

**Unburdened:
Adjudication of Abortion Cases at the U.S. Courts of Appeals**

Maxwell H.H. Mak
Ph.D. Candidate
Department of Political Science
Stony Brook University
Stony Brook, NY 11794-4392
mmak@ic.sunysb.edu

* The author wishes to acknowledge the invaluable comments, insights, and suggestions of Jeffrey Segal, Brandon Bartels, and Scott Basinger. I also owe many thanks to Emily Rothenberg for her research assistance on this project. I am grateful to the National Science Foundation for funding this project.

Abstract

This paper seeks to determine whether and to what degree Supreme Court-defined legal considerations function as hierarchical constraints on the choices judges at the U.S. Courts of Appeals make. By accounting for the mechanisms through which hierarchical constraints influence vote choice, this paper fuses the three dominant models of judicial decision-making while also clarifying the role of ideology, legal considerations and judicial behavior. Circuit court judges appear to be highly responsive to Court abortion jurisprudence. The impact of the undue-burden test is conditional not only on the ideology of a given judge, but also panel composition and case facts.

Previous research examining decision-making at the Courts of Appeals (e.g., Songer and Haire 1992; Songer and Sheehan 1990; Songer, Segal and Cameron 1994) generally concludes that lower court compliance with the Supreme Court is the norm rather than the exception. Moreover, two common and significant predictors of judicial behavior are judges' ideologies and legal considerations; both of which are theoretically and/or empirically modeled as independent effects on judicial vote choice. Although previous research has done much to enhance the understanding of lower court compliance with the Supreme Court, two often missing components are examinations of the conditions under which judges are indeed constrained and the manner in which such constraint should be evinced.

I argue that compliance alone is insufficient to conclude that the Supreme Court, in setting doctrine and legal considerations, constrains the choices judges make. For hierarchical constraint to be present, lower court judges must adhere to the relevant legal considerations despite a preference for deciding a case in the opposite direction. Moreover, legal considerations must shift the overall behavior, but in doing so can also affect the role of ideology in the eventual vote choice. Previous examinations, empirically and sometimes theoretically, have ignored the possible interaction between legal doctrine and ideology. By accounting for hierarchical constraints and the mechanisms through which they affect judicial decision-making of abortion cases at the U.S. Courts of Appeals, this paper seeks to clarify the role of ideology, legal considerations, and the impact these have on the choices judges make.

I find that circuit court judges were sensitive to the Supreme Court's shift to the undue-burden standard; moreover, compliance here is consistent with the idea that the law (determined by the Court) serves as a significant hierarchical constraint. Also, there is ample evidence that the law interacts with policy preferences. Where judicial discretion is low, judges regardless of

ideology decreased support for abortion rights. Liberals, moderates and conservatives alike supported abortion rights less under a less stringent standard for government regulations to pass constitutional muster. Under instances of high judicial discretion, liberals and conservatives polarized voting consistently with what their ideologies would predict. No longer under the heavy burden of *Roe* and its substantive holdings, conservative judges are now free to vote in accordance with their policy preferences regardless of the factual circumstances and the amount of judicial discretion; they became unburdened by the law under undue burden.

The paper will continue as follows. First, I discuss the theories of hierarchical constraint and heterogeneity in the preference-behavior relationship. Second, I will survey the Supreme Court's major decisions in the area of abortion to determine the appropriate "cut-point" and shift in jurisprudence. Third, I will employ the theories of hierarchical constraint and heterogeneity in the preference behavior relationship to derive hypotheses regarding the Court's influence on the choices judges make. Lastly, utilizing newly collected data on cases decided at the U.S. Courts of Appeals, I will discuss the results and their implications.

Hierarchical Constraint and the Choices Judges Make

The conventional wisdom is that lower court judges are constrained by the Supreme Court (Songer 1987; Songer, Segal and Cameron 1994). The Supreme Court is the court of last resort; the justices hand down doctrines, guiding principles and precedents for lower courts to apply. Lower judges can choose to defy, but they weigh doing so at the peril of being sanctioned in the form of a reversal that establishes the weight of national precedent. This institutional set-up, where lower court judges' decisions are subject to review and possible reversal by the Supreme Court, establishes an institutional, hierarchical constraint on the choices these judges

make. This relationship is especially true for the federal judiciary and particularly the jurists serving on the U.S. Courts of Appeals.

Supreme Court justices have policy preferences (Epstein and Knight 1998; Segal and Spaeth 1993, 2002) and obviously would like to see those preferences evinced in the form of doctrine and precedents for lower courts to follow. Unfortunately, evidence from previous research suggests, logically, that judges at the lower courts also vote in accordance with their own policy preferences (i.e., Giles, Hettinger and Peppers 2002; Songer and Haire 1992). If lower court judges were always faithful adjudicators of Supreme Court doctrine, the idea that judges systematically vote against their policy preferences runs counter to the conception of rationality and self-interest. Yet, previous research has generally concluded that compliance with the Supreme Court doctrine has been the norm rather than the exception (Benesh 2002, Benesh and Reddick 2002; Songer and Sheehan 1990).

As a possible explanation for compliance, Brehm and Gates (1997), in examining federal agency response to a principal, suggest that bureaucracies are often staffed by individuals who have similar policy preferences. Thus, not every circuit court judge will deviate from the Court and, therefore, fail to adhere to the Supreme Court, as Benesh (2002) notes. When preferences between the principal and the agent are opposing or distant, only then will agents possibly go “rogue” and the threat of noncompliance is truly likely (Brehm and Gates 1997). The reason for compliance at the lower courts could be due to the fact that, in general, the circuit court judges are not ideologically divergent from the Supreme Court. Rather, the federal judiciary may be staffed by like-minded individuals and, as a result, yields similar outcomes across all levels.

If judges and the justices have similar policy preferences, compliance is achieved because ideological congruence yields such an outcome. When Supreme Court-established legal

considerations indicate positions that are aligned with a lower court judge's ideology, the legal model, strategic model (Epstein and Knight 1998) and attitudinal model (Segal and Spaeth 1993, 2002) predict the same outcome. It is the problem of observation equivalence; differentiation between Supreme Court influence and preference-based voting is not possible. If the reason for compliance is due to similar preferences between the Supreme Court and circuit court judges, the observation and empirical evidence of lower court judges' adherence to the Supreme Court is not substantively meaningful. In these instances, a conclusion of hierarchical constraint—where the Supreme Court impacts lower court judicial decision-making—is inappropriate.

Hierarchical constraint is not simply lower court adherence to Supreme Court doctrine. While compliance is a necessary component of constraint, it is not sufficient to conclude the Court can effectively determine and impact lower court decision-making. Rather, hierarchical constraint requires a given judge to comply with legal considerations (established by the justices) *in spite* of divergent preferences; under the circumstances of ideological conflict with the relevant legal considerations, judicial compliance evinces hierarchical constraint. Where legal considerations and a given judge's policy preferences indicate opposing positions, the predictions from the legal, strategic and attitudinal models can be distinguished.

Heterogeneity in the Preference-Behavior Relationship

The manner in which hierarchical constraints operate in the judicial voting calculus must also be clarified. On the one hand, Supreme Court influence must impact the final vote of a given judge, and on the other, it can also mitigate the impact of ideology in that vote choice. While both go hand-in-hand, the overall vote shift as well as the effect of policy preferences are two distinct mechanisms of the Supreme Court evincing influence on the choices judges make. First, hierarchical constraints must change the overall propensity of a judge to vote in a particular

way. Supreme Court doctrine, if shifting, must induce lower court judges to do the same. If the contemporary Court shifts jurisprudence and scrutiny levels, the lower courts, too, must also apply those legal considerations accordingly. A Court decision, for example, that enumerates a shift from rational basis to strict scrutiny in a given issue area should lead to greater levels of liberalism, or support for individual rights, at the lower courts in that issue area.

Second, hierarchical constraints can also mediate the impact of policy preferences on the eventual vote choice; the relevant legal considerations may accentuate or attenuate the effect of ideology on the eventual voting behavior. Few (i.e., Bartels 2006) of the previous examinations in judicial decision-making have accounted for this possible heterogeneity in the preference-behavior relationship. In other words, the impact of ideology is not constant as has been previously modeled in almost every empirical examination employing a measure of policy preferences. Rather, there are instances, or contexts, that may increase or decrease the influence of policy preferences on the choices judges make.

Another piece of conventional wisdom suggests that judicial decision-making does not occur in a proverbial vacuum. Instead, the choices judges make are made within contexts. For example, each case is adjudicated within contexts defined by the relevant factual circumstances and, especially for the circuit courts, the panel's ideological composition (Hettinger, Lindquist and Martinek 2006; Sunstein et al. 2006). For the purposes of this examination, the choices judges make are affected by the legal considerations—pertinent case facts defined by Court precedents—that may accentuate or attenuate the impact of ideology on the eventual vote choice.

As Cross and Tiller (1998) posit, lower court judges are more likely to apply Court doctrine when it is in line with their preferences—partisan or ideological. When legal considerations and policy preferences indicate similar directionalities in terms of vote choice, it

should be the case that each reinforces the other; it is in these instances that there should be an accentuation of the impact of ideology on the eventual vote. But, when legal considerations run counter to a given judge's policy preferences, these considerations—if it serves as a sufficient hierarchical constraint—may attenuate the effect of ideology in the judicial voting calculus.

