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STRATEGY OF REFORM: COURTS, POLITICS, AND POLICY REFORM IN TEXAS

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Strategy of Reform: Courts, Politics, and Policy Reform in Texas

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Strategy of Reform: Courts, Politics, and Policy Reform in Texas

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When, how, and why do policy makers and reformers use courts and legal procedures to achieve their policy ends? This project explores the relationship of courts to the process of policy reform in Texas. I predict that reformers within this context utilize judicial and quasi-judicial strategies in different ways than the current literature suggests, that is that courts and legislatures are used interdependently to advance a policy goal. This line of inquiry enhances our understanding of the relationship of courts to policy reform as it contemplates reformers utilizing court based reform strategies in ways other than a court ruling in their favor and producing the desired policy end. This study also contemplates courts in the policy making arena as more than just one static institution; rather, court based strategies can and do encompass other quasi-judicial institutions available to

reformers to advance their policy objectives. Through an in-depth case study analysis of reform in the areas of the scope of practice battle between engineers and architects, transportation infrastructure funding, and voter ID, I find that reformers, constrained by the overall opportunity structures available, choose a set of strategies that utilize multiple venues in ways that strengthen each other, so that their strategies are not just alternative or sequential but interdependent.

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INTRODUCTION

Politics matters. Certainly much scholarly energy has focused on this simple statement in the field of public law since Dahl's contention in 1957 that the Supreme Court of the United States is a political institution.[1] Dahl goes on to assert:

> The fact is, then, that the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States. Consequently it would be most unrealistic to suppose that the Court would, for more than a few years at most, stand against any major alternatives sought by a lawmaking majority.[2]

This provocative hypothesis has certainly been the subject of much scholarly critique. For the purpose of this project, however, it is a point of departure. If the appointed Court conceived in the vein of the separation of powers doctrine behaves in a manner according to the lawmaking majority, then how might we expect an elected court with the same party affiliation as the lawmaking majority to behave? Moreover, if politics indeed matters to political scientists in our quest for understanding how those in power make policy decisions, does it also matter

[1] Dahl, Robert, "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker," *Journal of Public Law*, Vol. 6 (1957).
[2] Dahl, 1957.

to the reformers operating within the system attempting to undertake policy change?

Much of the public law literature to date has framed the decision of reformers to utilize a court to advance a policy goal as an "either/or" proposition, meaning a reformer will utilize *either* the court *or* the legislature as a venue of reform. Assuming reformers are rational actors, existing theories would predict reformers' decisions to be constrained by the institutional rules of the game and the venue influenced by where reformers believe they can maximize the likelihood of success. Theories diverge on how the likelihood of success is best calculated and span a structural to behavioral spectrum. However, current theories do not account for a multi-venue approach that incorporates the utilization of institutions in an interdependent manner, that is reformers' decisions to utilize the court in a way that will stimulate legislative action or the legislature in a way that will impact court proceedings and potentially court based outcomes. Rather than view the court as a standalone venue of reform to advance a policy goal, do reformers utilize judicial and quasi-judicial strategies in conjunction with and synergistic to legislative strategies? Is the business

of policy reform indeed more complex in this regard than current theories describe?

While the public law literature has traditionally viewed reform strategy with a lens that separates legislative and judicial institutions, it may be that reformers do not necessarily disentangle the two, as progress in one arena could impact progress in the other because the institutions coexist within the same overall structure. I hypothesize, therefore, that reformers utilize both legislative and judicial venues of reform in tandem to advance their specific policy goals.

This project seeks to systematically explore the relationship of courts to the process of social policy reform in the Texas. I predict that reformers within this context utilize judicial and quasi-judicial strategies in different ways than the current literature suggests, that is that courts and legislatures are used interdependently to advance a policy goal. By focusing on the external relationship of courts as institutions to other institutions in the political system, including interest groups and reformers, it is my hope that this research will provide a better understanding the relationship of courts to their larger political framework. I am hopeful that this research will contribute to scholarly debate in the

public law field and most importantly provide a deeper understanding of the role of courts in the complex and nuanced policy making process.

