is by no means certain. In the qualitative chapter some attorneys said that their organizations were strategic; nonetheless the institutional structures of the courts and ideologies of the states prevented venue shopping. In Texas for example a liberal political interest would find it difficult to find a liberal judge. Nonetheless, the evidence does suggest that these factors may influence the choices of actors other than state judges. This is worth further investigation, and now is an ideal opportunity to do so, with the development and refinement of interchangeable measures of ideology for state and federal judges.

This research also developed a new model that explains why political interests—not only those at the state level—turn to the federal and state courts. This model included four factors: legal advantage, state political orientation, judicial ideology and state judicial selection. The model produced similar results in both the marriage equality and eminent domain cases. Would this model explain the decisions to enter into the state or federal courts of political interests in other areas of law? This is uncertain, and is an avenue for future research. Nonetheless, eminent domain and marriage equality, as previously observed, are very different political issues, one, arguably, being driven by ideology and the other by material interests. Thus there is reason to believe then that this model is generalizable to other areas of law.

In addition, this research has examined localism in the courts. Political localism remains largely underdeveloped. The early studies that touched on localism were

mostly descriptive, noting that there existed a greater tendency for political interests to register to lobby in more than one state. There are some more recent empirical studies. Nonetheless, this area of research is akin to a town with a gas station, souvenir shop and stretch of state highway running through the middle. If a small, unincorporated settlement represents the study of localism and American politics, the tree filled land behind the gas station represents localism and the American courts, which remains untouched. While some may have visited or explored this area, there are no visible signs of investigation. Localism and the American courts then represents an important yet unexplored gap in the literature.

In examining state political orientation, this study has made a first effort at filling this gap. In doing so, this research has made a number of important findings and perhaps opened future avenues for research. One finding is that state political interests are very unlikely to enter into courts that lack jurisdiction over the home state. Approximately 10% of the sample of state interest group activity in the courts showed extraterritorial legal actions. This statistic is similar to the rate of out-of-state lobbying registrations that were observed by previous research. Yet this rate may be far less, given that this study's sample did not include institutions, e.g., corporations, businesses and religions, which research has shown have a strong state political orientation. These finding argue strongly for an in-state political orientation.

This research has also investigated both qualitatively and quantitatively why state political interests enter into courts that lack legal jurisdiction over their home states. The research approaches gave slightly different results. In the qualitative research, the linkages between out-of-state legal actions and contributing factors such as participation, state political density, and judicial ideology were not those seen in the quantitative analysis. Nonetheless, two factors stand apart in both analyses: membership vs. non-membership organization and purposive vs. material orientations.

The groups that enter into out of state courts seem to often have two qualities: First these organizations are often purposive, advocating for a political cause rather than material interests. Second, these interests often do not have members. There are a number of reasons why the groups that enter into out of state courts have these qualities. For one, these groups are most likely more willing to take political risks, and the leaders are most likely able to take these risks because there are no members to question the actions taken by the leaders. For a member of a state organization, investing time and resources into a venue where there is no direct in state benefit might appear to be a waste of limited time and resources, but one that is more easily taken without the oversight of members.

Two, holding a purposive orientation, a political victory in a different state might carry the same or close to the same value as one in the home state. The Sierra Club was founded in 1892 to protect the Sierra Nevada, a range of mountains lying wholly within the state of California, The organization was then at the time a state organization. The organization nonetheless strongly advocated for the creation of Mount Rainier and Glacier National Parks, both outside of the home state of California Fox (1981). Purposive state organizations then value out of state political victories and this ostensibly inspires out of state political actions, including those taken in the courts.

This research also suggests that political interests decide to enter into out of state courts in different ways. A leader of one political interest emphasized the relationship between state level political interests that were members of a federated partnership. Consequently these federated partnerships operate laterally as well as vertically, with information and resources being shared between partners that operate at the same level. A second leader emphasized the spillover effects of policy in other states and at the federal level. It would seem that state political interests also enter into the

politics of other states when these groups perceive that policy changes in these states will ultimately change policy in their home state. California is often described as a “bellwether” state, as its policies often become the policies of the United States. It would then come as little surprise that state political interests in South Carolina and Louisiana, as well as many others, entered into the California courts during the marriage equality controversy.