When the Supreme Court shifts doctrine and therefore the relevant legal considerations that a circuit court judge must apply, there are two different predictions. A very strict reading of the attitudinal model argues that judges will vote sincerely and, therefore, in accordance with their policy preferences; this effect holds even in the face of Court doctrine that may be counter to judges' ideology. The strategic model of judicial decision-making posits that judges may indeed deviate systematically from their policy preferences when confronted with Court doctrine that indicate a directionality counter to judges' preferences. If the strategic model is correct, the impact of hierarchical constraints can lead to a higher likelihood of sophisticated voting—mitigating the impact of ideology or sincere voting. Thus, if legal considerations are an adequate constraint on circuit court judges, it can also attenuate the impact of ideology on the eventual vote choice of those judges that may be “rogue agents,” those that are ideologically divergent from the Supreme Court. Decision-making contexts—the case's pertinent legal considerations—may accentuate or attenuate the impact of ideology on the eventual choice. Compliance under these hierarchical constraints can operate through two distinct mechanisms: the impact of legal considerations can be evinced through (1) the final outcome as well as (2) attenuation of the impact of ideology on that final outcome.

There is also another consideration that contributes to ideological heterogeneity—that accentuates or attenuates the impact of ideology. Like Supreme Court justices (Epstein and Knight 1998), judges at the circuit courts, too, work within a collegial environment. The

Sunstein et al. (2006) examination adds that not only does the partisanship of the judge matter, but also the partisanship of the other judges serving on a given panel. As the authors deem it, ideological dampening suggests that a judge's policy preferences will be attenuated when serving on a panel with judges of a different political party. On the other hand, ideological amplification occurs when a judge's propensity to vote in accordance with his partisan preferences is amplified by the presence of other like-partisan judges. For example, a Republican on a panel with all Republican-appointed judges is more likely to make conservative decisions compared to a panel with mixed partisanship; a Democrat on a panel of all Democrat appointees, on the other hand, has a higher propensity to make liberal decisions when compared to a Democrat serving on a panel with partisan heterogeneity.

There is strong evidence that there is heterogeneity in decision-making in the choices judges make; even the wordage—ideological dampening and amplification—employed by Sunstein et al. (2006) supports this. Unfortunately, few examinations within the judicial politics literature have specified empirical models to account for the ways in which hierarchical constraints and panel effects impact the voting calculus. Not only should hierarchical constraints and panel effects matter in the overall propensity of the vote choice, but they can also affect the impact of ideology on that eventual vote choice.

Applying these two theories—hierarchical constraint and heterogeneity in the preference behavior relationship, I examine the impact of several Supreme Court decisions in the area of abortion and the influence they had on cases handled at the U.S. Courts of Appeals. Specifically, this paper seeks to determine whether and to what degree circuit court judges were responsive to the Court's shifting jurisprudence from the strict scrutiny standard enunciated in *Roe* (1973) to the undue-burden standard.

Undue Burden as the Law of the Land

Instances where the Court deviates or changes jurisprudence in a given issue area are clear enunciations of Court preferences that can and should guide adjudication at the Courts of Appeals. Previous research has examined instances where the Supreme Court hands down major decisions. Overall, these examinations find similar results suggesting that compliance with Supreme Court jurisprudential shifts is the norm rather than the exception. Although the lower courts appear to adjust decision-making to match changes in doctrine or precedent, the degree of compliance and the time to eventual adherence vary (Benesh and Reddick 2002; Brent 1999, 2003; Songer 1987; Songer and Sheehan 1990).

Abortion jurisprudence underwent such a change in Court preferences and the relevant standard of judicial scrutiny. In 1973, *Roe v. Wade* established that strict scrutiny should be the test of constitutionality for abortion regulations; under this standard, judges must determine whether a law advances a compelling government interest and whether that law is the least restrictive of means to advance that interest. *Webster v. Reproductive Health Services* (1989) shifted jurisprudence to the undue-burden standard. This change allows for a prediction that circuit court cases post-*Webster* should be less supportive of the right to an abortion under a less stringent level of scrutiny.

Adjudication in the issue area of abortion also offers an interesting dynamic. *Webster* was a plurality, where no opinion achieved the assent of five justices. When legal standards achieve a doctrinal majority, the application of the relevant test is rather simple; the law of the land is the standard endorsed by the doctrinal majority. Plurality decisions, however, do not offer such clear legal guidance for the lower courts to follow, but the justices provided guidance in *Marks v. United States* (1977). The *Marks* Doctrine dictates that the narrowest standard

emerging from the dispositional majority becomes the controlling, relevant standard for judges to apply. As Stearns (1997) notes, “the opinion decided on the narrowest grounds is that opinion that would least alter the status of the law at the time of the decision” (128). In striking down provisions, the narrowest grounds standard dictates the law of the land is that the opinion “would strike down the *fewest* statutes” (Stearns 1997); the reverse is true when upholding provisions. The Courts of Appeals panel deciding *Planned Parenthood v. Casey* (1991) writes: “Where a Justice or Justices concurring in the judgment in such a case articulates a legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree, that standard is the law of the land.” As such, the reality from *Marks* is that the doctrine endorsed by the median justice is the law of the land.

[Insert Figure 1A and 1B here.]

Based on the opinions signed in *Webster*, Figure 1A places the justices on a single dimension ranging from most restrictive to most permissive of the right to an abortion. Justice O’Connor argued that, pre-viability, a law was constitutional unless it was unduly burdensome to the right of a woman seeking an abortion. Because O’Connor’s opinion represented the median position on the Court as well as the necessary vote to achieve a dispositional majority, the undue-burden standard emerged as the law of the land under the *Marks* Doctrine.

Despite the presence of *Marks*, there is doubt as to whether lower court judges would adhere to undue burden established in *Webster*. First, as Figure 1A notes, O’Connor’s opinion, failed to achieve the all important label of “Judgment of the Court”; it was not the opinion, in the dispositional majority, to have the most justices joining the opinion. That status belonged to Justice Rehnquist’s opinion. Under *Marks*, the standard emerging from the dispositional majority that is decided on the narrowest grounds (and the median justice) is the appropriate

standard for the lower courts to apply when working under precedent that was a plurality decision. The law of the land is not necessarily the opinion endorsed by the most justices and, therefore, not necessarily the opinion that receives the label of “Judgment of the Court” (Stearns 1997). This duality between the Marks Doctrine and the Judgment of the Court places *Webster* on unsure ground; it is hardly what Senator Specter (R-PA) might deem a “super” precedent, which is what he labeled *Roe* during Samuel Alito’s confirmation hearing to be associate justice (Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice on the Supreme Court of the United States, 2006).

Second, as Canon and Johnson (1998) note, clear and unambiguous Supreme Court policies are most likely to elicit compliance at the lower courts. *Webster*, arguably, does not fall into this category. Of the three opinions constituting the dispositional majority, only one applied undue burden, another called for an explicit overturn of *Roe* (Scalia), and the last employed rational basis (Rehnquist). Moreover, in *Webster* (and even in her dissents in previous court decisions), O’Connor never truly clarified the elements of a regulation that would be unduly burdensome to the right to an abortion. As Justice Alito noted during his confirmation hearing, “our panel, after some effort, determined under the *Marks* standard for determining what the holding of a case is when there’s no majority opinion, that the standard was the Undue-burden standard. And there just wasn’t a lot to go on.... I looked for whatever guidance I could find” (Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice on the Supreme Court of the United States, 2006).

Third, the plurality status raises serious questions as to the likelihood that *Webster* would generate significant impact on the choices judges make at the Courts of Appeals. As Benesh and Reddick (2002) suggest, the status of a precedent does have serious consequences for the

probability that a judge will comport with a Supreme Court decision; while they examine only explicit overruns of previous Court precedent, the authors find that the composition of the dispositional majority significantly impacts the degree of compliance. A unanimous decision, for example, significantly and systematically increases the likelihood of Courts of Appeals adherence to explicit overruns of precedent. If the composition of the majority matters in circuit court adherence to Court overruns, the same intuition should follow for shifts in Court doctrine that are plurality opinions, where no doctrine is applied and supported by at least a majority of the justices. In instances of a plurality decision, compliance with Supreme Court decision-making (doctrine) can be subject to deviation by circuit court judges.

It was not until *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), which was also a plurality opinion, that the Court reaffirmed and clarified the undue-burden standard as the law of the land. Figure 1B depicts the justices' positions on the standard of scrutiny. In *Casey*, the undue-burden standard was not only supported by O'Connor, who co-authored the joint opinion with two other justices (Souter and Kennedy), but also that joint opinion received the title, "Judgment of the Court." With three justices employing undue burden to determine the constitutionality of an abortion regulation, the standard advocated by O'Connor for abortion cases was on surer footing than it was in *Webster*. With the plurality in *Casey*, both the judgment of the court and *Marks*' narrowest grounds approach indicate that undue burden is indeed the law of the land and, as a result, the appropriate level of judicial scrutiny to apply when adjudicating abortion cases. Although the substantive holdings in *Casey* mirror those in *Webster*, the multiple ambiguities of *Webster* make *Casey* appear to be the appropriate "cut-point" where the Court effectively shifted jurisprudence to the undue-burden standard.

The Impact of Undue Burden on Judicial Decision-Making

The impact of scrutiny levels of judicial decision-making can be evinced in two ways. On the one hand, different scrutiny levels must impact the final vote of a given judge, and on the other, it *can also* mitigate the impact of ideology in that vote choice. While both go hand-in-hand, the overall vote shift as well as the effect of policy preferences are two distinct mechanisms of different scrutiny levels evincing influence on the choices judges make. First, changing standards of adjudication must change the overall propensity of a judge to vote in a particular way. If the contemporary Court shifts jurisprudence and scrutiny levels, the lower courts, too, must also apply those legal considerations accordingly. A Court decision that shifts from rational basis to strict scrutiny in a given issue area, for example, should lead to greater levels of liberalism at the lower courts in that issue area.

