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The Role of Public Opinion: Judicial Decision Making on Gay Rights Cases

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Abstract: In the United States, public opinion on gay rights has not always been favorable to gay Americans. Recently, this trend has been challenged and public opinion in support of gay rights has been growing. There is reason to believe that both the legislative and executive branches of government have responded to this increase accordingly, but what about the judicial branch? In this paper, I look at how public opinion on gay rights, specifically gay marriage, affects how individual state supreme court justices vote on gay rights cases, between the years 1981 and 2004. Additionally, I examine how the method of selection for justices impacts their responsivity to the increase in support for gay marriage. Then I view the effect of public retention elections on how justices respond to public opinion. The results indicate that justices are more likely to vote in favor of gay rights, as public opinion increases, especially for justices facing partisan elections. This adds to the greater narrative of the role of the judiciary and how public opinion affects governance.
Introduction:

The seven members of the Iowa State Supreme Court unanimously decided in favor of gay rights, by permitting marriage between couples of the same sex. In 2010, the public responded, as Iowans voted to remove three justices from the court via retention elections. The ouster of these justices by the public was interpreted in part, as a reaction to their ruling in the gay marriage case, which was decided against the wishes of many Iowans (Sulzberger 2010). This debate over whether the justices should or should not have voted in favor of majority public opinion, lies with the question of what is the role of the judicial branch of government. A potential answer to this question is that justices, as public officials, are obligated to listen to their constituencies and rule in favor of public opinion. On the other hand, the role may be to act as a counter-majoritarian force designed to balance the decisions made by other branches. The relationship between the judicial branch and the public may not be as clear as it is for the other branches. It is for reasons like the three justices getting voted off of the Iowa State Supreme Court, due to their disregard to public opinion, that the relationship between public opinion and judicial decision making should be further examined.

When it comes to highly salient issues, judges face the complex task of making decisions that have broad implications for the American populace. In making these decisions, there are numerous factors that a judge needs to weigh in order to make such a ruling. Which factors are the most important to consider in the judicial decision making process? In the United States, there have been many social movements by marginalized groups in the fight for legal rights, such as the woman’s suffrage movement and the civil rights movement, to name a few. Recently, the gay rights movement, a newer activist struggle, has emerged in the fight for legal rights and has seen major successes. One example of this movement gaining a civil right for gay citizens was
through the United States’ Supreme Court decision in *Obergefell v. Hodges*, that legalized same sex marriage across all fifty states. While this decision granted gay Americans the right to marry and the benefits that came along with it, there is more progress to be made in the arena of gay rights, especially through judicial processes.

There is a need to examine how judges make the decisions that they do, on cases that affect numerous Americans, such as gay rights cases. Therefore, it is important to analyze not only how judges decide on cases answering questions about gay rights, but also what leads to and influences these decisions.

![Percentage of Pro-Gay Rights Vote 1981-2004](image)

**Figure 1**: A bar graph representing the percentage of votes made by individual State Supreme Court Justices in favor of gay rights, organized by type of case, from 1981 to 2004 (Lewis et al. 378).

What is interesting to note from this graph is how there is not a uniform percentage of votes being cast across all the different issue areas, but rather there is variation. The differences in voting patterns by justices may be indicative of varying levels of public opinion. When public opinion is higher for a certain issue, say gay marriage, this may cause more justices to vote in
favor of gay rights on these certain cases. The overall majority of votes being cast in favor of gay rights in these cases could also speak to a larger trend of growing public support for gay rights. Another potential reason as to why some issues have higher percentages of pro-gay votes and others have lower percentages of pro-gay votes could be due to the limited number of cases being heard on a given issue during the time period, thus potentially skewing the amount of pro-gay votes in one way or the other. Overall, this relates back to the question of what factors impact the decision making of justices on gay rights cases. My analysis focuses on decisions that are being made at the state supreme court level because the United States’ Supreme Court does not hear enough gay rights cases. Also, I am confining my search to state supreme courts, not lower courts, because decisions made at the state supreme court level are salient to an entire state’s population and not a smaller locality.

When it comes to the previous literature on what factors contribute to the judicial decision making process, there have been numerous reasons posited. For example, public opinion is said to have an effect on how a judge decides a gay rights case (Lewis et al. 378) and on the legislature (Lax and Phillips 378). Also, previous research states that salience affects the role of public opinion, by increasing its role, both for policy (Lax and Phillips 378) and judges (Clark et al. 225). Another key factor that relates to how judges make decisions is the manner through which they are selected, appointment versus election (Clark et al. 225). These are some of the more prominent factors, previously mentioned, that help to explain how justices make decisions on gay rights cases.

This paper begins with an in-depth examination of literature that relates to judicial decision making and includes the context in which it relates to my analysis of gay rights cases. The next section includes the guiding hypotheses that are potential answers to the question of
what factors affect judicial decision making on gay rights cases and the theoretical support for my analysis. Following the hypothesis section, I lay out the framework for how I test the question, including a description of variables and data. Next, there is a data section, in which the models used to test the hypothesis are explained, as well as how the data relates to my hypotheses. Then comes the discussion section that helps to clarify the results, by explaining what the data and models mean in the context of my paper. The policy implications section explains how the results relate to potential policy changes that could arise from this paper. Also, I include a section on potential areas for future research beyond the confines of what is done in this paper. I conclude with a summary of the paper and the broader context of the findings as well.

The importance of my analysis will not only be rooted in providing greater insight into how judges do what they do, but it will provide insight into how the judicial branch responds to public opinion. This addition will give people a starting point for holding judges accountable and determine if the relationship I uncover is positive or negative for society. In shedding light on how judicial decision making works, both citizens and policy makers can question if the judicial system is operating in an efficient and proper way. They should be able to see how public opinion and the way a judge is selected affect judicial outcomes. More importantly, my analysis should add to the larger context of not only how judges respond to the public, but other government officials as well. This will help to increase the accountability of the government in favor of public opinion, which in turn could lead to a more democratic United States of America.

The reason I choose to examine how public opinion impacts how justices vote on gay rights cases is because of scenarios like the one with the Iowa State Supreme Court. I am interested in determining how a justice comes to a decision and what factors lead them to this
decision. I want to know whether or not courts respond to public opinion, because there are differing opinions on the role of the judiciary. This relationship may be altered based on how a justice is selected for, thus why I look at the joint effect of public opinion and selection method. It will be interesting to see the variation in justices’ responsivity to public opinion and how this relates to the way they were put on court. There is reason to expect that public officials, including members of the judicial branch, are aware of how the public feels on salient issues and feel obligated to act in line with the public opinion. There could exist incentives that are built into the system of judicial selection, such as retention elections, that force justices to be more cognizant of how the public feels on a given issue and the consequences of voting against public opinion. I choose the issue of gay rights because this is a salient issue that has garnered opinions and reactions by the public. In relation to the generalizability of the results of this paper, the insight into how justices respond to public opinion may be limited to salient cases, in which there is significant public opinion generated. In addition, public support for gay rights has been increasing over time and that’s why I look at how the increase in public opinion relates to judicial decision making on gay rights cases. Gay rights, being a salient issue, are likely to be of greater interest, not only to the public but potentially to the justices as well and hence provide a good foundation for studying how justices decide on cases of salience.

**Literature Review:**

There are many potential factors that could affect the decisions judges make, ranging from public opinion to selection method. These factors can be internal to the judge such as their gender, or they can be external to the judge such as how they are selected. For my analysis, I examine the role of public opinion, an external factor, in the judicial decision making process. It is important to determine if public opinion has any effect on judicial decision making or if it has
no impact at all. The relationship between public opinion and policy is higher policy-specific public opinion is associated with a higher probability of policy adoption (Lax and Phillips 374). Also, policy-specific opinion has a consistently significant effect on final policy adoption, independent of elected elites or voter ideology (Lax and Phillips 376). When looking beyond policy to punishment, there is an increase in punitiveness in judicial sentencing due to public pressure on judges (Enns 865). More specifically for gay rights cases, direct democracy amplifies the effect of public opinion on judicial decisions. That is to say, that when there are more options available for the public to have their voices heard, such as through ballot measures or legislation, then judges are less likely to vote with public opinion (Lewis et al. 378). There does appear to be a relationship between public opinion and judicial decision making, often under certain circumstances.

In the context of my analysis, the notion that public opinion does affect how judges decide cases is important. The main independent variable I utilize for my model is public opinion, specifically public opinion on gay rights. If a relationship between public opinion and judicial decision making does not exist, then my analysis would suggest that courts do not behave in the same way as other branches. There is an expectation that members of the legislative and executive branches responds to the public, including public opinion. This expectation is not necessarily true of the judicial branch; thus, my analysis has the potential to support or not support expectations regarding how the courts should operate. In addition, it will be interesting to see how the relationship between the courts and public opinion differs when the cases are gay rights cases and the public opinion is on gay rights.