7.2 Future Research

As touched on briefly in the previous section, this dissertation opens a number of different avenues for future research. This dissertation brought together research in both public policy and judicial politics. This research contributes towards both subfields. It also provides a platform for future research on political interests and the courts, an area of American politics that may become increasingly active and important in the future.

Within judicial politics, as noted, this research found a statistically significant relationship between ideology, state judicial selection and the decision to enter into out of state courts. Previous research has not found these connections. In judicial politics, much of the research has given its attention to how these factors influence the choices that judges make. Nonetheless, in the courts, there are other actors. Ultimately, the judicial politics subfield will need to consider how these influential factors affect the choices that other actors make. These findings merit further consideration.

This is now an ideal time to begin considering these questions. The measures of judicial ideology have become increasingly sophisticated. In addition, these measures are comparable. The ideology of a state supreme court justice can now be considered alongside the ideology of a U.S. Supreme Court justice or federal circuit judge. These measures, however, are not perfect. Good data still do not exist for state judges in

the appellate and trial courts, as well as for federal district judges. These data will most likely become available in the near future. It should also be noted that these measures are directly comparable with those of groups, as well as elected officials. Researchers will then have the opportunity to examine ideology and its impact on the different actors in a way that is much more descriptive and complete.

This dissertation also introduces research possibilities in public policy. As noted, the literature on state and national political interests has diverged. Both state and national interests, however, are active at shaping policy concurrently both at the national and state levels, as seen in this dissertation. Future research will continue to show the ways in which national and state political interests contribute to policy making. It will better describe how state and national political interests are similar, but also different. Research in the last decade (e.g., Baumgartner, Gray and Lowery 2009) has already pointed future research in this direction.

In this research, the state political interests showed a state political orientation, which was separate and distinct from their counterparts in Washington D.C. Prior research has shown that national and state political interests are similar. This research, however, suggests that while national and state political interests may be similar in some ways, they are dissimilar in others, many of them important. For example, state political orientation was positively linked with the decision by interests to enter into state courts at a much higher rate than their national counterparts.

The study of political interests and judicial federalism merits future research of its own. As American politics becomes increasingly polarized and contentious it is not unreasonable to conclude that political interests will seek out alternate political venues, the state courts not being an exception. This research, however, can be made more complete. There are a number of ways that this research can be improved upon.

For one, future research can examine legal areas other than eminent domain and

marriage equality. American politics is not lacking in legal controversies and there exists a myriad of legal topics, which researchers can easily access through Westlaw and other legal databases. The only requirement is that the state or federal courts should be able to decide these cases on the basis of either state or federal law. Obviously, if a case can only be decided on the basis of state law then there exists no option of turning to the federal courts. Prior to data collection, this research considered a number of different legal areas that include marijuana legalization, abortion, pornography and religious liberty. ¹

Future research will hopefully also be able to examine the data in ways that are more complete. For example, this research considered entrances into the courts as equivalent acts. Other researchers have also adopted this approach in their quantitative analyses of interest groups and the courts, (e.g., Olson 1990). Yet legal actions are not equivalent. Participating in an amicus brief, for example, does not entail the investment of time or resources that sponsoring a test case does. Hopefully future research will be better able to consider the level of involvement. Most political interests, as described earlier, participate in amicus briefs, so future research may have difficulty in finding enough observations for the quantitative study of direct participation or test cases difficult. Perhaps better data will facilitate research that better captures the different strategies with multiple groups in multiple cases.

Political interests employ varied strategies. These groups also play different roles in cases. Some groups assume leadership roles, coordinating and directing the movement of cases through the courts. Other groups assist these groups in their efforts. Other groups enter into cases on their own, independent of the consent of the leaders.