Second, scrutiny levels can also mediate (accentuate or attenuate) the impact of policy preferences on the eventual vote choice. The effect of scrutiny levels on the impact of policy preferences on judicial decision-making has been previously discussed in Bartels (2006), who examines the impact of legal considerations on judicial decision-making at the Supreme Court. A primary contention and contribution of the Bartels examination are that scrutiny levels can indeed induce heterogeneity in the preference-behavior relationship. Taking lessons from his examination of free speech cases and the content-neutrality jurisprudential regime, the intuitions from the Bartels examination easily translate over into abortion jurisprudence.

Again, with *Casey*, the Court placed undue burden on firmer footing than *Webster*. As such, it should be the case that judges no longer employ strict scrutiny as a blanket test of constitutionality after the Court's affirmation of undue burden in *Casey*. If undue burden truly is a less stringent standard, the hypothesized impact of *Casey* (and the undue-burden standard) is that it led to an overall decrease in support for abortion rights at the Courts of Appeals. This

general hypothesis captures only one aspect—the shift in the overall propensity of a given outcome—of the theory of heterogeneity in the preference-behavior relationship.

Where rational basis and strict scrutiny would predict conservative and liberal outcomes, respectively, undue burden places the legal considerations in between, offering no clear guidance as to whether the decision should support striking down or upholding a given regulation. With no presumed validity or invalidity of a given law, undue burden is an intermediate level of judicial scrutiny. This can have serious repercussions for the amount of judicial discretion available to judicial decision-makers operating under different standards of adjudication. This increased discretion can be evinced through the impact of preferences on the eventual behavior, which is the second possible mechanism legal considerations can affect the choices judges make.

While undue burden in the abstract affords much discretion to lower court judges, the Court in *Casey* also offered several examples of laws or regulations that do not constitute substantial obstacles to a woman obtaining an abortion. Where lower court judges are presented with a case concerning these provisions, judicial discretion even under undue burden is low. The joint opinion in *Casey* determined that recordkeeping and reporting requirements, parental notification or consent laws, informed consent requirements, and provisions that mandated at least a 24-hour waiting period were not undue burdens and, therefore, constitutional. The only provision struck down was a spousal consent requirement before a married woman could obtain an abortion. These types of provisions should be upheld and therefore withstand constitutional challenge. This also supports the fact that undue burden is a less stringent standard. In *Akron v. Akron Center for Reproductive Health* (1983), the Court was presented with provisions mirroring those at issue in *Casey*; all were struck down as unconstitutional under strict scrutiny.

[Insert Figure 2A and 2B here.]

Figure 2A presents the hypothesized support levels for abortion rights, comparing the pre- and post-*Casey* time periods. Prior to *Casey*, the heavy burden of strict scrutiny should lead to high levels of support for abortion rights. Where judicial discretion is low (i.e., a provision similar to that upheld in *Casey*), it should be the case that liberals, moderates and conservatives alike decrease support for abortion rights after *Casey*. Prior to *Casey*, liberal judges adjudicated abortion cases under strict scrutiny; this would reinforce their ideologies because liberal judges, here, are assumed to prefer supporting abortion rights and striking down restrictions on abortion. If hierarchical constraint is to be present, it must be the case that liberals move in the conservative direction when adjudicating a case concerning a *Casey* provision. If they vote counter to their policy preferences post-*Casey*, hierarchical constraint is present. Moderates are the ones most likely to adhere to Supreme Court doctrine. As such, moderate judges, too, should shift with Court jurisprudence decreasing their support for abortion rights. Conservatives already are ideological predisposed to restrict abortion rights. Deciding cases under a less stringent standard should reinforce their ideologies; their policy preferences indicate a similar directionality as Court jurisprudence when deciding a case pertaining to a *Casey* provision. For conservatives, significant hierarchical constraint should be evinced in the pre-*Casey* period. Conservative judges supporting the right to abortion, prior to *Casey*, is evidence on the Supreme Court establishing legal considerations (strict scrutiny) that constrain the choices make.

Figure 2B depicts the hypotheses where judicial discretion is high (i.e., where a case does not concern a provision upheld in *Casey*). The undue-burden standard in *Webster* and *Casey*: (1) left unanswered the question of what exactly is a substantial obstacle and at what point does a regulation unduly burden the right to an abortion; (2) remained a standard that was unable to achieve the support of a majority of justices; and (3) led to differing results in concurring and

dissenting opinions applying the standard. The discretion available to liberal judges should be evinced in post-*Casey* jurisprudence. Prior to *Casey*, again, strict scrutiny as the applicable and relevant legal consideration should lead to high levels of support for abortion rights.

Because undue burden is a less stringent standard for abortion regulations to survive constitutional challenge, moderates being ideologically predisposed to adhere to Court precedent should decrease support for abortion rights. In the post-*Casey* jurisprudence, conservative judges should be freer to vote more conservatively in abortion cases, overall, when compared to the cases decided between *Roe* and *Casey*. Although not the rational basis standard that would reinforce conservative decision-making the most, undue burden is a less stringent standard for the government to survive constitutional challenge. As a result, conservatives should vote more conservatively after *Casey*. Pre-*Casey*, conservative judges would have been constrained by the strict scrutiny standard. There should be an accentuation of the impact of ideology on the eventual vote choice for conservative judges deciding abortion cases post-*Casey*. Liberals, under the *Roe* jurisprudence, were unconstrained. Where judicial discretion is high, liberal judges are still free to vote in accordance with their policy preferences and therefore support the right to an abortion; this should lead to voting behavior (liberal) consistent with the pre-*Casey* period.

Another consideration—panel ideological composition—can also contribute to judicial voting behavior (Sunstein et al. 2006; Hettinger et al. 2006). The results from the Sunstein et al. examination are robust for most issue areas, but the authors find overall find little or no evidence in the area of abortion (as well as capital punishment). There are two possible explanations. First, as Sunstein et al. (2006) note, abortion views are often entrenched and unlikely to move regardless of panel composition. Second, the effect of panel heterogeneity—even when policy preferences are entrenched—is conditional on the decision-making context as well as judge's

ideology. Unfortunately, few examinations within the judicial politics literature have specified empirical models to account for the ways in which hierarchical constraints and panel effects impact the voting calculus. Not only should hierarchical constraints and panel effects matter in the overall propensity of the vote, but can also affect the impact of ideology on that vote choice.

Panel effects should be conditional on the relevant legal consideration. There is theoretical support for the impact or non-impact of panel heterogeneity at different time periods of the Courts of Appeals' adjudication of abortion cases. On the one hand, because strict scrutiny is such a demanding test of constitutionality, it may be the case that panel effects played no significant role in adjudicating cases prior to undue burden. Again, judicial discretion is at its lowest ebb and strict scrutiny does not appear to reinforce preferences to restrict the right to an abortion. Post-*Casey*, panel effects will have no effect for any judge—liberal or conservative—simply because judicial discretion is at its highest and therefore judges are free to vote their policy preferences regardless of the panel composition; this would support the Sunstein et al. (2006) findings for abortion cases. Alternatively, panel effects—once accounting for the possible preference-behavior heterogeneity—can be significant and systematic post-*Casey*. This would support the contention that undue burden increased judicial discretion and, in doing so, increased the propensity to vote collegially under the uncertainty that undue burden offers.

Data and Methods

In order to test the hypotheses discussed above, original data was collected for all abortion cases decided at the U.S. Courts of Appeals from 1973 to 2006. Identification of the population of abortion cases was completed through searches on Lexis/Nexis¹, which includes information for case opinions that were unpublished.² Cross-petitioned cases were counted as separate cases if it challenged different provisions or aspects of a government regulation seeking

to *restrict* the right to an abortion. Cases containing multiple dockets were also counted as separate cases if the circuit court opinion made note of the controversies as being different for each docket, indicated different provisions from each docket, or arose from different states within the circuit. In order to be included in the population of cases employed in this paper, cases had to pertain to the constitutionality of abortion regulations that seek to limit the right to an abortion in general, as a target of government spending, or as a medical procedure.³

I employ a two-level hierarchical model (Raudenbush and Bryk 2002; Skrondal and Rabe-Hesketh 2004). The structural model can be written as follows:

$$\begin{aligned}
 & \text{(Level-1 equation)} \quad \eta_{ij} = \pi_{0j} + \pi_{1j} \textit{Liberal Judge}_{ij} + \\
 & \quad \quad \quad \pi_{2j} \textit{Conservative Judge}_{ij} \\
 (1) \quad & \text{(Level-2 equations)} \quad \pi_{0j} = \beta_{00} + \beta_{01} \textit{Casey Provision}_j + \\
 & \quad \quad \quad \beta_{02} \textit{Panel Heterogeneity}_j + \\
 & \quad \quad \quad \beta_{03} \textit{Post-Casey}_j + \\
 & \quad \quad \quad \beta_{04} \textit{Post-Casey}_j \times \textit{Casey Provision}_j + \\
 & \quad \quad \quad \beta_{05} \textit{Post-Casey}_j \times \textit{Panel Heterogeneity}_j + r_{0j} \\
 & \quad \quad \quad \pi_{1j} = \beta_{10} + \beta_{11} \textit{Casey Provision}_j + \\
 & \quad \quad \quad \beta_{12} \textit{Panel Heterogeneity}_j + \\
 & \quad \quad \quad \beta_{13} \textit{Post-Casey}_j + \\
 & \quad \quad \quad \beta_{14} \textit{Post-Casey}_j \times \textit{Casey Provision}_j + \\
 & \quad \quad \quad \beta_{15} \textit{Post-Casey}_j \times \textit{Panel Heterogeneity}_j \\
 & \quad \quad \quad \pi_{2j} = \beta_{20} + \beta_{21} \textit{Casey Provision}_j + \\
 & \quad \quad \quad \beta_{22} \textit{Panel Heterogeneity}_j + \\
 & \quad \quad \quad \beta_{23} \textit{Post-Casey}_j + \\
 & \quad \quad \quad \beta_{24} \textit{Post-Casey}_j \times \textit{Casey Provision}_j + \\
 & \quad \quad \quad \beta_{25} \textit{Post-Casey}_j \times \textit{Panel Heterogeneity}_j
 \end{aligned}$$

As Equation 1 notes, judges' choices (level-1) are nested within cases (level-2). r_{0j} represents random intercepts to account for unobserved heterogeneity that vary across case-levels. The dependent variable is again coded 1 if a judge votes in favor of abortion rights, 0 otherwise.