One potential circumstance that could change this relationship, is the salience of the case. On the legislative side, the greater salience of a policy induces greater responsiveness to policy
specific opinion and reduces the impact of general attitudes (Lax and Phillips 378). This means that the response to public opinion on policy depends, at least to some degree, on how important the issue is to the constituents the policy affects. This is also true for other public officials as well, including judges that face retention elections and those that are elected in nonpartisan contestable elections. These judges face similar incentives to cater to public opinion for hot-button issues, such as abortion (Clark et al. 225). This reinforces the notion that judges are not responsive to public opinion in all cases, but rather judges are responsive to public opinion when the cases have some degree of salience. I examine judicial decision making on gay rights cases, because these cases are salient in the eyes of the public, unlike other less visible cases. This means that there is a higher likelihood that people have an opinion on the issue and therefore contribute to public opinion for judges to respond to, when it comes to gay rights cases. The court in which judges are likely to pay more attention to public opinion are the courts with greater jurisdiction, due to the greater attention given to these judges and the greater influence they have over more citizens. This idea helps support the decision to look at cases at the state supreme court level instead of those at lower levels.

The institutional structure of the judiciary, specifically the means through which justices are selected to a court impact the way that public opinion might influence their decisions. For example, retention elections more than traditional partisan elections, fail to insulate judges from public opinion on salient issues. We also see this with judges in retention and nonpartisan contestable systems that face similar incentives to cater to public opinion (Clark et al. 225). In contrast, a judge is unlikely to vote in a pro-life or pro-choice direction, simply because their state has a certain type of electoral system (Clark et al. 227). For death penalty cases, death penalty support does not attain significance in non-elective states and the impact of death penalty
opinion is contingent on judicial elections. In states that elect their judges, higher levels of public support for capital punishment are associated with significantly lower probabilities of voting to reverse capital sentences (Boyea and Brace 376). In addition, there is the notion that elected judges respond to their constituents, by voting in ways that reflect their constituents’ not their own preferences. This relates to the idea that judges have more reason to fear voters perceiving them being too lenient than being too severe. Also, judges in partisan districts are overall more punitive than other judges and that prison sentences are longer than in districts with retention elections (Gordon and Huber 130). These statements indicate that the method of selection should be examined, in the context of the effect on public opinion, in order to better clarify how selection method could play a role in the decision making process. For my analysis, I divide the states by selection method and see the effect of selection method on public opinion and judicial decision making.

This insight is helpful to my project due to the fact that I analyze the relationship between public opinion on gay rights and judicial decisions on gay rights cases, across different systems of selection. I test the main relationship with the selection method in order to see if a state’s particular selection method has an impact on how the public opinion and judges’ decisions interact. Specifically, for gay rights cases, there may be differences in how judges react to public opinion if they feel the need to respond to these pressures based on if they are elected and if they face retention.

Another factor this is likely to impact the decisions judges make is the gender of the judge making the decision. Women are more likely than their male counterparts to rule that acts, laws or sets of laws violate gay Americans’ constitutional rights (F. Smith Jr. 2097). There is also the notion that women who decide to attend law school have less traditional concepts of
gender roles (F. Smith Jr. 2097), which could greatly impact the way they decide cases involving gender, identity and sexuality. Gender and sexuality are often closely related and it may be expected that people with traditionally marginalized identities may think more similarly than those that have not been in that position. Female judges could also feel the need to respond to public opinion on gay rights more because their voice has not always been heard as well.

Another potential condition impacting how a judge votes is ideology. When a judge hears a case that deals with a hot-button issue, the partisan affiliation of a judge helps to predict a judge’s decision in that case. For example, conservative judges are likely to vote against abortion, while liberal judges are more likely to vote in favor of abortion, following their partisan affiliation (Clark et al. 226). When it comes to capital punishment cases, judge ideology is positively related to the likelihood of voting to overturn a capital sentence (Boyea and Brace 367). This may mean that judges not only face pressure from the public but from their political party as well, indicating that judges could be faced with a tradeoff between deciding a case in favor of their party or the public. In addition, for sexual harassment cases, a judge appointed by a Democratic president was more likely to decide cases in favor of the plaintiff, compared to judges appointed by a Republican president (Kulik et al. 81). There does exist a relationship between how a judge decides a case and the political affiliation or ideology of that judge, but this relationship may not be prevalent under all circumstances. This could possibly impact the results, with democratic justices being more likely to vote in favor of gay rights and republican justices being less likely to vote in favor of gay rights, regardless of the degree of public opinion or method of selection. Justices may also feel compelled to vote in line with their party when it comes to issues of higher salience, out of fear of being punished. This relates to how justices are
selected and if they face retention, two things that could affect the relationship between a judge’s ideology and the way they vote on a gay rights case.

Clearly previous research on public opinion and judicial decision making exists, but there is minimal research on public opinion’s effect on judicial decisions made on gay rights cases. The work that most closely looks at this relationship is the paper “Public Opinion and Judicial Behavior in Direct Democracy Systems: Gay Rights in the American States” by Lewis, Wood and Jacobsmeier. In their paper, they examine the indirect role public opinion plays on judicial decision making, through using a direct democracy index. They do not look at the direct role of public opinion and the effect of differing levels of public opinion on how a judge decides a case on gay rights. Their analysis takes a narrow approach when measuring public opinion, an area in which I expand upon by creating a broader metric for public opinion on gay rights. This work also lacks a delineation between partisan and nonpartisan elections, something that other authors believe can have an effect on a judicial decision making.

Other literature gives explanations of the potential influence of public opinion on a judge, but their application is confined to cases relating to the death penalty or abortion, not to gay rights cases. My analysis adds to the existing literature, to the extent that more light will be shed on the degree to which justices respond to public opinion for salient issues. Not only does my paper further examine how justices make the decisions they do, but it provides insight into how justices may act differently under different circumstances. This paper should provide clarity into how judicial selection methods impact how they vote in gay rights cases, across different levels of public opinion on gay marriage. Also, there will be light shed on the effect of public retention elections and how they impact responsivity to public opinion on gay marriage, in gay rights cases. I focus on how public opinion on gay marriage, along with selection method affect how
judges make decisions on gay rights cases, while paying attention to other factors, such as retention elections, that contribute to the judicial decision making process. Looking beyond gay rights at the state supreme court level, my work can highlight factors that may impact judges, at all levels in salient cases. It can contribute to the literature on judicial selection method by showing different voting patterns of justices across different levels of public opinion. The policy implications of this work are related to how society desires their justices and judges to respond to public opinion and the selection method or methods with that outcome should be advocated for in the policy arena.

**Guiding Hypotheses:**

*Hypothesis One: In a state with higher public opinion in favor of gay rights, a justice in that state is more likely to vote in favor of gay rights. In a state with lower public opinion in favor of gay rights, a justice in that state is less likely to vote in favor of gay rights.*

This hypothesis hinges on the assumption that justices actually respond to public opinion in a similar manner to other public officials. This inherently contradicts the role justices are meant to play, according to some, as independent deciders of law and justice, however they are not entirely isolated from public opinion. When it comes to salient issues, justices do make decisions that correspond with the public opinion of their state. To what degree this happens is not clear. I would expect the states with the highest public opinion in favor of gay rights to have more individual justices voting in a pro-gay direction.

*Hypothesis Two: For states with less clear support for or against gay rights, I expect to see less responsivity to public opinion in decisions made by justices.*

This hypothesis is subsidiary to the first hypothesis, in that justices are acting in response to public opinion, but I expect to see less responsiveness to public opinion when it is not as clear
or less unanimous. Justices need to have a signal to influence the way they vote either favorably one way or another. When this influence is lacking, votes can’t be cast in line with public opinion. This could also relate to the salience of the issue because divided public opinion could mean less importance or support for two extremes. This puts justices in a position not to respond because there is less of a reason to listen to a weaker signal with lesser importance. Also, justices do not want to vote in favor of a single side of an issue or part of the constituency; consistently deciding in the name of one side of public opinion can isolate the other. Of course, the possibility of ostracizing some individuals will always exist, but that risk becomes greater when the number of those left out is larger.

*Hypothesis Three: Elected justices will be more likely to vote in favor of public opinion on gay rights than will appointed justices.*

Elections are a way in which the public can support a candidate for a position in office and function to create a relationship between elected officials and constituents. Elected officials often feel obligated to cater to the needs of the people that voted them in to office and their constituencies. Justices that are elected are not exempt from this logic and therefore are more likely to respond to their constituents and the public than those who are appointed. Elected justices may be more likely to listen to public opinion and consider it when making decisions because of the relationship with their constituents. Appointed justices may not feel this same pressure to cater to the public opinion, as they were put in office by another elected official or group of officials. Also, appointed justices might feel obligated to please whoever put them on the court, rather than listening to citizens. Appointed justices are distanced from the public and isolated from public opinion via the way they are selected. However, the influence of public
opinion on appointed justices may be augmented when these justices face retention elections by the public.

Hypothesis Four: Justices that face nonpartisan elections will be more likely to vote in favor of public opinion than justices who face partisan elections.

This distinction between nonpartisan and partisan elections comes down to the notion of judicial ideology and how justices may cater to their party or the public. When elections are partisan, a justice runs under their party’s title. This association with a political party, ties the justices closer to that party, potentially coming at the cost of not listening to the public. Political parties often provide support for their candidates in elections, not excluding judicial elections, and/or try to prevent the opposite parties candidate from winning an election. By doing this, a judicial candidate may feel a need to repay their party and those that helped them win the election, once on the court. Another reason that judicial candidates may feel closer to their party is because many judicial candidates face partisan primaries, meaning they are competing within their political party for a chance to run in the general election. Once a candidate wins a nomination, candidates may feel like they won their party’s blessing and feel a need to pay them back for their nomination. Obviously not all judicial candidates face partisan primaries, but the partisan election process brings justices closer to their political party. On the contrary, when a justice runs in a nonpartisan election, they do not face the same pressure or support from a political party. This allows justices in nonpartisan primaries to respond to those who elected them and their public opinion, rather than a political party. Also, voters may have higher expectations for justices in nonpartisan elections than those in partisan elections, because they may feel partisan elections result in greater allegiance and accountability to the party and not the individual. On the other hand, justices elected in partisan elections may be voted in to office
because of their congruent ideology with those who elected them. This would lead to justices that are naturally more responsive to their constituents.