¹These are all "social" issues. In retrospect this study should have considered alternatives to eminent domain as its economic region of law. These cases might include workplace and environmental regulations, which are governed by both federal and state law. Any type of business-regulation policy where there is both a federal and state regulatory role (e.g., insurance, banking) might also be candidates.

These groups are often referred to as “rogue litigants.” Unfortunately, large data sets fail to capture these types of dynamics. Future research on political interests in the courts, however, will hopefully be able to do exactly this: capture the group actions, but also see these actions in a larger context. This will give a much more complete and accurate picture.

Future research should also focus its attention on the changing American federalism, not only in the courts but with executive and legislative branches as well. Political researchers are now giving much effort and time to polarization, and understandably so. As the parties drift apart ideologically, groups compete more fiercely. Ostensibly, these groups will seek out alternative political venues, particularly when other groups control the institutions that control power. The states themselves arguably represent an important outside venue. Both Republicans and Democrats have sought out the states as policy-making venues. For example, under President Ronald Reagan, the federal government gave federal dollars directly to the states in block grants as a way to end liberal programs. Liberals, on the other hand, have turned to the states with U.S. drug policy, with many states in recent years having adopted liberal measures that often are at odds with federal laws.

The state courts might also become increasingly important political venues. State judges, unlike their federal counterparts, can interpret both federal and state laws. Groups might seek out a state court because they believe that the judges will favorably interpret federal law. In the marriage equality controversy, for example, the Southern courts did not interpret the U.S. Constitution as liberally as did the courts in California. Yet, the interpretation of federal law is not the only advantage, there is also state law. Clearly, the U.S. Constitution is the ultimate authority, the “law of the land,” yet the boundaries between state and federal authority, like most legal controversies, are a “matter of interpretation.”

It is unclear how American judicial federalism will evolve. Time will ultimately decide that. The signs, the tea leaves, however, point in the direction of increased competition and contestation in the state courts. Future research in this area will aid our understanding not only in the topic that this dissertation has chosen, but also the nature of power in America and the future of politics and conflict in the America that has yet to come.

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APPENDIX A
INTERVIEW QUESTIONS

General

1. Can you describe the origins of your organization? Why was it created? What are its purposes?
2. Would you call your organization a state and not a national interest group?
3. If yes, can you give some specific examples of how your organization has participated in state politics?

Purposive vs. Material Orientation

1. Would you say that your organization pursues its political goals or protects the material interests of those it represents more?
2. Can you give any specific examples of this?
3. Is an out-of-state political victory as valuable as an in-state political victory? Why?

Participation

1. Is your organization more likely to enter into political venues where participation from other political organizations is high?
2. Do your members (formal or informal) expect that your organization participate in high-profile issues?

Density and Diversity

1. In your state are there organizations that are like yours? Can you name a few?
2. If yes, do you compete with these similar organizations for members (if open membership) or financial backers? Can you give some examples of this?
3. Do you see your state as having some, or quite a few important issue areas that interest groups organize around?

Courts

1. Does your organization have in-house attorneys? Does your organization hire private attorneys? If yes, are your attorneys' offices inside or outside of your state?
2. In your opinion is your organization strategic about the courts where it pursues its policy goals? Would you agree that picking a court that agrees with your organization's political values is important? What about a court where the judges are elected and the state voters are sympathetic to your cause?

Out of State Legal Actions

1. My data shows that your organization has/has not participated in out-of-state court cases. (If yes)
2. Why does your organization enter into out-of-state courts?
3. In these specific cases, why did your organization enter into this out-of-state or federal court that did not have jurisdiction over your home state?
4. (If no) Would your organization ever pursue its goals in out-of-state courts?

APPENDIX B
VARIABLES

This data set includes observations of interest group activity for 20-year periods in two legal areas, eminent domain and marriage equality. This research took these observations from *Westlaw*, an online legal data service. In the data each row represents an act of participation by an interest group, or what may possibly be categorized as an interest group depending on the typology used. There are 3640 observations of interest group activity spanning 335 unique case groups. These data include observations of both appellate and trial courts, both in the federal and state or territorial courts. The sample includes interest group participation in all of the U.S. states and territories. Below is a description of some of the important variables used in this research.