Judge's ideologies are ideological scores derived from the Giles et al. (2001) coding strategy.⁴ *Liberal Judge* is coded 1 if the judge's ideology score is at least one standard deviation away from the mean in the liberal direction, 0 otherwise. *Conservative Judge* is coded

1 if the judge is at least one standard deviation less than the mean of ideology in the sample, 0 otherwise. As a result, the excluded category is moderate judges who are those jurists within one standard deviation from the mean.

Please note that each of the case-level variables are cross-level interacted with each of the dummy variables for judges' ideology. The reason for the interactions stems from the discussion above regarding heterogeneity in the preference-behavior relationship. Again, there are two mechanisms through which contextual factors can affect the eventual vote choice. First, scrutiny levels, panel effects and/or case facts must shift the overall propensity to vote liberally or conservatively. Second, these same considerations may also accentuate or attenuate the impact of ideology on the eventual vote choice. The impact of case facts, for example, should shift the overall behavior, which would be the probability of voting liberally; in doing so, the impact of case facts can also affect the role of policy preferences on that eventual vote choice. I control for those by specifying cross-level interactions of case-level factors with judicial ideology.

As for the case specific (level-2) variables, *Casey Provision* is measured as a dummy variable coded 1 if a case concerns one of the provisions discussed in *Casey* AND was upheld by the Court in *Casey*, 0 otherwise. If a government regulation on abortion concerned parental consent, medial recordkeeping, informed consent, or a 24-hour waiting period, the variable *Casey Provision* was coded 1, 0 otherwise. If the government regulation pertained to spousal consent, the variable was coded 0 because the Court in *Casey* regarded this regulation constituted an undue burden and thus fails to comport with the Constitution. *Panel Heterogeneity* is measured as the standard deviation of judicial ideology (as determined by the Giles et al. coding strategy) on a given panel. All variable are interacted with *Post-Casey*, which is a dummy variable coded 1 if a case was decided after the Supreme Court handed down their decision in

Casey, 0 otherwise. After coding of the relevant variables, the model has 669 votes (level-1) nested within 210 cases (level-2).⁵ Equation 1 was estimated using full maximum likelihood.

Results and Discussion

[Insert Table 1 here.]

The results from the multilevel random intercept logistic regression are presented in Table 1.⁶ Please note that the variance component for the random intercept is indeed significant⁷; this suggests that there is unobserved heterogeneity at the case level, which is not overly surprising given the parsimonious specification of the model's level-2. While there are indeed coefficients that are significant, they are conditional on the base-line effect. Thus, I will proceed with interpreting the results using predicted probabilities.⁸

[Insert Figure 3A and 3B here.]

Figure 3A presents the predicted probabilities where judicial discretion is low (a case containing at least one provision upheld in *Casey*). Comparing pre- and post-*Casey* time periods, it is evident that the Supreme Court significantly affected circuit court jurisprudence in the area of abortion. Prior to *Casey*, judicial support for abortion rights was quite high, regardless of the policy preferences of judges. Liberals did so with a predicted probability of about 80 percent. Moderates and conservatives were not significantly different; they had a predicted probability of supporting abortion rights at about 88 percent. This suggests that the strength of strict scrutiny and its heavy support for individual rights left little judicial discretion at the circuit courts. Conservative voted no different than liberals or moderates, offering strong evidence that prior to *Casey* conservative jurists behave in a manner consistent with the conceptualization of hierarchical constraint. They voted against their ideologies.

Post-*Casey*, support for abortion rights plummet across judicial policy preferences in decisions involving at least one provision similar to those upheld in *Casey*. Moderates support abortion rights at a predicted probability of 16 percent, which is a drop of about 70 percent when compared to the pre-*Casey* time period. This drop in predicted probabilities is significant for liberals and conservatives as well. Liberals decrease to about 21 percent in predicted probability; where judicial discretion is low under undue burden, liberals evince strong evidence of hierarchical constraint. Conservatives drop to a predicted probability of virtually zero after *Casey*. Although differences in predicted probabilities between liberals, conservatives and moderates exist, those differences are not significant under traditional statistical standards. Judges behave quite similarly where judicial discretion, as determined by the Court, is low.

Figure 3B produces the predicted probabilities where judicial discretion is high (i.e., a case not involving a provision upheld in *Casey*). It also suggests that *Roe* had a significant impact on judicial vote choice, leaving little judicial discretion. Liberals supported the right to an abortion with a predicted probability of about 73 percent. Prior to *Casey*, moderates and conservatives have predicted probabilities of about 61 and 64 percents, respectively. Similar to instances of low judicial discretion post-*Casey*, there are no significant differences in predicted probabilities pre-*Casey* when comparing liberals, moderates and conservatives. This suggests Court jurisprudence placed a significant hierarchical constraint on conservative judges prior to *Casey*. Post-*Casey*, liberal judges increased support for abortion rights from about 73 percent to 97 percent, but this difference is not statistically significant. Liberal judges behaved much the same way post-*Casey* as they did pre-*Casey*. Moreover, moderate judges and conservative judges decreased support to predicted probabilities of about 40 and 46 percent, respectively; these, too, are indistinguishable from the pre-*Casey* period.⁹ What lends strong support for the

fact that increased judicial discretion leads to ideological voting, however, is the finding that liberals compared to conservatives and moderates polarize. While moderates and conservatives post-*Casey* do not vote significantly differently from each other, the differences in predicted probabilities between liberals and conservatives as well as liberals and moderates suggest polarization among jurists under high discretion jurisprudence under undue burden. In no other instance are there significant differences when comparing predicted probabilities based on judges' ideologies. Under factual circumstances with low judicial discretion, liberals, moderates and conservatives behave in manners indistinguishable from one another. In the instance of high judicial discretion post-*Casey*, judges vote significantly differently from each other.

[Insert Figures 4A and 4B here.]

Figures 4A and 4B help further elaborate this point as well as offer support for the conceptualization of heterogeneity in the preference-behavior relationship. Figure 4A presents a comparison of the predicted probabilities for both high and low judicial discretion circumstances pre-*Casey*. The differences in predicted probabilities when deciding a case with or without a *Casey* provision are not significant. Again, comparisons based on judicial policy preferences are also not significant. This depiction reiterates the fact that strict scrutiny and the *Roe* jurisprudence significantly constrained judicial behavior; conservatives clearly voted to support abortion rights in spite of their divergent preferences.

Figure 4B, however, presents a very different perspective for cases adjudicate after *Casey*. There is clearly heterogeneity in the preference-behavior relationship. Liberals support abortion rights significantly less when there is low discretion (a *Casey* provision). Moderates do not behave differently whether they are deciding a case with one of the *Casey* provisions or not. Conservatives, actually, vote more conservatively where judicial discretion is low. This makes

intuitive sense given the fact that the Supreme Court decided that these provisions clearly do not constitute undue burdens to the right to an abortion. Decision-making under these contexts only helps to reinforce conservative policy preferences and restricting the right to an abortion. Moreover, it is clear from Figure 4B that the gulf between liberal and conservative jurists has grown where judicial discretion is high under undue burden.

The impact of panel effects is strong in the multilevel model and comports with the theoretical expectation that panel heterogeneity matters even in issue areas with entrenched views. This effect, however, is conditional on the decision-making context or legal consideration as well as the ideology of the judicial decision-maker. For all tests for differences in the effects of panel heterogeneity pre-*Casey*, there is no significant change in predicted probabilities moving from high to low panel heterogeneity. Judges vote to support the right to an abortion regardless of panel composition prior to *Casey*. This also offers strong evidence suggesting that strict scrutiny in abortion jurisprudence had marked influence on the choices judges make leaving little judicial discretion for possible compromise due to service on a collegial court.

[Insert Figures 5A and 5B here.]

Figure 5A (high discretion) and 5B (low discretion) present the comparison between liberal, conservative and moderate judges across the minimum, mean and maximum values of panel heterogeneity post-*Casey*. Moderates clearly are moved by the panel composition deciding a given case; this holds true regardless of the amount of discretion afforded under undue burden. Of course, this, too, is not a surprising finding. Rather, it makes sense that moderates more likely than liberal or conservatives to compromise or adjust decision-making based on panel composition. Conservative judges seem to be impervious to panel composition in post-*Casey* jurisprudence. Although Figure 5A suggests that conservative jurists actually get more

conservative when serving on an ideologically heterogeneous panel, the tests for differences when moving from different levels of panel heterogeneity are not significant under traditional statistical standards. The same relationship holds true for conservative judges when deciding a case concerning a *Casey* provision; under these instances, conservatives are simply going to vote to restrict the right to an abortion regardless of panel composition. As Figure 5A depicts, liberals on the other hand seem to be sensitive to panel composition much like moderates. When judicial discretion is high, liberals will support abortion rights with a 99 percent predicted probability when the panel is ideologically homogeneous. At the mean level of panel heterogeneity, the predicted probability moves in the appropriate direction (more conservative), but this is indistinguishable from instances where a liberal judge serves on a completely homogenous panel. It is only when a liberal judge serves with a panel of jurists that are ideological opposites do the predicted probabilities of voting liberal drop to about 40 percent. This is an extraordinary testament to the power of panel effects given the high salience of abortion.