CHAPTER 1

THEORETICAL FRAMEWORK: MULTI-VENUE STRATEGY FOR POLICY CHANGE

When, how, and why do policy makers use courts and legal procedures to achieve their desired policy ends? Because of the reactionary nature of courts, reformers must make the first move and create an opportunity for a court to act. Thus, generally speaking, courts cannot simply insert themselves in the policy making process; courts must first have an invitation to the party before they can dance. It follows, then, that an important component to understanding the when, how and why courts are utilized in policy making is the decision first made by the reformer to seek court based policy change. The decision making process of a reformer to determine such avenues of reform i.e. when and to what extent to utilize the court system to achieve the desired policy goal is a central focus of this study. Reform, in the context of this study, refers simply to policy change; those pursuing the policy change, either to the right or to the left, are therefore labeled reformers.

I hypothesize that varying opportunity structures shape reformers decisions about when, how, and why to

utilize a court as a means to shape/make social policy. Additionally, I hypothesize that reformers in the field utilize institutions as a means to advance their policy goals as part of an overall strategy to accomplish an objective, rather than as an ends that will deliver a specific outcome. Should this hypothesis bear fruit, our understanding of the relationship of courts to policy reform will be enhanced as it contemplates reformers utilizing court based reform strategies in ways other than a court ruling in their favor and producing the desired policy end. These questions also contemplate courts in the policy making arena as more than just one static institution; rather, court based strategies can and do encompass other quasi-judicial institutions available to reformers to advance their policy objectives.

Multi-Venue Reform and Interdependent Strategies

Building from Roch and Howard's[3] assertion that the lines between an elected court and legislature are blurred because of their interconnectivity to the election process, I argue that reformers do not distinguish between court

[3] Roch, Christine and Robert Howard, "State Policy Innovation in Perspective: Courts, Legislatures, and Education Finance Reform," *Political Research Quarterly*, Vol. 61 (2008) p. 342.

based reform strategy and legislative reform strategy as separate and distinct avenues of reform. Rather, reformers formulate strategies that incorporate both venues of reform to advance policy agendas. By utilizing a synergistic approach between legislative and judicial avenues rather than a uni-dimensional approach, reformers are more likely to be successful in securing their preferred policy outcome. Constrained by the overall opportunity structures available, reformers choose a set of strategies that utilize available venues in ways that strengthen each other, so that the strategies are not just alternative or sequential but interdependent.

Opportunity Structures – What Venues are Available as Potential Avenues of Reform?

The concept of "opportunity structures" influencing the strategy crafted by reformers to advance a policy goal is not new. Literature related to broad based social movements utilizes this concept to identify favorable conditions for the birth of a social movement, likelihood of movement success, etc. Gloppen defines an opportunity structure as:

> …the set of possible avenues for remedying the problem… political mobilization; media pressure; Ombuds offices — and the courts. Choice of strategy depends on their relative availability, accessibility, cost, perceived effectiveness, and normative acceptability. People and organizations are assumed to pursue litigation when doing so is seen as the most promising route, given their available resources and the barriers that they face.[4]

According to Wilson and Cordero[5], the notion of political opportunity structures is used to explain why social movements embrace particular strategies and that specific factors outline the universe of possibilities that interest groups can exploit when pursuing their goals. Tarrow's dynamic conception of opportunity structures provides for actors themselves creating and manipulating opportunities through creating networks, coalitions, and incentives for decision makers to act.[6]

Building upon this literature, I contend that opportunity structures as applied to reform strategy are both intuitionally and politically defined. Institutional constraints with regard to opportunities to engage in a

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[4] Gloppen, Siri, "Litigation as a Strategy to Hold Governments Accountable for Implementing the Right to Health," *Health and Human Rights*, Vol. 10, No. 2 (2008), p. 23.

[5] Wilson, Bruce and Juan Carlos Rodriguez Cordero, "Legal Opportunity Structures and Social Movements: The Effects of Institutional Change on Costa Rican Politics," *Comparative Political Studies,* April 2006, p. 326.

[6] Tarrow, Sidney, *Power in Movement: Social Movements and Contentious Politics*, 2nd ed. (Cambridge, New York and Melbourne: Cambridge University Press, 1998).

particular venue vary; for example, rules associated with approaching the legislature to address a particular policy may differ from rules associated with engaging judicial or quasi-judicial institutions. Professionalized reformers are aware of the rules associated with barriers to entry for the menu of potential venues that the underlying separation of powers structure dictates.