_Hypothesis Five: Justices who face public retention election are more likely to vote in favor of public opinion than justices who do not face public retention elections._

Retention elections are another manner through which the public can hold public officials accountable, including justices. If an individual justice is up for retention they may try and cater to public opinion in order to preserve their position on the court. Justices that do not face retention elections are less likely to increase their attention towards public opinion. These justices do not have to worry about losing their job via the failure to retain their seat on the court. This hypothesis may not hold because retention elections are not necessarily a determinant of how well a justice is voting in favor of public opinion. Justices may be retained due to their popularity or due to a single salient decision, regardless of their track record on voting in line with public opinion. Also, justices may not be retained due to their lack of popularity, their decision on an important case or some other characteristic. What is more important, is how justices act when they face retention elections, in comparison to those that do not face retention elections. Elections are a way to strengthen the relationship between the public and public officials, therefore justices facing public retention are more likely to respond positively to public opinion.

**Data:**

For my models I utilize and build upon data from the paper titled “Public Opinion and Judicial Behavior in Direct Democracy Systems: Gay Rights in the American States” by Lewis, Wood and Jacobsmeier. Their observations include data on all of the 122 gay rights decisions made by state supreme courts from 1981 through 2004 (Lewis et al. 372). Specifically, they look
at the 728 votes of individual justices, either in favor of or against gay rights, classified on the basis of “whether he or she voted to extend equal treatment to the group claiming discrimination or to remove the legal distinction that denied equal treatment” (Lewis et al. 373). The vote of a justice, their dependent variable, is coded dichotomously with a one representing a pro-gay rights vote and a zero representing an anti-gay rights vote. In their work, they test the relationship of public opinion on policy through a direct democracy index variable, which they say correlates to less judicial responsiveness to public opinion (Lewis et al. 382). For this data, there are missing observations due to not all state supreme courts hearing cases on gay rights during the given time period. The missing observations should not have a significant impact on the results of the data, because there are only nine states in this group. Unless one of these states or a group of the missing states represents a large share of one of the selection methods or has an extreme public opinion on gay rights, the results should not be greatly altered. The results should not be largely different with the missing observations because public opinion will be measured on an individual state level. I examine judicial decision making at the individual level, as opposed to the court level, because this allows for a larger set of observations and more insight into factors that affect individuals.

For my analysis, I use the same dependent variable, the votes of individual justices on gay rights cases, taken from Lewis et al.’s dataset. Where I begin to differ from their model, is with my independent variables. My first independent variable is public opinion, which I use to test the direct relationship between people’s attitudes towards gay rights and the probability an individual justice votes in favor of gay rights in a case. In contrast Lewis et al. tests the indirect relationship between public opinion through direct democracy institutions and how this relates to judicial decision making. They use the General Social Survey (GSS) to gauge public opinion on
gay rights from 1980 through 2010. Specifically, the authors use the question of whether the respondent believes homosexual sex is always, sometimes or never wrong (Lewis et al. 374). My paper varies from their paper, when it comes to measuring public opinion on gay rights cases for a few reasons. The first being that people’s opinion on gay rights as a whole is possibly different from people’s opinion on homosexual sex and there is likely to be a bias in asking a respondent about sexual relations. The other reason being that gay rights cannot be confined to sexual relations. It is for these reasons, that I use public opinion data on support for gay marriage, rather than homosexual sex, throughout the paper because this metric goes beyond sexual relations and is related to the broader context of gay rights.

My first independent variable of public opinion on gay rights at the state level, comes from multiple different surveys in order to be consistent and measure public opinion across time. I use the GSS question of whether or not the respondent agrees “homosexuals should have right to marry”, with the answers being strongly agree, agree, either agree nor disagree, disagree or strongly disagree (T. Smith 2018). This question was asked twice during the 1981 to 2004 time period in the years 1988 and 2004. This survey measures responses at the level of the individual so I aggregate the data in order to get state level public opinion data. In order to do this, I classify all of the responses to the gay marriage question based upon the respondent’s region of residence at age 16, due to the state data being unavailable. The nine U.S. regions are New England, Middle Atlantic, East North Central, West North Central, South Atlantic, East South Central, West South Central, Mountain and Pacific (T. Smith 2018). I apply the regional level data to each state within the region to create a measure for the public opinion of each state for the years of 1988 and 2004. This may not accurately measure the public opinion on gay rights in 1988 and 2004 for several reasons. Firstly, it is possible that the respondent’s region of residence, or state,
has changed since they were 16. However, this is unlikely to impact the results because not all of
the respondents are likely to have moved elsewhere. Secondly, it is likely that there is variation
across states within regions and this variation is unlikely to be uniform across all states. For
example, states in the South may be a lot more similar in regard to how each state feels about gay
marriage, while states in the South Atlantic may be more divided on gay marriage. To remain
consistent, I combine the strongly agree and agree responses for each region and then take them
as a percentage of the total responses for the region to measure support for gay marriage.

Figure 2: A map of public opinion of gay marriage from the GSS in 1988. The states without data
shown are Massachusetts at 21%, Rhode Island at 21%, Connecticut at 21%, New Jersey at 14%,
Delaware at 11%, Maryland at 11%, and Hawaii at 17% (T. Smith 2018).
Figure 3: A map of public opinion of gay marriage from GSS in 2004. The states without data shown are Massachusetts at 36%, Rhode Island at 36%, Connecticut at 36%, New Jersey at 41%, Delaware at 15%, Maryland at 15%, and Hawaii at 35% (T. Smith 2018).

In order to fill in data for my public opinion variable across time, I include state-level data from two other sources: a *New York Times* article and a paper titled “Public Support for Marriage for Same-sex Couples by State” by Andrew Flores and Scott Barclay. For both of these sources, the questions are similar to the one that is asked by the *General Social Survey*. The *New York Times* article provides estimates of public opinion towards same-sex marriage, measured as a percentage in support, between 1994 through 1996, for each state (Gelman et al. 2010). In the paper by Flores and Barclay, there are estimates of public opinion towards same-sex marriage, also using a percentage in support, for the year 2004 for every state. The authors note that the estimates of public opinion tend to underestimate as opposed to overestimate support (Flores and Barclay 6-7).
Figure 4: A map of public opinion of gay marriage from the New York Times between 1994 and 1996. The states without data shown are Massachusetts at 33%, Rhode Island at 34%, Connecticut at 34%, New Jersey at 27%, Delaware at 29%, Maryland at 29%, and Hawaii at 28% (Gelman et al. 2010).

Figure 5: A map of public opinion of gay marriage from Flores and Barclay in 2004. The states without data shown are Massachusetts at 45%, Rhode Island at 42%, Connecticut at 39%, New Jersey at 38%, Delaware at 34%, Maryland at 33%, and
Hawaii at 37% (Flores and Barclay 6-7).

Figure 6: A bar graph representing the change in public opinion across all fifty states for three time periods: 1981-1992, 1993-1999, and 2000-2004. The blue bar represents the base level of public support for the first time period, across all fifty states. The orange bar represents the increase in public opinion between the first and second time periods, while the gray bar represents the increase in public opinion between the second and third time periods. For states in which there was no increase in public opinion from one time period to the next, there is no orange or gray bar. This graph represents the main independent variable of public opinion.
Figure 7: A bar graph representing the change in public opinion across all fifty states for three time periods: 1981-1992, 1993-1999, and 2000-2004. The orange and gray bars represent the increase in public opinion between the given periods and the blue bar represents the base level of public support, as was the case for the last figure. For states in which there was no increase in public opinion from one time period to the next, there is no orange or gray bar. This graph represents a second measure of the main independent variable of public opinion. The only difference between the two measures is the source of the data from the 2000 to 2004 time period.

For public opinion, I generate two measures that both represent public attitudes towards gay marriage between the 1981 to 2004 time period. In order to do this, I start with public opinion on gay marriage in the year 1988 from the General Social Survey. Then I match up each state’s 1988 level of public opinion for the years 1981 through 1992. Next, I take the same
approach with Gelman et al.’s data from the years 1994 to 1996. This public opinion data is matched up with each state for the years 1993 to 1999. By taking this approach, public opinion on gay marriage for each state can be measured for every year there is a case on gay rights. The reason why the public opinion measures and estimates are matched with more than just the year the data is from is because state-level public opinion on gay marriage does not exist for every single year in the 1981 to 2004 time period. Other authors (Lax and Phillips 2009) have incorporated similar strategies when estimating public opinion on gay rights by interpolating between existing data. Using this approach oversimplifies public support for gay marriage by assuming there were few changes in public opinion during the 1981 to 2004 time period. Another problem with this approach is extrapolating data backwards from 1988 to 1981, assuming public opinion didn’t change, because it is likely that there was an increase in support for gay marriage over seven years, meaning the older data would be lower. This can be assumed because there is an increase in public opinion for the data that I do have measures for, thus it is likely that previous public opinion data followed this trend. Despite the lack of data across every year, the public opinion accurately measures the trend and direction of public opinion, just as the justices’ votes represent judicial decision making towards gay rights cases. There does not need to be data for every state for every single year to be able to comprehend the direction in which public opinion is headed. Also, for my analysis it is important to look at the relative differences between states and not necessarily the exact percentage difference between one state and another.