According to Figure 5B (low judicial discretion), liberals and moderates both appear willing and likely to support the right to an abortion when serving on a panel with like-minded jurists. Perhaps a subversive interpretation is that liberal judges (as well as moderates) appear willing and quite likely to deviate from Supreme Court precedent when there is ideological homogeneity on the panel. This lends support for the whistle-blower type arguments presented by Cross and Tiller (1998) and discussed by Hettinger et al. (2006). The potential for deviation from Court precedent decreases with the presence of a judge that may file a dissent signaling a possible “shirking” by a panel. A judge will be more likely to file a dissent where a panel deviates from Court precedent and where that precedent is closer to the potential dissenter’s policy preferences. In order to avoid the possibility of whistle-blowing, judges should be more

likely to vote against their policy preferences when an ideologically distant jurist also serves on the same panel. Liberals present a threat of “going rogue” when deciding cases with other ideologically proximate judges, but that effect immediately disappears when serving on an ideologically homogenous panel.¹⁰

[Insert Figure 6 here.]

As one last point, I empirically verified whether *Casey* was indeed the true “cut-point” where abortion jurisprudence effectively shifted from the substance of *Roe*. In order to do such a sensitivity analyses akin to that in Richards and Kritzer (2002), I estimated the model in Equation 1, but changing the point in time at which there would be a permanent intervention. From Supreme Court jurisprudence, there are only two likely candidates—*Webster* and *Casey*. Thus, I also estimated Equation 1 substituting the Post-*Casey* dummy variable with a Post-*Webster* variable. A dummy variable was coded 1 if the case was decided after the Court’s decision in *Webster*, 0 otherwise. But, in order to rule out other possible cut-points, I also specified different permanent interventions and estimated a model to similar to Equation 1 for each year from 1978 to 2001. Figure 6 presents the chi² test statistics for each of the Wald tests from the logistic regressions. As an empirical confirmation that *Casey* is indeed the appropriate point in which the Supreme Court shifted jurisprudence, the largest test statistic is the one derived from the model in Equation 1. Specifying *Casey* as the point at which abortion jurisprudence changed at the Courts of Appeals appears to be legally *and* empirically justified.

Conclusion

This paper attempted to resolve several gaps left from previous research regarding the role of law and the choices lower court judges make. First, compliance alone is insufficient when examining whether and to what degree legal considerations (as determined by the Supreme

Court) influence judicial decision-making at the lower courts. Rather, the search for hierarchical constraint can only be achieved when judges comply with the relevant legal considerations in spite of divergent preferences. Second, there is clearly evidence here for the fact that hierarchical constraints (legal considerations) operate not only in shifting the overall judicial behavior, but it also affects the role of ideology on vote choice. There are two mechanisms through which hierarchical constraints operate when determining the final voting calculus; examinations that do not account for the interaction between legal doctrine and ideology ignore one of the mechanisms through which the Supreme Court can influence the choices judges make.

The results discussed also provide strong evidence in support of the Supreme Court being able to significantly constrain circuit court judges. Through doctrine, the justices affect the amount of discretion afforded to lower court jurists. This obviously had serious consequences for abortion jurisprudence at the U.S. Courts of Appeals. Prior to *Casey*, all judges supported abortion rights regardless of ideology; this was due to the little discretion available to judges adjudicating under strict scrutiny and the *Roe* jurisprudence. In this instance, the law represented a significant hierarchical constraint on conservative judges, where these jurists voted counter to their policy preferences. With *Casey*, the Supreme Court offered instances of both high and low discretion. In circumstances of low judicial discretion, all judges shifted and voted to suppress the right to an abortion in accordance with Court jurisprudence. This is even true of liberal judges who voted against their ideologies and evinced a good degree of hierarchical constraint. In instances of high judicial discretion, liberals and conservatives voted in accordance with their policy preferences and, as a result, polarized. Conservatives, no longer operating under strict scrutiny, became unburdened because undue burden presented a doctrine that reinforced ideology. Thus, conservatives regardless of the factual circumstances voted conservative under

the less stringent test of constitutionality of undue burden. These judges were now free to vote in accordance with their policy preferences and any deviation might be considered irrational.

Post-*Casey*, the significant impact of panel effects here runs counter to the results in the Sunstein et al. (2006) examination, which find little or no effect of panel composition in this high-salience issue. There are two possible implications for the finding that panel effects do indeed matter even when adjudicating in issue areas where views might indeed be entrenched. First, previous examinations have not controlled for the possible heterogeneity in the preference-behavior relationship. Panel heterogeneity operates not only to shift the overall outcome, but also affects the impact of policy preferences. Capturing both means of influence and dynamics are important for future examinations of panel heterogeneity on vote choice.

Furthermore, panel effects are conditional on the decision-making contexts. While the effects of panel composition are insignificant pre-*Casey*, increased judicial discretion adjudicating under the undue-burden standard also elicits the input of other members of the panel. But, this effect is also conditional on the ideology of the decision-maker. Conservatives clearly do not move regardless of the panel composition, which makes intuitive sense; the law post-*Casey* reinforces their ideology and therefore presents no benefit to deviating from voting sincerely. Moderates are also the ones most likely to work within the predicted manner of serving on a collegial court, but their ideologies predispose them to doing so. Liberals, on the other hand, still vote liberally when judicial discretion is high, but will vote counter to predictions under the attitudinal model when serving on a completely heterogeneous panel (and, most likely, only with other conservatives). Where judicial discretion is low, it appears to be the case that liberals and moderates will deviate from Supreme Court precedent when the panel is

composed of other individuals that would prefer such an outcome. The counter to this is that the simple presence of an opposing ideology will indeed prevent such an occurrence.

¹ While this method does place much discretion in identifying the relevant population of cases, the selection process proceeded quite cautiously to ensure that as many relevant cases were included. First, searches on Lexis/Nexis were completed employing three main search terms: “abortion”, “trimester” and “viability”. Searches employing major Supreme Court decisions in the area of abortion were also completed; they were *Roe* (1973) *Doe v. Bolton* (1973), *Akron* (1983), *Webster* (1989) and *Casey* (1992). Second, each case was then screened to ensure that it involved a controversy surrounding a government regulation of abortion.

² As Songer (1988) cautions, the use of Shepard’s Citations only elicits cases include full citations or case names in the opinion. Lexis/Nexis is the appropriate source for case selection. While it occasionally suffers from problems of search over-inclusion as well as under-inclusion, it does offer cases whether it is published or unpublished.

³ Cases where the controversy began with such a regulation, but the overall question answered by the court focused on standing, justiciability or jurisdiction, were also included. If one is to accept the possibility of opinions being post-hoc justifications for ideological voting, omission of such litigation and the subsequent decisions would be problematic and bias the results.

⁴ A given judge’s ideology takes on the value of the nominating president’s common space score if senatorial courtesy is inactive. If senatorial courtesy is in play, a given judge’s ideology takes on the value of the home-state senator of the president’s party; if both home-state senators share the same party affiliation as the nominating President, the judge’s ideology is measured as the average of the senators’ common space scores.

⁵ Please note that other specifications were also tested. First, the likelihood ratio test suggests that there is no significant difference between the model estimated in Equation 1 and a model also utilizing circuit court dummies. Second, a three-level model was estimated nesting judge’s

choices (level-1) within cases (level-2), which in turn was nested within circuits (level-3). The likelihood ratio test suggests that there is no significant difference between the model in Equation 1 and the three-level model; the three-level model did not yield a significant random component (intercept), suggesting that there is no significant circuit-level unobserved heterogeneity. The substantive results of the fixed effects model, the three-level model as well as basic logistic regressions with no random parameters do not change.

⁶ I also estimated a version of Equation 1 using a continuous measure of ideology, which is again based on the Giles et al. (2001) measurement strategy. Overall, the results comport with the discussion to follow regarding the role of undue burden and the choices judges make in the two different time periods. The choice to present the two-dummy variable specification versus the continuous measure is simply for presentation and ease of interpretation.

⁷ I also estimated models specifying random coefficients for *Liberal Judge* and *Conservative Judge* to control for the unobserved causal heterogeneity; the variance component never achieves statistical significance and the likelihood ratio tests suggest that there is no significant difference between the random intercept model and a model that also specifies random coefficients.

⁸ Please note that I use predicted probabilities derived from the coefficients; in order to account for the uncertainty of the estimates, the predicted probabilities are based on 10,000 iterations utilizing a “clarify” type (King, Tomz and Wittenberg 2000) procedure.

⁹ This could be due to the fact the model only controls for *Casey* provisions that are upheld. The case types in this portion of the sample (high discretion) might still concern other provisions on which the Court may have handed down decisions. The circuit courts handled cases concerning partial-birth restrictions but also monetary appropriations by the federal government or state.

Both issue areas, up until 2007 in *Gonzales v. Carhart*, had differing predicted directionalities (liberal or conservative) in outcome. In sum, there is still heterogeneity in case facts.