Opportunity structures, in the US case, are also influenced by federalism. Therefore, some traditional areas of state policy reform may be framed in ways that open additional opportunities in the federal system should reformers assess such a maneuver to be advantageous. The issue of voter ID which I examine in detail is a good example of such an issue as the policy change is initiated in the state lawmaking arena but ultimately transcends that arena and enters the federal court system.

Finally, opportunity structures are also politically defined. Because of the specific institutional design, one would predict that a legislature and an elected court that are dominated by the same political party would be inclined to advance policy, to the extent that it advanced the party platform, in a similar manner. For reformers in a partisan minority, opportunity structures may hinge upon the partisan makeup of available venues and the extent to which

one venue is more aligned than another. However, not all issues that reformers seek to influence fit nicely within a partisan construct; consequently the extent to which reformers calculate the presence of political parties within certain venues into their strategy of reform may vary according to issue type.

Therefore, the strategy of reform is influenced by the opportunity structure with regard to the population of venues available to the reformer. In summary, I argue that the choice of venue selection is a factor of 1) institutional constraints related to barriers to entry among legislative, judicial and quasi-judicial venues 2) jurisdictional factors within the US federal system, and 3) the extent to which the desired policy outcome is connected to the partisan makeup of a venue.

Multi-Venue Reform Strategy – Engaging Venues in Reform

Traditional American public law literature has framed the decision of reformers to utilize a court to advance a policy goal as an "either/or" proposition, meaning a reformer will utilize *either* the court *or* the legislature as a venue of reform. I contend, however, that reformers utilize strategies that engage multiple venues rather than

a single strategy based on the possibilities and limitations that are inherent in each venue.

While the American public law literature has focused on courts as a standalone strategy of reform, the concept that courts can be utilized by activists as part of a multi-venue reform strategy is not entirely novel. In their edited volume, *Courting Social Justice: Judicial Enforcement if Social and Economic Rights in the Developing World,* Gauri and Brinks examine how reformers engage in the policy legalization of social and economic rights across developing countries. They describe their findings:

> What we see and what we have described as legalization is not so much the courts closing off debate in more representative venues as it is adding another venue for debate. What we observe is not the courts substituting their own judgment for a legislative one, but rather injecting new concerns into a debate or perhaps foregrounding goals derived from constitutional or legislative concerns. [7]

According to Gauri and Brinks, "This account of legalization weakens the popular dichotomy between judicial and legislative action."[8]

If the dichotomy between legislative and judicial action is indeed weakened as evidenced by the empirical research in Gauri and Brinks' account, what explains why

[7] Gauri, Varun and Daniel M. Brinks Eds., *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World,* (New York: Cambridge University Press) 2008, p. 343.
[8] Ibid, p. 5.

reformers might utilize a multi-venue approach rather than a standalone judicial or quasi-judicial strategy? Volumes of public law literature abound on the impact, or possibly lack thereof, of judicial decisions in public policy reform. Levine and Becker[9] suggest that the United States Supreme Court has a limited effect on policy impact in American society. They argue three reasons for Supreme Court inefficiency: lower court autonomy, elite unresponsiveness, and public unawareness. More specifically, lower courts often apply standards in variation with those articulated by the Supreme Court, because findings of fact provide flexibility, high court language is often easily manipulated and state courts can often insulate themselves by grounding their decisions in state law. Elites often do not voluntarily comply with court proclamations, because of bureaucratic inertia or even simple ignorance of the changes called for by judicial decisions, and the judiciary generally lacks the ability to sanction elites in order to coerce compliance. Furthermore, according to Levine and Becker, the public tends not to realize what is going on with the Court.

[9] Levine, James and Theodore Becker, "Toward and Beyond a Theory of Supreme Court Impact," in Becker, Theodore Lewis and Malcom Feeley eds. *The Impact of Supreme Court Decisions; Empirical Studies*, (New York: Oxford University Press) 1973.

Levine and Becker also note that empirical evidence of symbolic effects of decisions is fairly meager, a concern shared by Wasby as well in his work, *The Impact of the United State Supreme Court.*[10] Johnson and Canon[11] inventory theories put forth put to explain and examine judicial impact which include psychological theories, such as legitimacy theory, which implies the more legitimate the Court and its decisions are seen to be the greater the impact, utility theory, essentially cost-benefit analysis guiding responsiveness to judicial decisions, communications theory, where proper context and packaging of decisions can increase impact, and organizational theories, which discuss how decisions are often implemented by agencies whose organizational policies and procedures may in turn effect policy implementation.