Furthermore, I create two measures of public opinion that both match the same public opinion data, for the years 1981 through 1999, to each state. Where the two measures differentiate is with the 2000 through 2004 time period. The first public opinion variable will be referred to as Public Opinion Flores and Barclay throughout the paper. For this measure, I take
data from the Flores and Barclay paper from 2004 and match it up for each state for the years 2000 through 2004. The benefit of using this Flores and Barclay data is that each state has their own individual measure of public opinion on gay marriage, in comparison to the second measure of public opinion. For the other measure of public opinion, now referred to as Public Opinion GSS 2004 throughout the paper, I use data from the General Social Survey in 2004. I take this data and match it with each state, based on their region, as I did for the GSS data from 1988, for the years 2000 through 2004. The benefit of using this data is that it more consistently measures public opinion on gay marriage because the same question is being asked in both 1988 and 2004. The downside to using the GSS data is that public opinion is measured across regions and not individual states, thus potentially manipulating the results. Public opinion is easier to generalize across some regions and not across others, therefore this measure of public opinion may not be as accurate. Despite the faults with each public opinion variable, I believe that having two variables helps to better understand how justice’s may or may not be responding to public opinion.

For my second independent variable: selection method, I code the selection method of state supreme courts in each state for every year between 1981 and 2004. The selection method of each supreme court is coded categorically with a one for partisan elections, with a two for nonpartisan election, and with a three for appointments. All of the selection method data comes from the National Center for State Courts website. I review the history of reform efforts for each state to determine their state supreme court’s method of selection and any changes in selection method, such as from appointment to partisan election, between 1981 and 2004 (“Judicial Selection in the States” 2019). This coding methodology does not perfectly capture the effect of selection method on the relationship between public opinion and judicial decision making.
because not all of the justices were selected by the selection method of their state. Often, when an interim vacancy exists on a court, the process for filling that interim vacancy differs from the normal process for filling a full-term spot on the court. This means that the selection method variable is used to discern how a normal position on a state supreme court is filled, rather than each individual justice on the court. Also, it is possible that some of the justices were selected before 1981 and thus could’ve been chosen by a different method of selection. Despite these possibilities, the results should not be greatly altered because a majority of justices are chosen by the normal selection method process, fitting into the three categories I code for. In Lewis et al.’s work they code judicial retention method based on the states, not the individual justices (Lewis et al. 374), employing the same strategy for coding selection methods.

<table>
<thead>
<tr>
<th>Selection Method</th>
<th>Frequency</th>
<th>Percent</th>
<th>Cumulative</th>
</tr>
</thead>
<tbody>
<tr>
<td>Partisan Election</td>
<td>169</td>
<td>23.21</td>
<td>23.21</td>
</tr>
<tr>
<td>Nonpartisan Election</td>
<td>207</td>
<td>28.43</td>
<td>51.65</td>
</tr>
<tr>
<td>Appointment</td>
<td>352</td>
<td>48.35</td>
<td>100</td>
</tr>
<tr>
<td>Total</td>
<td>728</td>
<td>100</td>
<td></td>
</tr>
</tbody>
</table>

Table 1: This table shows all of the votes being made on a gay rights case between 1981 and 2004, categorized by the method of selection for the supreme court of the state it was made in during that time period. The ratio of justices facing election (51%) to those being appointed (48%) is about 1:1. Also, the ratio of those elected by partisan (23%) to nonpartisan elections (28%) is about 1:1.

I measure the independent variable of retention dichotomously with a one for state supreme courts in which justices face public retention elections and a zero for state supreme courts with justices that do not face public retention elections. Public retention elections include retention elections, nonpartisan elections and partisan elections, whereas reappointment via commission or governor, legislative election, or no retention election aren’t included. Public
retention elections are classified as elections that follow an initial selection, via election or appointment, meaning they are independent of the initial selection process. These often take the form of a question on the ballot of whether or not a justice should remain on the court, however there can also be partisan or nonpartisan elections that reflect the initial selection process. The other category of no public retention is when justices do not directly face the public following their initial selection. The retention data also comes from the National Center for State Courts website. In a similar manner to the selection method variable, I examine the history of retention elections in each state between 1981 and 2004 and check for changes in retention methods between categories (“Judicial Selection in the States” 2019). This variable may not be a perfect representation of retention methods for each individual justice, as there may be exceptions, such as for interim justices, but this follows the strategy employed in other works (Lewis et al. 374). This should not affect the results, due to the fact that a majority of justices will or will not face public retention, as part of the normal process.

<table>
<thead>
<tr>
<th>Retention</th>
<th>Frequency</th>
<th>Percent</th>
<th>Cumulative</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Public Retention</td>
<td>175</td>
<td>24.04</td>
<td>24.04</td>
</tr>
<tr>
<td>Public Retention</td>
<td>553</td>
<td>75.96</td>
<td>100</td>
</tr>
<tr>
<td></td>
<td>728</td>
<td>100</td>
<td></td>
</tr>
</tbody>
</table>

Table 2: This table shows all of the votes being made on a gay rights case between 1981 and 2004, categorized by retention for the supreme court of the state it was made in during that time period. The ratio of those facing public retention (76%) to those not facing public retention (24%) is about 3:1.

Analysis:

In order to begin testing my hypotheses, I run two simple probit models. Probit models are used when an independent variable is dichotomous, meaning there are only two outcomes, such as yes or no. My independent variable, a justice’s vote, is coded as either pro-gay rights or
anti-gay rights, and is therefore dichotomous. My first model examines the relationship between the way my main independent variable, public opinion, impacts my dependent variable of the probability of justice’s pro-gay vote. Here are the probit models: the first with the Flores and Barclay data from 2004 and one with the GSS data from 2004.

<table>
<thead>
<tr>
<th>VARIABLES</th>
<th>(1) Justice’s Vote</th>
<th>(2) Justice’s Vote</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public Opinion</td>
<td>0.0219***</td>
<td>0.0217***</td>
</tr>
<tr>
<td>Flores and Barclay</td>
<td>(0.00544)</td>
<td>(0.00531)</td>
</tr>
<tr>
<td>Public Opinion</td>
<td></td>
<td></td>
</tr>
<tr>
<td>with GSS 2004</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Constant</td>
<td>-0.351**</td>
<td>-0.348**</td>
</tr>
<tr>
<td></td>
<td>(0.138)</td>
<td>(0.135)</td>
</tr>
<tr>
<td>Pseudo R2</td>
<td>0.0164</td>
<td>0.0170</td>
</tr>
<tr>
<td>Observations</td>
<td>728</td>
<td>728</td>
</tr>
</tbody>
</table>

Table 3: This table shows the independent effect of two public opinion variables on the way an individual Justice votes in a gay rights case, across 728 votes between 1981 and 2004.

Both the measures of public opinion have a positive effect on the way a justice votes on a gay rights case. This shows that as public opinion increases in favor of gay rights, gay marriage in this case, so does the likelihood of a justice voting in favor of gay rights. Not only are the relationships positive for both the public opinion variables, but they are statistically significant to the 99th percent. In order to see the degree to which public opinion affects a justice’s vote beyond just the positive or negative effects, the marginal effect of public opinion is examined. This graph shows how an increase in the percentage of public opinion, towards gay marriage, by five percent impacts the probability of a justice voting in favor of gay rights in a case. The marginal
effect of public opinion on an individual justice’s vote in a gay rights case better demonstrates the relationship between public opinion and judicial decision making than does a probit model. The coefficients of the independent variables in a probit model are less simplistic to understand than they are for OLS regressions. For OLS regressions, a one unit increase in the independent variable means a change in the amount of the coefficient for the dependent variable. This is not true for probit models and thus it is necessary to look at the relationship between variables graphically.

![Adjusted Predictions with 95% CIs](image)

Figure 8: A graph showing the effect of public opinion, with the Flores and Barclay data, on the probability an individual justice votes in favor of a gay rights case. The impact of public opinion begins at 4 percent and goes to 44 percent because this measure of public opinion ranges from 4 percent to 41 percent. The probability of a pro-gay vote is shown at intervals of five percent increases in public opinion.

This graph, as well as the first probit model, highlights the positive relationship between public opinion and the way a justice votes on a gay rights case. As public opinion for gay
marriage increases, so does the probability of a justice voting in favor of gay rights, across all of
the 122 gay rights cases in the dataset. It is important to note that the bars extending from each
data point show the margin of error for each given data point, with the bars getting shorter closer
to the middle. This is due to how there is more data concentrated near the middle of the data set,
which helps to more accurately predict the effect of public opinion on a justice’s vote. Even with
the larger margins of error, the general trend between the variables is still positive, hence the size
of the bars are of lesser importance.