¹⁰ The difference in predicted probabilities between ideologically homogenous panels to the mean level of panel heterogeneity is significant, but the shift from the mean level to the maximum level for both moderates and liberals is insignificant. This lends support for the impact of panel heterogeneity to be quite quick and immediate for liberals and moderates.

References Cited

- Bartels, Brandon L. 2006. "Legal Considerations and Heterogeneity in Supreme Court Decision-Making." Paper Presented at the 2006 Annual Meeting of the Midwest Political Science Association, Chicago, IL.
- Benesh, Sara C. 2002. *The U.S. Courts of Appeals and the Law of Confessions: Perspectives on the Hierarchy of Justice*. New York: LFB Scholarly Publishing LLC.
- Benesh, Sara C., and Malia Reddick. 2002. "Overruled: An Event History Analysis of Lower Court Reaction to Supreme Court Alterations of Precedent." *Journal of Politics* 64: 534-50.
- Brent, James C. 1999. "An Agent and Two Principals: U.S. Courts of Appeals Responses to *Employment Division, Department of Human Resources v. Smith* and the Religious Freedom Restoration Act." *American Politics Quarterly* 27: 236-66.
- Brent, James. 2003. "A Principal-Agent Analysis of U.S. Courts of Appeals Responses to *Boerne*." *American Politics Research* 31:557-570.
- Canon, Bradley C., and Charles A. Johnson. 1998. *Judicial Policies: Implementation and Impact*, 2nd ed. Washington, DC: Congressional Quarterly Press.
- Carp, Robert A., and C.K. Rowland. 1983. *Policymaking and Politics in the Federal District Courts*. Knoxville: University of Tennessee Press.
- Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing before the Committee on the Judiciary of the United States Senate. 109th Cong., 2nd Sess. (2006).
- Cross, Frank B., and Emerson H. Tiller. 1998. "Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals." *Yale Law Journal* 107: 2155-76.
- Epstein, Lee, and Jack Knight. 1998. *The Choices Justices Make*. Washington, D.C.: Congressional Quarterly Press.
- Epstein, Lee, Andrew D. Martin, Jeffrey A. Segal, and Chad Westerland. 2005. "The Judicial Common Space." Paper originally presented at the annual meeting of the Law and Society Association, Las Vegas, NV.
- Giles, Micheal W., Virginia A. Hettinger, and Todd C. Peppers. 2001. "Picking Federal Judges: A Note on Policy and Partisan Selection Agendas." *Political Research Quarterly* 54: 623-641.

- Hettinger, Virginia A., Stefanie A. Lindquist, and Wendy L. Martinek. 2006. *Judging on a Collegial Court: Influence on Federal Appellate Decision-Making*. Charlottesville: Virginia University Press.
- Howard, J. Woodford, Jr. 1981. *Courts of Appeals in the Federal Judicial System*. Princeton, New Jersey: Princeton University Press.
- King, Gary, Michael Tomz, and Jason Wittenberg. 2000. "Making the Most of Statistical Analyses: Improving Interpretation and Presentation." *American Journal of Political Science* 44: 341-355.
- Klein, David E. 2002. *Making the Law in the United States Courts of Appeals*. Cambridge: Cambridge University Press.
- Poole, Keith T. 1998. "Recovering a Basic Space from a Set of Issue Scales." *American Journal of Political Science* 42: 954-993.
- Raudenbush, Stephen W. and Anthony S. Bryk. 2002. *Hierarchical Linear Models: Applications and Data Analysis Methods, 2nd ed.* Thousand Oaks, CA: Sage.
- Richards, Mark J., and Herbert M. Kritzer. 2002. "Jurisprudential Regimes in Supreme Court Decision Making." *American Political Science Review* 96: 305-20.
- Rowland, C.K., and Robert A. Carp. 1996. *Politics and Judgment in Federal District Courts*. Lawrence: University of Kansas Press.
- Segal, Jeffrey A., and Harold J. Spaeth. 1993. *The Supreme Court and the Attitudinal Model*. New York: Cambridge University Press.
- Segal, Jeffrey A., and Harold J. Spaeth. 2002. *The Supreme Court and the Attitudinal Model Revisited*. New York: Cambridge University Press.
- Skrondal, Anders, and Sophia Rabe-Hesketh. 2004. *Generalized Latent Variable Modeling: Multilevel, Longitudinal, and Structural Equation Models*. Boca Raton, FL: Chapman & Hall.
- Songer, Donald R. 1987. "The Impact of the Supreme Court on Trends in Economic Policy Making in the United States Courts of Appeals." *Journal of Politics* 49: 830-41.
- Songer, Donald R., and Susan Haire. 1992. "Integrating Alternative Approaches to the Study of Judicial Voting: Obscenity Cases in the U.S. Courts of Appeals." *American Journal of Political Science* 36: 963-82.
- Songer, Donald R., Jeffrey A. Segal, and Charles M. Cameron. 1994. "The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions." *American Journal of Political Science* 38: 673-96.

Songer, Donald R., and Reginald S. Sheehan. 1990. "Supreme Court Impact on Compliance and Outcomes: *Miranda* and *New York Times* in the United States Courts of Appeals." *Western Political Quarterly* 43: 297-319.

Stearns, Maxwell L. 1997. *Public Choice and Public Law: Readings and Commentary*. Cincinnati: Anderson Publishing Co.

Stidham, Ronald, and Robert A. Carp. 1982. "Trial Court Response to Supreme Court Policy Changes: Three Case Studies." *Law and Policy Quarterly* 4: 215-34.

Sunstein, Cass R., David Schkade, and Lisa Michelle Ellman. 2004. "Ideological Voting on the Federal Courts of Appeals: A Preliminary Investigation." *Virginia Law Review* 90: 301-54.

Sunstein, Cass R., David Schkade, Lisa M. Ellman, and Andres Sawicki. 2006. *Are Judges Political? An Empirical Analysis of the Federal Judiciary*. Washington, D.C.: Brookings Institution Press.

Cases Cited

Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983).

Casey v. Planned Parenthood of Southeastern Pennsylvania, 947 F.2d 682 (1991).

Doe v. Bolton, 410 U.S. 179 (1973).

Marks v. United States, 430 U.S. 188 (1977).

Planned Parenthood of Southeastern Pennsylvania v. Casey. 505 U.S. 833 (1992).

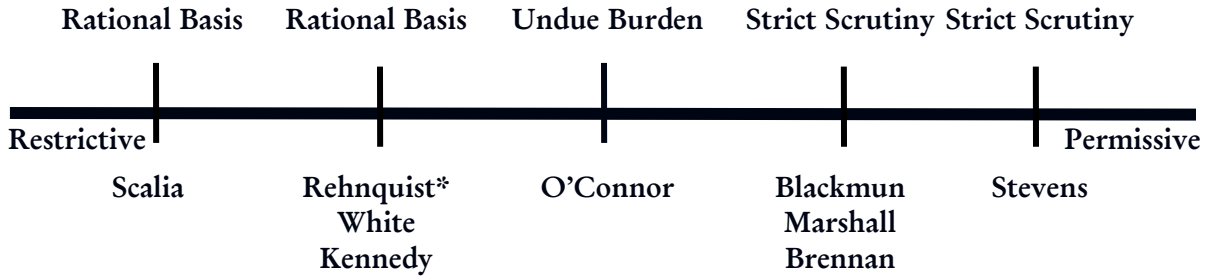
Reproductive Health Service v. Webster, 851 F.2d 1071 (1988).

Roe v. Wade, 410 U.S. 113 (1973).

Women's Health Center of West County v. Webster, 871 F.2d 1377 (1989).

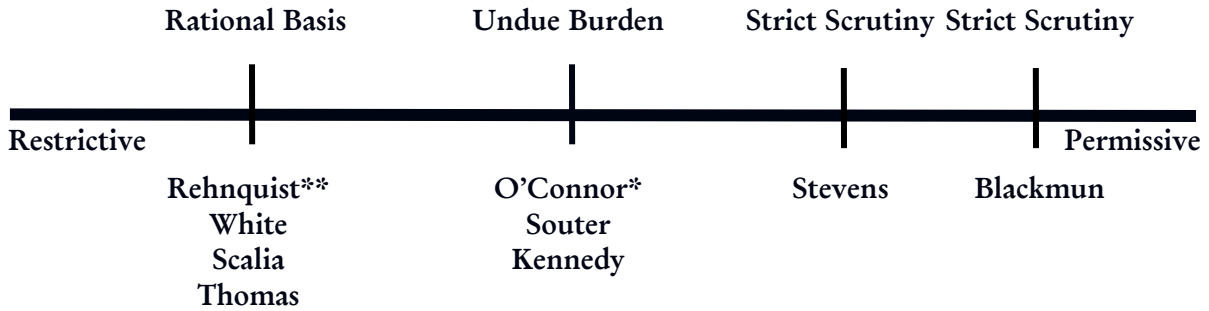
Webster v. Reproductive Health Services, 492 U.S. 490 (1989).