Additionally, Rosenberg's empirical analysis in *The Hollow Hope* provides a compelling argument that the courts, and in particular the Supreme Court, in fact have little effect on social policy. Specifically concerning *Brown v Board of Education*, Rosenberg provides a detailed analysis of Court action in the context of legislative and executive

[10] Wasby, Stephen, *The Impact of the United States Supreme Court The Impact of the United States Supreme Court: Some Perspectives* (Dorsey, 1970).
[11] Johnson, Charles and Bradley Canon, *Judicial Policies: Implementation and Impact.* (Washington DC: Congressional Quarterly Press) 1984.

action and policy implementation. The evidence surrounding the implementation of desegregation practices supports the Constrained Court view that the Court is unable to exhibit any real policy influence because of three separate constraints built into the structure of the judicial system: the limited nature of constitutional rights, the lack of judicial independence, and the courts' lack of implementation powers.

Rosenberg's examination of the United States Supreme Court with regard to impact on social policy reform portrays courts as a rather ineffective mechanism for change largely due to formal institutional constraints. Furthermore, Gauri and Brinks engage in impact based arguments that tackle questions regarding when courts are able to advance social and economic rights in a comparative context. For Gauri and Brinks, "Courts have their greatest impact when policy seems unresponsive to popular demands."[12] Thus, my contention that reformers utilize strategies that engage multiple venues is informed by the public law literature that argues that the courts do not produce great results when utilized as a standalone strategy. It follows, then, that reformers seeking a desired policy change would adopt strategies that maximize the likelihood

[12] Ibid, p. 6.

of a successful policy implementation. As political scientists, we should expect reformers to be able to assess the benefits and limitations of individual venues and craft strategy accordingly.

Interdependent Strategy

Finally, I contend that reformers utilize a multi-venue approach in an interdependent manner, that is incremental movement in one venue is purposefully meant to create action in another venue. What might this type of reform strategy look like? If a reform strategy does entail a multi-venue approach, then we must re-examine how we define the goals and objectives of the utilization of each venue. Rather than choose a venue of reform based on perceived maximization of the likelihood of success as a pure rational choice framework would predict, or as a last resort strategy as literature related to litigation strategy would predict, venues may be utilized to achieve smaller objectives on the path to the desired end. To restate, a multi-venue approach logically entails various desired outcomes other than simply achieving the end policy objective. Reformers may utilize judicial and quasi-judicial approaches not because they think the issue

ultimately will be resolved in that particular venue but perhaps to stimulate legislative action that will ultimately move the reform to its desired end. Or they may adapt their strategies as the progress back and forth between venues – a small victory or even defeat in one venue can be utilized to progress in another. In this sense, a multi-venue approach to policy reform would view legislative and quasi-judicial or judicial activity as interdependent, meaning that the processes and outcomes of one venue can be utilized in another. The following classifications are offered to summarize potential feedback effects of such a strategy.

Potential Interdependent Strategies:

There are four main feedback strategies that reformers might employ when utilizing legislative and judicial or quasi-judicial strategies interdependently, but these strategies must first be oriented within the reform context. Predominant arguments within the interest mobilization literature as well as initial research suggest that reformers perceive that a legislative strategy provides the reformer with more control over the policy outcome versus a court based strategy in which a judge

provides a decision or ruling dictating a particular outcome. Thus, legislative based reform is perceived to be the preferred method of obtaining policy change by reformers. Additionally, the barriers to entry for a legislative strategy are perceived to be quite low while the barriers to entry for a court based strategy are perceived to be higher. Institutional constraints would therefore suggest that reformers utilize courts or quasi-judicial venues as last resort strategies. But, my contention is that reformers actually utilize a multi-venue approach which would suggest that while last resort strategies may in fact take place, additional motivations also exist for engaging the court system in policy reform. Reformers will also utilize the court and quasi-judicial venues in conjunction with a legislative strategy to create a legislative environment that maximizes their likelihood of success. The four classifications of these feedback strategies that I have identified are agenda setting, reframing, venue of last resort, and abstaining.