As a way of seeing if this relationship exists across both measures of public opinion, I
include a graph showing the marginal effect of public opinion on the probability of a justice
voting in favor of gay rights. This graph relates to the last graph, in that it shows how an increase
in the percentage of public opinion, towards gay marriage, by five percent impacts the
probability of a justice voting in favor of gay rights in a case. The only difference is that the
public opinion measure replaces the Flores and Barclay data with the GSS data from 2004.

Figure 9: This graph also highlights the effect of public opinion on the probability an individual
justice votes in favor of a gay rights case. However, using this measure of public opinion requires increasing the outer limit of the data. Public opinion starts at 4 percent but then goes to 49 percent, as to include the new public opinion data in this measure. The probability of a pro-gay rights vote is shown at five percent increases in public opinion, as well.

This graph further supports the notion that as public opinion increases, so does the probability that an individual justice will vote in favor of a gay rights case. Also, the margins of error are not large enough to cast doubt on the fact that a positive relationship exists between the two variables.

Another way to examine the effect of public opinion on the way an individual justice votes in a gay rights case, is by looking at how many pro-gay and anti-gay rights votes have been made during the 1981 to 2004 time period. Then the two types of cases can be divided into different categories based on the level of public opinion at that time. This will help to reveal how many cases followed the assumption that public opinion affects how a justice votes on a gay rights case.

<table>
<thead>
<tr>
<th>Scenario</th>
<th>Frequency</th>
<th>Percent</th>
<th>Cumulative</th>
</tr>
</thead>
<tbody>
<tr>
<td>Anti-gay Rights Low PO</td>
<td>70</td>
<td>9.62</td>
<td>9.62</td>
</tr>
<tr>
<td>Anti-gay Rights Medium PO</td>
<td>170</td>
<td>23.35</td>
<td>32.97</td>
</tr>
<tr>
<td>Anti-gay Rights High PO</td>
<td>74</td>
<td>10.16</td>
<td>43.13</td>
</tr>
<tr>
<td>Pro-gay Rights Low PO</td>
<td>75</td>
<td>10.3</td>
<td>53.43</td>
</tr>
<tr>
<td>Pro-gay Rights Medium PO</td>
<td>181</td>
<td>24.86</td>
<td>78.3</td>
</tr>
<tr>
<td>Pro-gay Rights High PO</td>
<td>158</td>
<td>21.7</td>
<td>100</td>
</tr>
<tr>
<td>Total</td>
<td>728</td>
<td>100</td>
<td></td>
</tr>
</tbody>
</table>

Table 4: This graph divides all of the votes of justices by whether or not they were pro-gay or anti-gay. They are further classified into the level of public opinion in their state during the time of the vote. Low public opinion is classified as being greater than or equal to 4 percent and less than 17 percent. Medium public opinion is classified as being greater than or equal to 17 percent and less than 30 percent. High public opinion is classified as being greater than or equal to 30
percent and less than 44 percent. This public opinion measure includes the Flores and Barclay data.

<table>
<thead>
<tr>
<th>Scenario</th>
<th>Frequency</th>
<th>Percent</th>
<th>Cumulative</th>
</tr>
</thead>
<tbody>
<tr>
<td>Anti-gay Rights Low PO</td>
<td>69</td>
<td>9.48</td>
<td>9.48</td>
</tr>
<tr>
<td>Anti-gay Rights Medium PO</td>
<td>185</td>
<td>25.41</td>
<td>34.89</td>
</tr>
<tr>
<td>Anti-gay Rights High PO</td>
<td>60</td>
<td>8.24</td>
<td>43.13</td>
</tr>
<tr>
<td>Pro-gay Rights Low PO</td>
<td>61</td>
<td>8.38</td>
<td>51.51</td>
</tr>
<tr>
<td>Pro-gay Rights Medium PO</td>
<td>219</td>
<td>30.08</td>
<td>81.59</td>
</tr>
<tr>
<td>Pro-gay Rights High PO</td>
<td>134</td>
<td>18.41</td>
<td>100</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>728</strong></td>
<td><strong>100</strong></td>
<td></td>
</tr>
</tbody>
</table>

Table 5: This table shows the same division of votes by their pro-gay and anti-gay classifications and then by different levels of public opinion. However, for this measure, low public opinion is classified as being greater than or equal to 4 percent and less than 17 percent. Medium public opinion is classified as being greater than or equal to 17 percent and less than 31 percent. High public opinion is classified as being greater than or equal to 31 percent and less than or equal to 45 percent. This public opinion measure includes the GSS data from 2004, not the Flores and Barclay data.

These tables relate to the hypothesis: for states with less clear support for or against gay rights there will be less responsivity to public opinion. The assumption in this hypothesis is that public opinion influences the way a justice votes. In order to see if this assumption is true, it would be expected that a majority of anti-gay rights cases would have low levels of public opinion in support of gay marriage. Also, the pro-gay rights cases would be expected to have high levels of public opinion in support of gay marriage. What would be expected of the hypothesis if it were true, would be that there would be a close to even distribution of anti-gay and pro-gay cases across the medium levels of public opinion.

Across both measures of public opinion, for votes cast in states with medium levels of public opinion, there is not a clear preference of justices to vote in a pro-gay or anti-gay
direction. In the first table, pro-gay votes, 24 percent, hold a slight majority of votes over anti-gay votes, 23 percent, when there is a medium level of public opinion. In the second table, pro-gay votes, 30 percent, hold a slightly larger majority of votes over anti-gay votes, 25 percent, with medium levels of public opinion. This means that in a state with divided public opinion on gay marriage, the way a justice votes in a gay rights case is less likely to be affected by the public opinion in the state. This supports the hypothesis relating to divided public opinion.

Alternatively, the number of pro-gay votes being cast should be higher when public opinion is higher and lower when public opinion is lower. On the other hand, the number of anti-gay votes being cast should be higher when public opinion is lower and lower when public opinion is higher. In the first table, the results for the pro-gay votes follow what is expected, with only 10 percent of pro-gay votes being made when public opinion is lower and 21 percent being made when public opinion is higher. The anti-gay votes do not follow the expectations, as 9 percent of anti-gay votes are made with lower public opinion and 10 percent are made with higher public opinion. The difference between the two is so minimal that this finding is unlikely to disprove or cast much doubt on the relationship between public opinion and judicial decision making. For the second table, the pro-gay votes were made in line with the expectations, as 18 percent of pro-gay votes were made when public opinion is higher and only 8 percent were made when public opinion was lower. The anti-gay votes were also made in line with the expectations, as 9 percent of anti-gay votes were made when public opinion was lower and 8 percent were made when public opinion was higher. Again, this difference is not enough to support the hypothesis that public opinion influences how a justice votes, but the division of pro-gay votes across lower and higher levels of public opinion supports the first hypothesis. A potential reason as to why the anti-gay votes may not follow the expectations, is that justices could be showing a
degree of preference for the status quo. An argument could be made that when a pro-gay vote is cast, the status quo of not having many gay rights is challenged. Thus, regardless of the degree of public opinion, some justices are going to vote in line with the status quo. That being said, there is clearly a higher percentage of pro-gay votes being made on gay rights cases in states with higher levels of public opinion on gay marriage.

Continuing on to testing more of the hypotheses, I introduce the independent variable selection method into the model. These models highlight the effect of public opinion on the way a justice votes in a gay rights case, across different methods of selection. Specifically, I run three probit models each with the individual justices’ votes on a gay rights case being the dependent variable and public opinion, with the Flores and Barclay data, being the dependent variable. There are three probit models because they are divided into categories based on the selection method of the state supreme court. These categories are partisan election, nonpartisan election, and appointment. I run the same three probit models in the second table, but this time with the public opinion data that includes the GSS data from 2004 and not the Flores and Barclay data.

<table>
<thead>
<tr>
<th>VARIABLES</th>
<th>(1) Partisan Election</th>
<th>(2) Nonpartisan Election</th>
<th>(3) Appointment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Justice’s Vote Public Opinion</td>
<td>0.066***</td>
<td>-0.005</td>
<td>0.012</td>
</tr>
<tr>
<td></td>
<td>(0.011)</td>
<td>(0.012)</td>
<td>(0.008)</td>
</tr>
<tr>
<td>Flores and Barclay constant</td>
<td>-1.629***</td>
<td>0.356</td>
<td>-0.092</td>
</tr>
<tr>
<td></td>
<td>(0.297)</td>
<td>(0.271)</td>
<td>(0.211)</td>
</tr>
<tr>
<td>Pseudo R2</td>
<td>0.1635</td>
<td>0.0006</td>
<td>0.0050</td>
</tr>
<tr>
<td>Obs.</td>
<td>169</td>
<td>207</td>
<td>352</td>
</tr>
</tbody>
</table>

* p<0.05, ** p<0.01, *** p<0.001
Table 6: This table shows the relationship between public opinion on gay marriage and how a justice votes on a gay rights case, divided into three categories based on judicial selection method.