Figure 1A. Permissiveness of the Right to an Abortion
The Legal Rules Supported in *Webster v. Reproductive Health Services*



**Judgment of the Court*

Figure 1B. Permissiveness of the Right to an Abortion
The Legal Rules Supported By the Justices in *Planned Parenthood v. Casey*



** Judgment of the Court/Joint Opinion*

*** All justices in this opinion also joined another opinion written by Justice Scalia*

Figure 2A. Predicted Support for Abortion Rights: Low Judicial Discretion

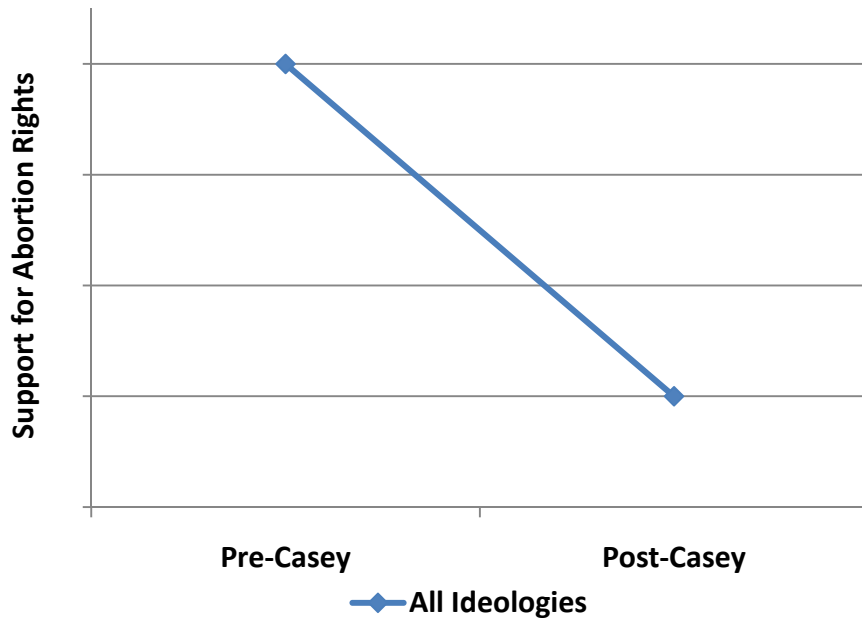


Figure 2B. Predicted Support for Abortion Rights: High Judicial Discretion

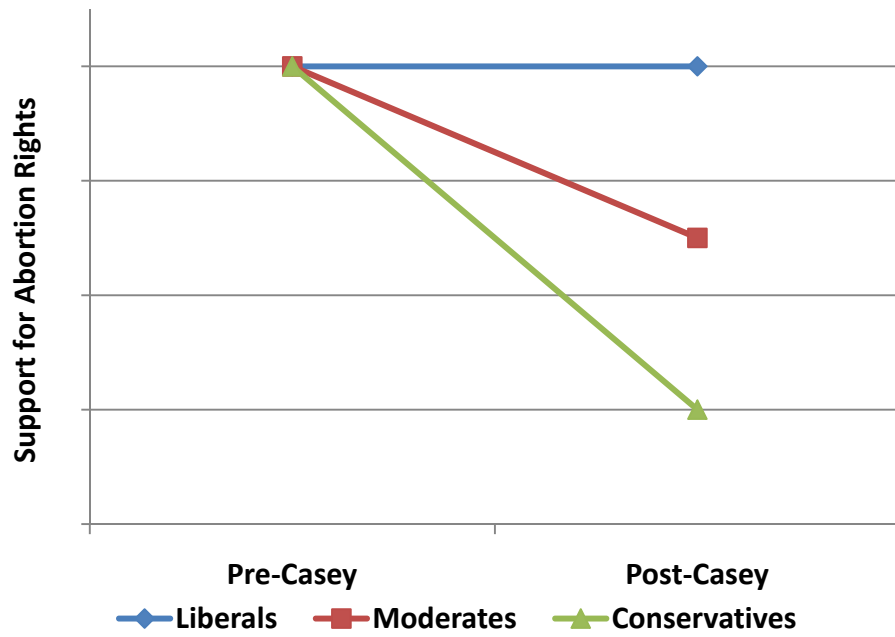
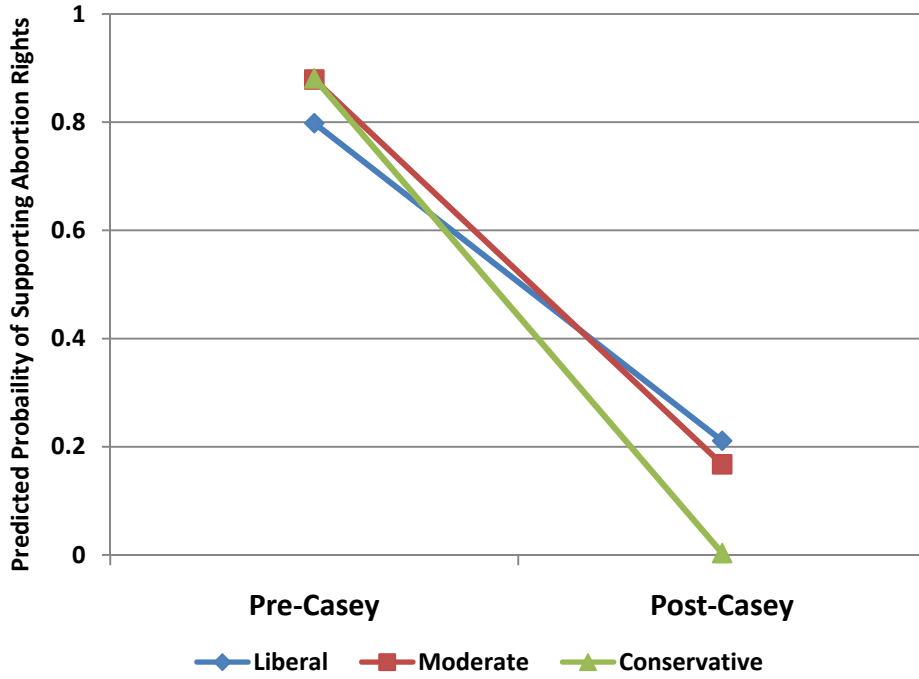


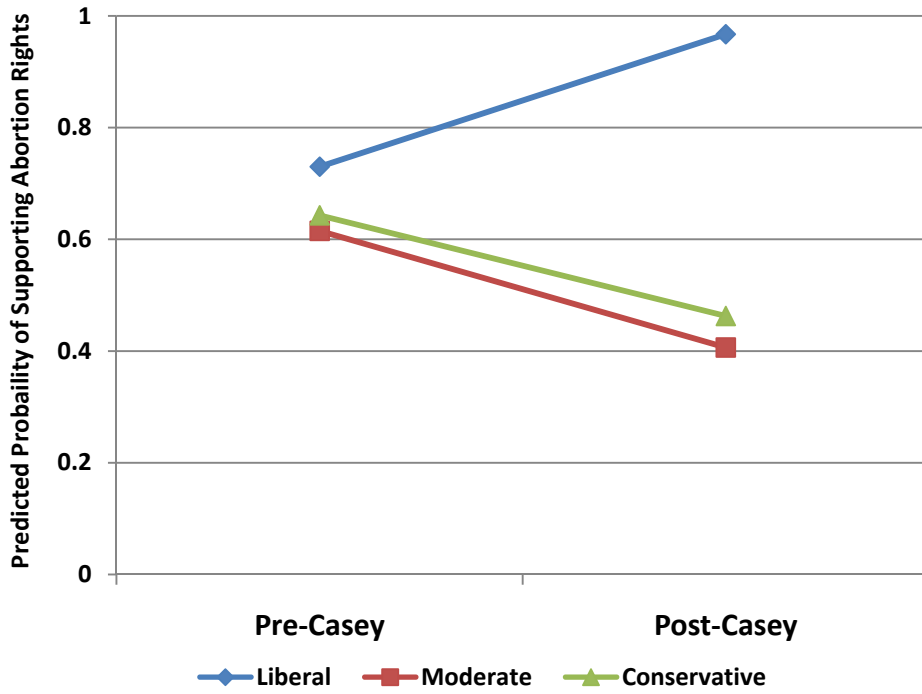
Table 1. Results from Model of the Likelihood of Supporting Abortion Rights

| | Coeff. | Std. Err. | p-value |
|--|---------|-----------|---------|
| Liberal Judge | 3.507 | 2.021 | 0.083 |
| Conservative Judge | 4.290 | 3.187 | 0.178 |
| <i>Casey</i> Provision | 1.835 | 1.558 | 0.239 |
| Liberal Judge X <i>Casey</i> Provision | -1.313 | 1.513 | 0.386 |
| Conservative Judge X <i>Casey</i> Provision | 0.059 | 2.053 | 0.977 |
| Panel Heterogeneity | 8.879 | 7.451 | 0.233 |
| Liberal Judge X Panel Heterogeneity | -11.401 | 6.991 | 0.103 |
| Conservative Judge X Panel Heterogeneity | -16.297 | 9.467 | 0.085 |
| Post- <i>Casey</i> | 8.672 | 2.231 | 0.000 |
| Liberal Judge X Post- <i>Casey</i> | 0.925 | 4.258 | 0.828 |
| Conservative Judge X Post- <i>Casey</i> | -10.763 | 3.884 | 0.006 |
| <i>Casey</i> Provision X Post- <i>Casey</i> | -3.162 | 1.851 | 0.087 |
| Liberal Judge X <i>Casey</i> Provision X Post- <i>Casey</i> | -4.336 | 2.807 | 0.122 |
| Conservative Judge X <i>Casey</i> Provision X Post- <i>Casey</i> | -4.565 | 2.728 | 0.094 |
| Panel Heterogeneity X Post- <i>Casey</i> | -39.103 | 8.237 | 0.000 |
| Liberal Judge X Panel Heterogeneity X Post- <i>Casey</i> | 16.271 | 12.298 | 0.186 |
| Conservative Judge X Panel Heterogeneity X Post- <i>Casey</i> | 43.387 | 11.542 | 0.000 |
| Constant | -1.614 | 2.044 | 0.430 |
| Variance Component (Random Intercept) | 5.541 | 0.303 | |
| Rho | 0.903 | 0.010 | |
| Cases | 669 | | |
| Judges' Votes | 210 | | |