Agenda Setting

In a multi-venue approach, reformers may utilize court and quasi-judicial strategies to engage in legislative agenda setting through court action/inaction. For example, the

issuance of an AG opinion might be utilized by reformers to stimulate legislative interest in a particular policy area. Additionally, while the policy issue is moving through the court system, reformers may generate legislative interest in providing clarifying legislation that would affect the outcome of a court ruling. In this strategy, reformers do not pursue court and quasi-judicial venues to achieve their desired outcome, rather, to move forward in achieving their desired legislative outcome. Peters describes how agenda setting previously has been characterized in political science literature:

> Many who have studied the agenda-setting process of the legislative and executive branches have focused on the role of attentive interest groups or other kinds of policy activists in mobilizing to attract government's attention (see, e.g., Baumgartner and Jones 1993; Cobb and Elder 1983; Cobb, Ross, and Ross 1976; Kingdon 1984; Light 1982; Walker 1977). The question, then, is how issue communities participate and how important their participation is. Does the Court, through its decisions, "focus the attention of litigants on particular policy areas, thereby increasing its ability to make comprehensive policy in those areas in the future" (Baird 2004, 769)? Or is the process more akin to one described by public policy scholars where, as Epp (1998, 1999) envisioned, members of issue communities are necessary players without whom the Court cannot determine the importance of issues?[13]

[13] Peters, C. Scott, "Getting Attention: The Effect of Legal Mobilization on the U.S. Supreme Court's Attention to Issues," *Political Research Quarterly*, Vol. 60, No. 3 (Sep., 2007), pp. 561-572.

For the purposes of this project, agenda setting from the reformer's point of view is more concerned with reform strategy rather than court behavior. However, Peters does not contemplate the extent to which reform strategy can utilize activity in one branch to influence the agenda of another as does the multi-venue approach presented here.

Reframe Issue

Reformers may engage in a reframing strategy when they utilize the courts and quasi-judicial institutions and legislature in an interdependent manner in their efforts to change policy. Court and/or quasi-judicial involvement interjected into the issue can be used to isolate or highlight a particular part of an issue or simply to bolster the argument that the statute is not clear and requires legislative attention. As in agenda setting, reformers may not be pursuing court based strategies as their end game but in an effort to stimulate legislative action. Additionally, adaptive reformers may utilize particular negative outcomes of a court based strategy to reframe their issue in a different venue. For example, if the utilization of a venue such as an administrative court did not produce a desired result, that negative outcome could be used to argue for legislative action.

Furthermore, the interdependent nature of multi-venue reform is not one directional in that court based strategies are utilized to effect legislative outcomes. Rather, legislative process and procedures can also be used by reformers to reframe an issue in the judicial arena. For example, witness testimony and bill analyses can be strategically crafted to influence future judicial activity on the issue.

Venue of Last Resort

A multi-venue approach does not preclude the possibility of reformers using a court or quasi-judicial venue as a last resort strategy in the manner in which litigant strategy literature suggests. In a last resort strategy, attempts of reform have failed in the legislative arena. In this scenario, reformers are seeking policy reform/resolution of the issue through court action. I am therefore in agreement that reformers can and do utilize the court in ways that the current litigant strategy suggests, but that it is actually one of several strategies nestled into a multi-venue reform context.

Abstaining

Conversely, reformers may choose not to engage in a court based strategy. In addition to refraining from court action out of fear of a negative outcome, reformers may also decide not to pursue court action when the negative political costs of a positive ruling outweigh the positive effects of the ruling itself. In this scenario, a court based venue may be available and the perception of success in that arena may be high, but because reformers operate in a political context rather than a vacuum, reformers may decide that the political costs of success in that arena are too high. In addition, reformers may choose not to engage in a court strategy because of the perceived loss of control over the policy outcome. If the desired policy outcome is complex rather than a simple "yes" or "no," reformers may shy away from a court based outcome even if they evaluate the overall environment to be favorable. The overall point is to recognize that the decision not to utilize a particular venue may be just as strategic as the decision to utilize that venue. We cannot assume that the absence of action means that the activity was not considered by reformers.

This theoretical framework of multi-venue reform is meant to enhance the understanding of the strategic

interdependence of venues that reformers utilize when engaging in policy reform. Should the examination of a multi-venue approach to policy reform bear fruit, then our understanding of the relationship between court action and policy making becomes more complex. The utilization of courts by reformers may be at times less about a particular court decision meant to "decide" an issue and more about the interaction and interdependence of legislative and judicial bodies in the policy making arena.