<table>
<thead>
<tr>
<th>VARIABLES</th>
<th>(1) Partisan Election b/se</th>
<th>(2) Nonpartisan Election b/se</th>
<th>(3) Appointment b/se</th>
</tr>
</thead>
<tbody>
<tr>
<td>Justice’s Vote Public</td>
<td>0.075***</td>
<td>-0.008</td>
<td>0.014</td>
</tr>
<tr>
<td>Public Opinion</td>
<td>(0.013)</td>
<td>(0.012)</td>
<td>(0.007)</td>
</tr>
<tr>
<td>GSS 2004 constant</td>
<td>-1.735***</td>
<td>0.413</td>
<td>-0.163</td>
</tr>
<tr>
<td>constant</td>
<td>(0.314)</td>
<td>(0.272)</td>
<td>(0.205)</td>
</tr>
<tr>
<td>Pseudo R²</td>
<td>0.1668</td>
<td>0.0014</td>
<td>0.0080</td>
</tr>
<tr>
<td>Obs.</td>
<td>169</td>
<td>207</td>
<td>352</td>
</tr>
</tbody>
</table>

* p<0.05, ** p<0.01, *** p<0.001

Table 7: This table shows the same relationship between public opinion and judicial voting, across methods of selection, but uses the public opinion measure with the GSS data from 2004.

Both of these models indicate the same directionality for the relationship between public opinion and a justice’s vote, across the three selection methods. The results show that when there are partisan elections, justices tend to vote in favor of public opinion on gay marriage, when it comes gay rights cases. For both models under partisan elections, the relationship between the independent variable public opinion and the dependent variable a justice’s vote is not only positive, but also statistically significant to the 99th percent. On the other hand, both models show when there are nonpartisan elections, public opinion on gay marriage seems to have a negative effect on how a justice votes on a gay rights case and this relationship is not statistically significant past the 90th percent. Also, for both models when there is judicial appointment, the relationship between public opinion on gay marriage and the way a justice votes on a gay rights
case is positive, but it is not statistically significant.

Another way of looking at how selection method plays a role in the judicial decision making process, is by examining the marginal effects of public opinion on the probability a justice votes in favor of gay rights. These graphs are similar to the first two graphs that look at the marginal effect of public opinion on the probability of a pro-gay vote, but this time the influence of selection method is included. Unlike the previous probit models, these graphs include an interaction between public opinion and selection method. That is to say that the independent effect of public opinion on the probability of a pro-gay vote and the independent effect of selection method on the probability of a pro-gay vote are multiplied together. This allows for the joint effect of both independent variables to be seen in relation to the independent variable. In terms of my hypotheses, this shows how public opinion and selection method interact towards the probability of a pro-gay vote.
Figure 10: This graph shows the interaction between public opinion with the Flores and Barclay data and selection method. Each of the different colored lines represent a different method of selection.

![Adjusted Predictions with 95% CIs](image)

Figure 11: This graph shows the interaction between public opinion with the GSS data from 2004 and selection method. Each of the different colored lines represent a different method of selection.

The two graphs provide strong insight into how selection method impacts how a justice responds to public opinion. The general slope of the lines are similar across both graphs and thus speak to similar relationships. Justices in states where supreme court justices are selected by partisan elections, are likely to respond to public opinion. For these justices, as public opinion increases, so does the probability of a pro-gay vote. Taking into consideration the margins of error for both of the partisan election lines in the graphs, the slopes of the lines are still positive. This helps support the notion that elected justices are more responsive to public opinion than
appointed justices, but there is more to this relationship. For justices in states in which supreme
court justices are selected by nonpartisan elections, the probability of a pro-gay vote goes down
as public opinion on gay marriage increases. This signifies that there is a negative relationship
between nonpartisan elections and public opinion. The fact that there is a downward slope for
both of the nonpartisan election lines, shows that nonpartisan elections result in justices that are
responsive to public opinion. As public opinion increases, justices that face nonpartisan election
tend to be less likely to vote in favor of gay rights. However, the slopes of the nonpartisan
election lines are not very steep and the margins of error are big, meaning that this relationship
may not exist or it may not be weak. Lastly, for justices in states in which supreme court justices
are selected by judicial appointment, the probability of a pro-gay vote increases as public opinion
on gay marriage increases. For these justices, as public opinion increases, so does the probability
of a pro-gay vote. Similar to the nonpartisan election lines, the weak positive relationship and
large margins of error for the appointment lines indicate that the relationship may not exist or
may not be very strong.

In terms of how this relates to my hypotheses, the results show that elected justices are
more likely to vote in favor of public opinion than appointed justices. The strong positive
relationship between the interaction of public opinion and partisan election towards the
probability of a pro-gay vote, outweighs the weak negative relationship between the interaction
of public opinion and nonpartisan election towards the probability of a pro-gay vote. Overall,
justices in states with elections are more likely to vote in favor of public opinion on gay rights,
than justices in states with appointments. This means that as public opinion on gay marriage
increases, the probability of a justice voting in favor of gay rights increases to a greater degree
for justices in states with elections than justices in states with appointment. Also, these results
hold true across both measures of public opinion meaning that this notion is more likely to be true.

Despite the hypothesis relating to elected and appointed justices being supported by the data, the hypothesis relating to partisan and nonpartisan elections does not seem to be true. My hypothesis states that justices facing nonpartisan elections are more likely to vote in favor of public opinion than are those facing partisan elections. The results from the two graphs indicate the opposite and do not support my hypothesis. There is a positive relationship between the interaction of public opinion and partisan election towards the probability of a pro-gay vote. However, there is a negative relationship between the interaction of public opinion and nonpartisan election towards the probability of a pro-gay vote. According to the results, justices in states with nonpartisan elections are less likely to vote in favor of public opinion, than are justices in states with partisan elections. That is to say that as public opinion on gay marriage increases, the probability of a justice in a state with nonpartisan elections to vote in favor of gay rights decreases. On the other hand, as public opinion on gay marriage increases, the probability of a justice in a state with partisan elections to vote in favor of gay rights increases. Again, these relationships are consistent across both measures of public opinion as well.

In order to test the final hypothesis, I run a probit model to see how justices facing public retention elections and those not facing public retention elections respond to public opinion. Both of these models include the relationship between the way a justice votes in a gay rights case and public opinion, one with the Flores and Barclay data and the other with the GSS data from 2004. The results are split up based on whether or not the justices who voted on the gay rights cases faced a public retention election or whether they did not face a public retention election.
Table 8: This table shows how public opinion on gay marriage, with the Flores and Barclay data, impacts the way a justice votes on a gay rights case, divided by public retention or not.

<table>
<thead>
<tr>
<th>VARIABLES</th>
<th>(1) Public Retention</th>
<th>(2) No Public Retention</th>
</tr>
</thead>
<tbody>
<tr>
<td>Justice’s Vote</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Public Opinion</td>
<td>0.023***</td>
<td>0.027*</td>
</tr>
<tr>
<td>(Flores and Barclay</td>
<td>0.006</td>
<td>(0.012)</td>
</tr>
<tr>
<td>constant</td>
<td>-0.346*</td>
<td>-0.575</td>
</tr>
<tr>
<td></td>
<td>(0.154)</td>
<td>(0.370)</td>
</tr>
<tr>
<td>Pseudo R2</td>
<td>0.0167</td>
<td>0.0198</td>
</tr>
<tr>
<td>Obs.</td>
<td>553</td>
<td>175</td>
</tr>
</tbody>
</table>

* p<0.05, ** p<0.01, *** p<0.001

Table 9: This table shows how public opinion on gay marriage, with the GSS data from 2004, impacts the way a justice votes on a gay rights case, divided by public retention or not.

<table>
<thead>
<tr>
<th>VARIABLES</th>
<th>(1) Public Retention</th>
<th>(2) No Public Retention</th>
</tr>
</thead>
<tbody>
<tr>
<td>Justice’s Vote</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Public Opinion</td>
<td>0.032***</td>
<td>0.008</td>
</tr>
<tr>
<td>(GSS 2004)</td>
<td>(0.007)</td>
<td>(0.011)</td>
</tr>
<tr>
<td>constant</td>
<td>-0.527***</td>
<td>-0.052</td>
</tr>
<tr>
<td></td>
<td>(0.160)</td>
<td>(0.345)</td>
</tr>
<tr>
<td>Pseudo R2</td>
<td>0.0286</td>
<td>0.0023</td>
</tr>
<tr>
<td>Obs.</td>
<td>553</td>
<td>175</td>
</tr>
</tbody>
</table>

* p<0.05, ** p<0.01, *** p<0.001

Across both models, the directionality is the same for the relationship between a justice’s vote and public opinion, across both retention variables. This means that for both justices in states with public retention elections and those in states without public retention elections, there
is a positive relationship between public opinion and how they vote. For justices in states with public retention elections, both models indicate the relationship between public opinion and the way a justice votes is positive and the relationship is statistically significant to the 99th percent. On the other hand, for justices in states without public retention elections, the relationship is still positive between public opinion and the way a justice votes, but only the first model shows statistical significance, to the 95th percent. This indicates that the relationship between public opinion and the way a justice votes is stronger for justices in states with public retention elections and weaker for justices in states without public retention elections.

Furthermore, the effect of public retention elections on the way a justice responds to public opinion can be seen with an interaction. Similar to the interaction between public opinion and selection method, here I run an interaction between public opinion and retention across the two measures of public opinion. That is to say that the effect of public opinion on the probability of a pro-gay vote and the effect of public retention on the probability of a pro-gay vote are multiplied together. This allows for the joint effect of both independent variables to be seen in relation to the independent variable. In terms of my hypotheses, this shows how public opinion and retention interact towards the probability of a pro-gay vote.
Table 10: This table shows an interaction between both justices that face public retention and justices that don’t face public retention with both measures of public opinion, on the way a justice votes in a gay rights case.