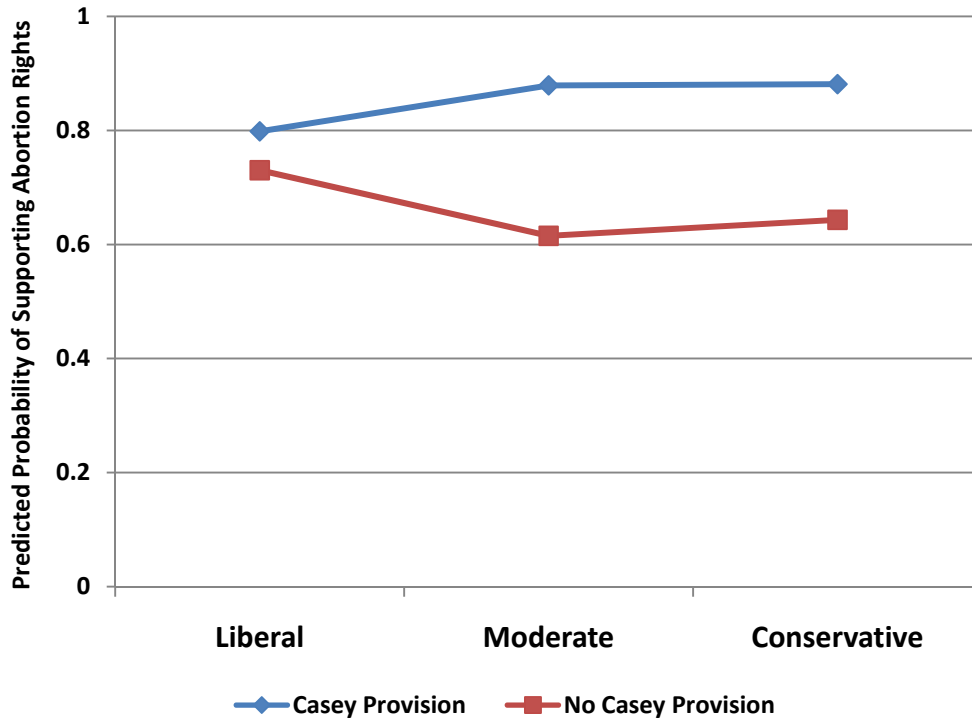
**Figure 3A. Comparing Support for Abortion Rights:
Judicial Discretion Low (*Casey* Provision)**



**Figure 3B. Comparing Support for Abortion Rights:
Judicial Discretion High (*Casey* Provision)**



**Figure 4A. Heterogeneity in Decision-Making:
Comparing High & Low Judicial Discretion (Pre-Casey)**



**Figure 4B. Heterogeneity in Decision-Making:
Comparing High & Low Judicial Discretion (Post-Casey)**

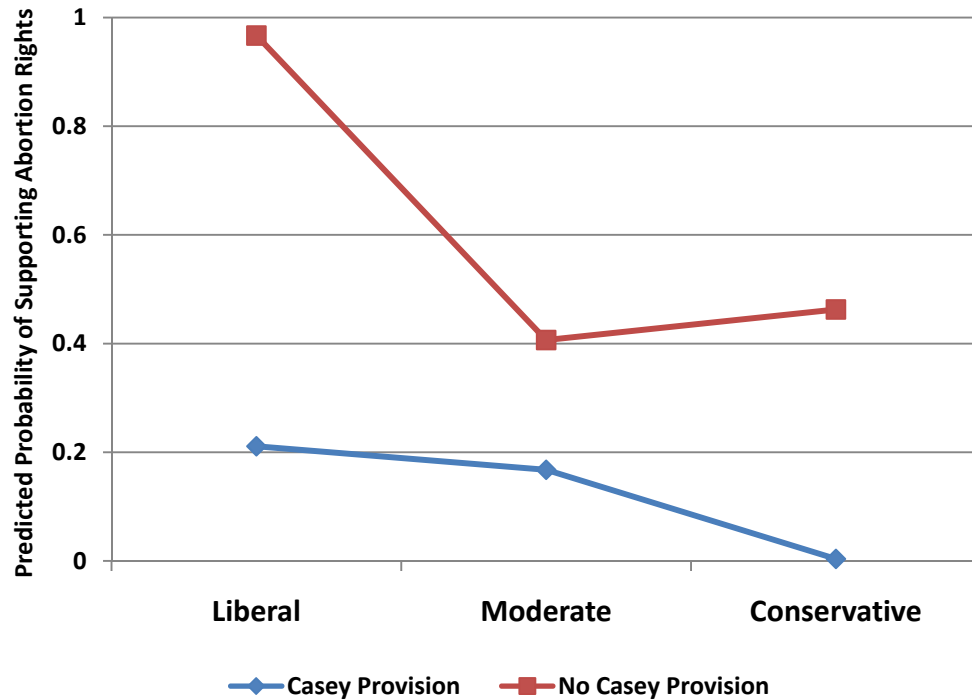
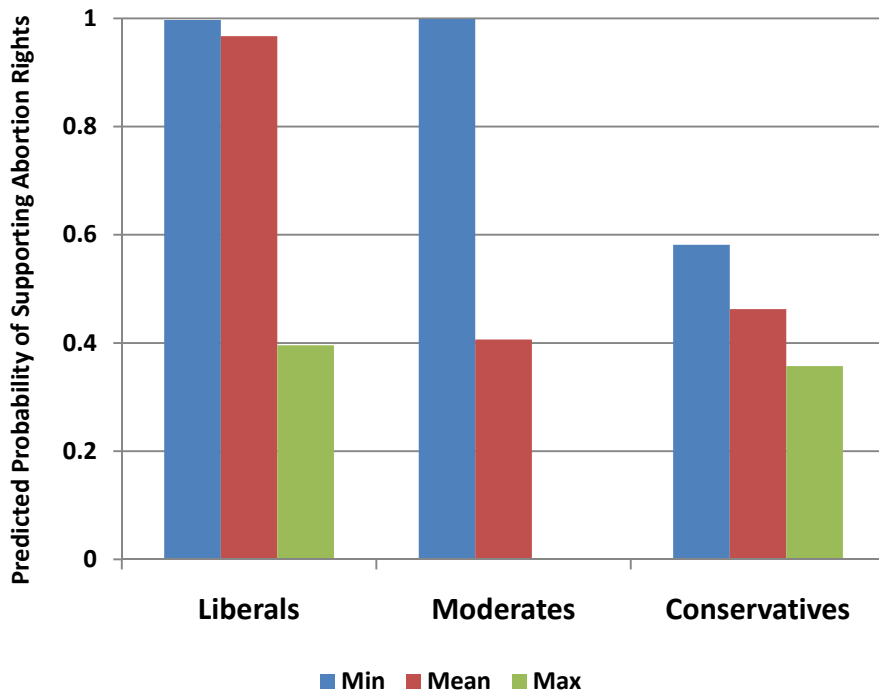
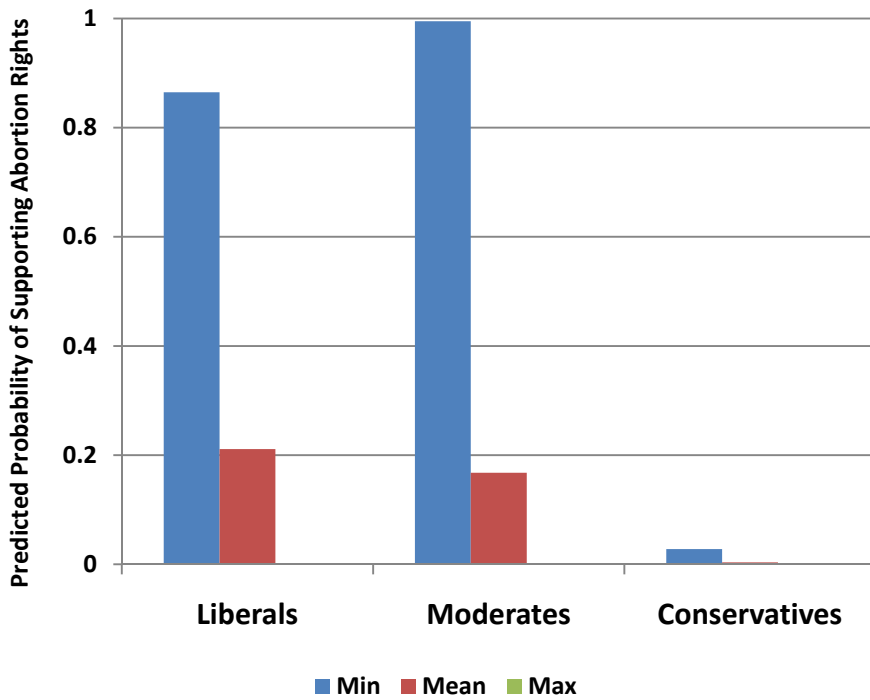


Figure 5A. Impact of Panel Heterogeneity: High Judicial Discretion (Post-Casey)



Note: Missing bars are where predicted probabilities are virtually zero.

Figure 5B. Impact of Panel Heterogeneity: Low Judicial Discretion (Post-Casey)



Note: Missing bars are where predicted probabilities are virtually zero.

Figure 6. Sensitivity Analyses: Testing for the Appropriate Shift in Abortion Jurisprudence