Variable: State or Federal Court

The United States has both federal or state courts. Litigants must pick which court system they wish to take legal actions in. The variable is dichotomous, coded 1 or 0, with 1 representing the state courts. In this study, this represents the dependent variable.

Variable: Group or Political Interest

For political scientists, the phrase “interest group” often has a specific connotation. Usually this phrase describes membership-based political organizations. There exists however in American politics politically active groups without members such as public interest law firms. This variable distinguishes between these types of groups, with 1 indicating a non-membership “political interest.” Broadly speaking, this research uses the phrase “political interests” to refer to both of these types together. In the statistical analyses however, “political interests” indicates a non-membership organization.

Variable: Purposive or Material Interest

Some political scientists categorize political interests as purposive or material (e.g., Kobyłka 1991). While ‘material political interests represent the property interests of their members, purposive interests work towards purposive goals. An organization that advocated for the legalization of same sex marriage, for example, would be considered a “purposive group.” This variable is also a dummy variable, with 1 representing a purposive interest.

Variable: Participation

Some political scientists have argued that competition drives participation in politics, with political interests turning to venues with high competition and visibility (e.g., Holyoke 2003). This study constructed this variable by adding the acts of legal participation in a case family, which is a legal case and its related cases.

Variable: Federated

Many political interests hold partnerships with organizations at either the national or state levels. This research categorized national political interests as federated if they have state chapters or close ties with independent state organizations and vice versa with state political interests. This research made this determination two ways:

First, state chapters of national organizations generally had the name of the state or geographical location in their title, e.g., the “San Francisco Bay Chapter” of the Sierra Club. Second, this research looked at the political interests’ websites, which generally show their alliances and affiliates.

Variables: Density and Diversity

Virginia Gray and David Lowery have researched the creation and destruction of political interests in the states (e.g., Gray and Lowery 2000). This research is generally descriptive of the makeup of political interests in the states themselves, but political scientists have used this research to describe why political interests take political actions. Wolak et al. (2002), for example, examine the relationship between density and out-of-state lobbying registrations. Much of their research focuses on two variables: density and diversity. This research follows Gray and Lowery’s operationalization of these variables. Political density represents the number of lobbying registrations in a state in a year. Diversity, on the other hand, is taken from a Herfindahl index, which measures the concentration of political interests across the different guilds. This is an inverse measure.

Variables: Ideological Advantage

Judicial ideology may incentivize the choices that political interests make in the courts. This research constructed this variable two different ways. In Chapter Three, this study labeled out-of-state court actions as ideologically advantageous if a group entered into an out-of-state court and it was a closer ideological match. In Chapters Five and Six, this dissertation categorized a legal action as ideologically advantageous if the state court was a closer ideological match than the federal alternative.

Variable: Judicial Selection

Judicial politics scholars have found that judicial selection methods influence the decisions that judges make (e.g., Brace and Hall 1997). This research considers whether state judicial selection methods contribute to the decisions that political interests make. In Chapter Three, this research operationalized judicial selection as a categorical variable, with partisan and non-partisan elections, Missouri plan and legislative appointment. In Chapters Four and Five this research operationalized judicial selection as a dummy variable, with 1 showing a partisan election.

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Variable: Legal Advantage

American law advantages the state or federal courts, and this advantage changes over time. This research operationalized this variable by following the coding scheme that

the U.S. Supreme court created in *Michigan v. Long* (1983), where the high court declared that for a court to have decided a case on the basis of state law, the decision should rest on state law. This research then looked for periods of time where the courts ruled on the basis of federal or state law and coded this accordingly as a dummy variable with 1 showing a state legal advantage.

Variable: State Political Orientation

This research assigned a 1 to state political interests and the state chapters of national political interests that took legal actions under their state title, e.g., the San Francisco Bay Chapter of the Sierra Club.