For the interaction between justices who face public retention and the public opinion with the Flores and Barclay data, there is a slight negative relationship, but this relationship was not statistically significant past the 90\textsuperscript{th} percent. This means that it is unlikely that retention elections impact the effect of public opinion on the way a justice votes in a gay rights case. On the other hand, there is a weak positive relationship between public retention elections and the public opinion with the GSS data from 2004. Also, this relationship is statistically significant to the 90\textsuperscript{th} percent. This signifies that public retention elections may impact the effect of public opinion on the way a justice votes in a gay rights case, by increasing the likelihood a justice votes in favor of

<table>
<thead>
<tr>
<th>VARIABLES</th>
<th>(1) Justice’s Vote</th>
<th>(2) Justice’s Vote</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public Opinion</td>
<td>0.0269**</td>
<td></td>
</tr>
<tr>
<td>Flores and Barclay</td>
<td>(0.0125)</td>
<td></td>
</tr>
<tr>
<td>Public Retention</td>
<td>0.229</td>
<td>-0.475</td>
</tr>
<tr>
<td></td>
<td>(0.401)</td>
<td>(0.380)</td>
</tr>
<tr>
<td>No Public Opinion</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Flores and Barclay</td>
<td>(0)</td>
<td></td>
</tr>
<tr>
<td>Public Retention</td>
<td></td>
<td>-0.00412</td>
</tr>
<tr>
<td>Flores and Barclay</td>
<td></td>
<td>(0.0140)</td>
</tr>
<tr>
<td>Public Opinion</td>
<td></td>
<td>0.00818</td>
</tr>
<tr>
<td>GSS 2004</td>
<td></td>
<td>(0.0110)</td>
</tr>
<tr>
<td>No Public Retention</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Public Opinion</td>
<td>(0)</td>
<td></td>
</tr>
<tr>
<td>GSS 2004</td>
<td></td>
<td>0.0234*</td>
</tr>
<tr>
<td>Public Retention</td>
<td></td>
<td>(0.0130)</td>
</tr>
<tr>
<td>GSS 2004</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Constant</td>
<td>-0.575</td>
<td>-0.0519</td>
</tr>
<tr>
<td></td>
<td>(0.370)</td>
<td>(0.345)</td>
</tr>
<tr>
<td>Pseudo R2</td>
<td>0.0175</td>
<td>0.0224</td>
</tr>
<tr>
<td>Observations</td>
<td>728</td>
<td>728</td>
</tr>
</tbody>
</table>

Standard errors in parentheses

*** p<0.01, ** p<0.05, * p<0.1
gay rights. Notably, there are interactions with zero effect on how a justice votes in a gay rights case. This is due to the fact that the variable retention election is coded with a zero for when there is no public retention and thus when it is multiplied by public opinion the effect is zero. The biggest take away from this model is that retention elections may or may not interact with public opinion and affect how a justice votes in a gay rights case.

In order to better see the interaction between retention elections and public opinion on how a justice votes, I look at the marginal effects. Specifically, I examine the effects of an increase in public opinion by increments of 5 percent, on the probability of a pro-gay vote. This time I look at the marginal effects delineated across whether or not justices faced public retention elections. This helps to test the hypothesis that justices who face public retention elections are more likely to respond to public opinion that justices who do not face public retention elections.

Figure 12: This graph shows the marginal effects of an increase in public opinion, with the Flores and Barclay data, by 5 percent on the probability of a pro-gay vote, across justices that face public retention elections and those who don’t face public retention elections.
The positive slope of both the public retention and no public retention lines indicate that the relationship between public opinion and how a justice votes on a gay rights case is still positive. That is to say that as public opinion on gay marriage increases, so does the probability of a justice voting in favor of gay rights. In other words, whether or not a justice faces a public retention election does not seem to matter when it comes to how public opinion influences a justice’s decision making on gay rights cases. Both of the lines are so similar and the margins of error, represented by the bars above the data points, overlap further supporting the idea that there isn’t a significant relationship between justices facing public retention elections and those who don’t. It would be expected that this relationship is the same or similar for the marginal effects of the other public opinion variable on the probability of a pro-gay vote.

Figure 13: This graph shows the marginal effects of an increase in public opinion, with the GSS data from 2004, by 5 percent on the probability of a pro-gay vote, across justices that face public retention elections and those who don’t face public retention elections.
The graph with the second public opinion variable varies from the first, in that the slope of the public retention line is steeper than the no public retention line. This means that justices facing public retention elections are more likely to vote in favor of gay rights as public opinion increases, than are justices that do not face public retention elections. Granted the margins of error do overlap and the slope of the public retention line is only relatively steeper than the no public retention line. Despite this, it is possible that for the second public opinion variable, public retention elections do have more of an impact on how a justice votes on a gay rights case.

**Discussion:**

The primary finding in my analysis is that justices are more likely to vote in favor of gay rights when public opinion on gay marriage is higher and less likely to vote in favor of gay rights when public opinion is lower. This means that there is reason to believe that state supreme court justices are not isolated from public opinion and that their decision making process is impacted by the public opinion of the state they are in. Additional support for the positive relationship between public opinion and how a justice votes on a gay rights case, comes from the number of votes made with different levels of support for gay marriage. For votes being made in states with medium levels of public opinion, there was not a clear preference of justices to vote in a pro-gay or anti-gay direction, meaning that when public opinion was less clear, justices were less likely to vote in favor of it. Alternatively, there was clearly a preference towards pro-gay votes when public opinion was high, because more pro-gay votes were cast when public opinion was high than when it was low.

Looking further at how the method of selection plays a role in responsivity to public opinion by justices, the results support the notion that elected justices are more likely to vote in favor of public opinion than appointed justices. There is a stronger positive relationship between
the probability of a pro-gay vote and public opinion, for elected justices than there is for appointed justices. This means that when public opinion on gay marriage increases, so does the likelihood that an elected justice, more so than an appointed justice, will vote in favor of gay rights. Appointed justices are less likely to respond to public opinion when making their decision on a gay rights case. Delving deeper, there is a clear distinction drawn between how a justice elected via partisan election reacts to public opinion and how a justice elected via nonpartisan election reacts to public opinion. The results indicate that there is a strong positive relationship between the probability of a pro-gay vote and public opinion for justices in states with partisan elections, while the same relationship is weak and negative for justices in states with nonpartisan elections. This does not conform to my hypothesis that justices elected by nonpartisan elections will be more likely to respond favorably to public opinion than justices elected by partisan elections. It is interesting to see how the relationship between public opinion and a justice’s vote is positive for both partisan elections and appointments, while the relationship is negative for nonpartisan elections. These results help to support the underlying logic that public opinion plays a role in the judicial decision making process on gay rights cases.

Additionally, the results from the models and graphs testing the effect of retention on the public opinion and justice voting relationship, do not strongly support my hypothesis either. If the results did support my hypothesis, it would be expected that there would be a strong positive trend in the probability of a pro-gay vote as public opinion increases for only the justices in states with public retention elections. However, both justices in states with public retention elections and without public retention elections, showed a similar degree of responsivity to public opinion. The one graph that may support my final hypothesis does not show a strong difference between justices facing public retention and those who do not face public retention.
There is a lack of strong support for the final hypothesis, but again supports the underlying logic that public opinion plays a role in the judicial decision making process.

There is reason to believe that my results are not only applicable to judicial decision making on gay rights cases, but rather for cases of higher salience as well. For example, when cases relate to salient topics, such as abortion or the death penalty, there is strong reason to believe that public opinion plays a role in how justices decide those cases. Also, I would argue that the way in which a justice is selected impacts how public opinion influences their decision making process. It would be expected, that for the more salient cases, justices that face partisan elections would be the most responsive to public opinion, while those facing nonpartisan elections would be the least responsive. The significance in this assumption is that my findings can be more broadly applied to other cases across many different levels of the judicial system.

Going further, I believe that my results speak to the larger context in which the judicial branch is situated in the United States’ system of democracy. The selection method component of my analysis relates to the assumption that justices are meant to be either protectors against the majority or responders to public opinion. When it comes to the protection of minorities against the majority, there is reason to believe that my paper provides unique insight. Despite the growing amount of support towards gay marriage during the 1988 to 2004 time period, the majority of citizens were never in support of gay marriage. This means that decisions being cast in favor of gay rights were working to counter the majority and protect the minority of those who supported gay marriage. However, there is an argument to be made that justices were responding to the increasing trend of public opinion towards supporting gay marriage. It appears there is an effort to balance between protecting against the majority, while catering to what the public wants.
More broadly, this relates to the protection of other minorities outside of the gay rights debate, that might not have increasing public support to the degree that gay marriage does. With gay rights, there is both a counter majoritarian and response to public opinion argument to be made. What happens in cases where the minority opinion is not gaining substantial public support? There is an argument to be made that the role of the judiciary, in that case, would be to act as a counter majoritarian force. Justices might fulfill this role until public opinion has reached a point at which the minority opinion is becoming prevalent and heard. While my analysis does seem to divide the justices into their methods of selection, it might be possible that all justices, regardless of how they are put on the court, are meant to protect against the majority to some extent. It is hard to examine how well an appointed justice may fulfill this goal in comparison to a justice facing partisan election, especially since my analysis fits into the conversation of how justices respond to public opinion. The lack of clear roles for the judiciary and outcomes to measure success in achieving these outcomes may cast a dark shadow on effective democratic governance. However, there is reason to believe that democracy is functioning at its best, not because we don’t have strong evaluative measures of the achievement of judicial goals, but rather because there is a conversation on what these roles are. Democracy is founded on the notion that the conversation must go on or else we lose the idea of democratic governance as a whole. Variation in how state supreme court justices respond to public opinion across different methods of selection, highlights how the conversation is ongoing.

Policy Implications:

To make clear policy recommendations from this analysis requires having a goal for the judiciary as part of the public sphere. Justices and judges are in fact members of the public service sector and are tasked with acting in the best interest of society. Also, members of the
judiciary are meant to think independently and are not meant to be as responsive to the public, to the same extent as are members of the legislature or executive. Striking a balance between serving the best interests of the public while also remaining independent is no easy task and thus why there are different ways in which state supreme court justices are selected. According to my results, if society wants to have justices that act primarily to serve their constituents’ interests, then all state supreme court justices should be elected via partisan elections. This claim rests on the assumption that in order to serve society’s interests, a justice must vote in favor of public opinion on a given issue. In the case of this paper, a justice must vote in favor of gay rights, when public opinion on gay marriage is high and must vote against gay rights when public opinion on gay marriage is low. On the contrary, if society does not want justices to act in the best interest of society and wants impartial and independent justices, then my analysis would advocate for nonpartisan elections. Instead of voting in favor of public opinion in gay rights cases, justices in states with nonpartisan elections were more likely to vote against gay rights when public opinion was higher and vice versa. Again, this logic assumes that for justices to be impartial and independent, means they must not vote in favor of public opinion on a given issue. Having justices that are not as responsive to public opinion could also reinforce the notion that the judicial branch functions to be a counter force to the majority. These two methods of selection seem to support the extremes when it comes to how justices deal with public opinion and rely on broad assumptions. One assuming the role of justices is to make decisions on issues by opening their ears to the public, while the other is to assume that justices need not listen to the public at all.

If the goals of judicial policy are not necessarily to enjoin judicial decision making with public opinion or to sever completely the relationship between the judiciary and its
constituency, my analysis may point to judicial appointments as a balanced solution. Appointed justices do not feel the same pressure to cater to their constituency as do elected justices and are less likely to be as responsive to public opinion as are elected justices. Despite the greater degree of independence that appointed justices have, they are not entirely isolated from the public either. My results indicate that justices in states with judicial appointments voted in favor of public opinion to a lesser extent than justices in states with partisan elections, but vote in favor of public opinion nonetheless. By having state supreme court justices selected by appointment, there can be both responsivity to public opinion more so than with justices elected by nonpartisan elections, but also a degree of independence different than justices elected by nonpartisan election.

Another important policy implication for this work is that retention elections may or may not cause justices to be more likely to vote in favor of public opinion. While it is clear that public retention elections can result in positive responsivity to public opinion, the same is true when there are not public retention elections. Nevertheless, a public retention election may help to further tie justices with their constituents and cause them to respond to public opinion. There is an important caveat to all these implications and this is that my results are relevant just for gay rights cases at the state supreme court level. However, I believe that these results can relate to the issue of court cases on salient issues and how public opinion can impact those cases. Therefore, these implications can have broad applications to different types of cases at different levels of the judicial system.

**Future Research:**

My work in no way fully examines all of the factors that could possibly influence how justices decides a given case. That being said, the main area in which I would recommend further
research would be with characteristics of individual justices. For example, I believe that my results would be stronger if I knew how each individual justice in the data set were selected and if they were retained. I classified the state supreme court of each given justice that voted on a gay rights cases between 1981 and 2004, while hinging on the assumption that each justice in that state was selected and retained in the same exact manner. This is unlikely to be entirely true and thus could skew the results, but I don’t believe there is a substantial impact on my paper due to this being irregular. I would also like to be able to code each of the justices in the data set based on their gender and political ideology, because those are two variables that the previous literature indicates could impact how a judge votes on a case. I think gender would be particularly applicable for this paper, due to how female justices may view gay rights cases differently than male justices. Ideology would be an interesting addition as well because there could be strong pressure coming from a justice’s political party to vote one way or another on any given case, especially when that case is dealing with a salient issue. Some other characteristics that I would like to be able to look at in my analysis would be the proximity an individual justice is to reelection or retention, because the previous research indicates that proximity to an end of a term causes justices to change their behavior.

Continuing on with the idea of future research, I think it would be highly beneficial to look at how public opinion impacts judicial decision making on gay rights cases, across differing degrees of salience. This might help to further explain the relationship between the way a justice votes on a case and how public opinion influenced their decision. The salience of an issue may also play an important part when it comes to the method of selection and retention because there may be different incentives for justices to respond to public opinion based on selection method and retention.
Two final areas in which I believe future research should be done are with more contemporary cases and a better measure of public opinion. The data set I utilize stops in 2004, hence it would be interesting to see what has changed since then, especially beyond 2015 when gay marriage was legalized across the country and because public opinion on gay marriage is higher now. Also, there have likely been changes in the selection method and retention of justices in at least some states, which would be interesting to track as well. One of the hardest components of this project has been collecting public opinion data on gay marriage from 1981 to 2004 at the individual state level. I agree my public opinion measures are not a perfect metric, that’s why I would want to fill in all the missing data with more public opinion on gay marriage support. This would work to provide clarity to the true effect of public opinion on judicial decision making on gay rights cases. This could also be done with respect to adding more contemporary cases into the data set and looking across a greater span of time. I would also be curious to see if there was a measure of public opinion that more accurately measured the public’s attitudes on gay rights, beyond just gay marriage.

Conclusion:

A majority of cases that judges and justices hear never get paid any attention to by the general public and judges are rarely removed from office, by not being retained. Not only is there a need for Americans to pay greater attention to judges in order to hold them accountable at the polls, but the way in which they make the decisions that they do needs to be monitored as well. A major component of holding a government official accountable is through understanding and monitoring what they are doing. There is a lack of attention and accountability towards the judicial branch at nearly every level in the United States. One way to begin the process of
holding all of our public officials accountable, especially those in the judicial branch, is to look at the reasons behind why they do what they do.

Even when the cases that judges hear are more salient, there is not much attention paid to the process by which judges make the decisions that they do. This is definitely an area where people should hold public officials more accountable, because the public tends to care about issues of importance. Some authors have attempted to answer the question of what influences judges in the decision making process, when it comes to salient issues, such as abortion and the death penalty, claiming public opinion plays a major role. Other authors have even claimed that the method through which a judge is selected could have an impact on how the judge decides a case. There is even an in-depth analysis on the issue of gay rights and how justices decide cases involving gay rights. There is not a paper that looks at the direct relationship between public opinion on gay rights and the role it plays in influencing the judicial decision making process, across various degrees of judicial selection. For that reason, my paper is unique and adds important insight into how gay rights cases, along with other salient cases, are decided and how judges make the decisions they do.

My paper works to show that the judicial decision making process is influenced, to some degree, by public opinion. As public opinion on gay marriage increases over time, the likelihood that a justice votes in favor of gay rights increases. Not only does there exist a relationship between public opinion and the way a justice votes, but the method of selecting a justice influences how they respond to public opinion as well. Elected justices are much more likely to vote in favor of public opinion than are appointed justices. Also, justices elected by nonpartisan election are less likely to vote in favor of public opinion than are justices elected by partisan election. If factors do exist that influence the way a justice makes decisions, then public opinion
and method of selection are two of them. The effect of a justice facing a public retention election or not facing a public retention election does not augment the positive relationship between public opinion and how a justice votes on a gay rights cases.

There is reason to believe that the majority of votes on gay rights cases are pro-gay votes because of the effect of the public and public opinion on gay marriage. This shows how, despite the lack of attention to the judicial decision making process, people actually influence how a justice votes on a case. Also, some justices are more likely to vote in favor of public opinion, due to their method of selection, while others are less likely to vote in favor of public opinion because of their method of selection. Broadly, this may be a positive consequence of the judicial system in which justices make the decisions they do because they are or are not responding to the people. On the other hand, this could be a negative consequence of the system because justices may not be meant to answer to the people and are there to make independent decisions. This paper provides great insight into a few factors that may impact the judicial decision making process, which have policy implications related to what society wants from its judicial system.

The goals of judicial policy should be made with consideration to how justices may or may not respond to the public when making decisions. In the future, there is ample space for more research to be done, not only in continuation of this work, but also across different issues of salience. By doing this future research, the amount of knowledge on judicial politics and decision making can increase. There is a need to hold all of our public officials accountable, justices and judges included. One of the best ways to enhance our accountability is by spreading knowledge on how a certain process works. It is my goal, in writing this paper and conducting this analysis to contribute to the existing knowledge and further the accountability of government.


Smith, Tom W, Michael Davern, Jeremy Freese, and Michael Hout. General Social Surveys, 1972-2016 [machine-readable data file] /Principal Investigator, Tom W. Smith; Co-Principal Investigator, Michael Davern; Co-Principal Investigator, Jeremy Freese; Co-