APPENDIX C

STATE JUDICIAL ADVANTAGE POST *KELO V. CITY OF NEW LONDON*

In categorizing cases as either having a state or federal judicial advantage, this research made use of the test that the U.S. Supreme Court established in *Michigan v. Long* (1983) to decide whether cases were decided on the basis of either state or federal law. Consistent with the test, this research categorized cases as having a state judicial advantage if the court decided the case on the basis of state law. This research then sought out periods of time where state or federal law was advantaged and categorized cases in these periods of time as having a state or federal advantage, as attorneys cannot be certain the basis on which the courts will rule on an individual case. The approach showed that the courts decided marriage equality cases on the basis of state law until efforts to overturn California's Proposition 8, a state constitutional amendment prohibiting same sex marriage, on the basis of federal law. This research found however that American courts decided eminent domain cases largely on the basis of the protections given to private property by the Fifth Amendment in the U.S. Constitution, so these cases were all labeled as having a federal judicial advantage.

Nonetheless, this categorization is somewhat quizzical following the U.S. Supreme Court's decision in *Kelo v. City of New London* (2004). American states can grant greater protections than those given by the U.S. Constitution, and this is exactly what many states did in the wake of the public outcry following the *Kelo v. City of New London* (2004) ruling, which gave state governments the ability to seize private property for economic development. By 2009, 37 states had introduced new eminent domain legislation, often granting greater protection to private property (Lopez et al. 2009). California voters, for example, passed Proposition 99, which prohibited state and local governments from transferring ownership of a an owner-occupied residence to a business or an individual (Office 2008).

These new laws however did not seem to produce the quantity of litigation that one might initially expect. Chapter Two describes the difference between direct and indirect condemnation, with direct condemnation addressing the taking of private property and indirect the compensation for private property. The data that this research collected show that most of cases following the *Kelo* decision did not give their attention to the taking of property but rather the compensation that government was expected to provide as a consequence of its laws, regulations and actions. Because the *Kelo* ruling speaks most directly to the taking of property and this is what the states acted to protect, it makes sense then that this research found that most cases were decided on the basis of federal law because most of these cases dealt with just compensation rather than the meaning of the U.S. Constitution's Fifth Amendment "public use" phrase.

For those readers who are not convinced that there continued to exist a federal judicial advantage post *Kelo* it may be helpful to show the regression results with these cases marked as having a state legal advantage. The table below reconstructs the regression found in Table 6.2 for eminent domain results. There are three models. The first shows the original regression. The second assigns state legal advantage to direct condemnation cases following the *Kelo* decision, while the third model assigns state legal advantage to all cases post *Kelo*

In Table C1, Models 2 and 3 emulate the results from the original regression. State political orientation and partisan elections achieve statistical significance in all of the models. Legal advantage reaches statistical significance in the second model, as in the original regression, but not the third. Regardless, making adjustments to state

Table C.1: State Judicial Advantage in Eminent Domain Post *Kelo*

Variables	Model 1: Original	Model 2: Direct	Model 3: Direct & Indirect
	Coefficient (Error)	Coefficient (Error)	Coefficient (Error)
State	1.95*	2.05*	1.98*
Orientation	(0.23)	(0.24)	(0.23)
Legal Advantage		3.67* (0.72)	0.38 (0.32)
Ideological Advantage	0.45 (0.41)	0.20* (0.44)	0.38 (0.41)
Partisan Election	2.08* (0.27)	1.83* (0.29)	2.14* (0.28)
Advantage x Election	0.18 (0.68)	-0.50 (0.82)	0.17 (0.68)
N	855	855	855
AIC	564	530	563

*p ≤ .05

*These regressions test the model that this research believes to how the most explanatory power of why political interests turn to the state and federal courts. The different models, however, show different assignments of state legal advantage in eminent domain cases post *Kelo v. City of New London*. Model 1 shows the regression in Table 6.2. Model 2 assigns state legal advantage to direct condemnation cases following the *Kelo* decision. Model 3 gives state legal advantage to all cases following the *Kelo* decision.

legal advantage does not substantially alter the effects of state political orientation and the other causal factors that this dissertation has attempted to develop.