CHAPTER 2

INTEREST MOBILIZATION AND LITIGAION STRATEGY

If we are to examine the decisions of reformers as a unit of analysis, we must first delve into literature related to reformers themselves. Because reformers have more than one option (the courts) at their disposal for achieving a desired policy outcome, it is necessary to broaden our discussion of literature to include both interest mobilization and litigation strategy. Scholarship related to interest mobilization and litigation strategy will thus be our starting point.

Legislative Strategy – The Conventional Paradigm

Conventional wisdom suggests that interest mobilization in the United States is most often associated with the legislative branch of government. One need not go beyond the curriculum in most high school government classes or the dictionary's definition of lobbying to find this emphasis: "to conduct activities aimed at influencing public officials and especially members of a legislative

body on legislation."[14] Much scholarly research has been done in the legislative lobbying arena as to how and when reformers attempt to influence policy decisions within the legislative process. While a detailed history of this body of political science literature is beyond the scope of this project, it is important to note that the primary focus has been on the legislature as a standalone entity. David Lowery succinctly summarizes the nature and critiques of this research:

> Choices about what issues to lobby and what tactics to employ, as well as the likelihood of their success, depend on institutions that allow or impede access, the public opinion context in which debates take place, and which other organized interests are also lobbying the issue. Again, this may seem very obvious. But such attention to context was, in fact, quite uncommon until recently. As Baumgartner and Leech noted from their survey of articles in the *American Political Science Review*, "the modal type of interest group study in the premier journal of political science over the postwar period is a cross-sectional comparison of a few groups working on a single issue at one point in time. Such a research approach seems a perfect strategy for producing unexplained variation between studies. It is a recipe," they further note, "for the creation of a contradictory and noncumulative literature."[15] In other words, the research designs of many studies of the politics of interest

[14] Merriam-Webster.com, accessed 10/2/2012.

[15] Frank R. Baumgartner and Beth L. Leech, "Interest Niches and Policy Bandwagons: Patterns of Interest Group Involvement in National Politics," *Journal of Politics* 63 (2001): 1191–1213 as quoted in Lowery, David. "Why Do Organized Interests Lobby? A Multi-Goal, Multi-Context Theory of Lobbying," *Polity*, Vol. 39, No. 1 (Jan., 2007), pp. 29-54.

> representation essentially defined away many critical elements of context.[16]

While Lowery as well as Baumgartner and Leach identify the importance of context to the understanding of interest mobilization in the legislative arena, neither contemplates the importance of context as it relates to potential judicial alternatives for reformers. Lowery goes on to state:

> …institutions matter. Perhaps most importantly, the venue in which lobbying takes place matters a great deal, as illustrated by the tremendous success of the religious right in the United States in lobbying via electoral campaigns, but its relative failure to turn that success into legislation. In the former venue, the drag of the general unpopularity of the policy agenda of the religious right could be avoided by targeting selective Congressional campaigns, but not so in legislatures.[17]

Interestingly, in his contention that institutions matter, Lowery acknowledges the potential relationship between the electoral process and the legislature as separate but interconnected venues of influence for reformers seeking policy reform.

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[16] Lowery, David "Why Do Organized Interests Lobby? A Multi-Goal, Multi-Context Theory of Lobbying," *Polity*, Vol. 39, No. 1 (Jan., 2007), pp. 29-54.

[17] Lowery, 2007.

I acknowledge that a vast and detailed literature on the practice and process of lobbying is indeed well known within the discipline, but what seems to be notably absent is the inclusion of courts. In addition to contributing to public law discourse, this project seeks to add to scholarly discussion on lobbying by including potential judicial and quasi-judicial avenues of reform that are available as potential influencers of policy outcomes.

Litigation Strategy – When to Go to Court versus the Legislature

Literature related to litigation strategy is often a point of departure for scholars interested in when, how, and why reformers utilize courts. Scholars such as Jacobi describe potential explanations in economic terms, "…is that the extent to which economic agencies can turn to the courts for solutions, when legislative solutions are not forthcoming, will be conditional on wealth, since litigation is costly."[18] The law and economics literature as described by Farhang further develops this line of inquiry

[18] Jacobi, Tonja, "The Role of Politics and Economics in Explaining Variation in Litigation Rates in the U.S. States," *The Journal of Legal Studies*, Vol. 38, No. 1 (January 2009), pp. 205-233.

through the model of rational litigant behavior which contemplates that a plaintiff will proceed with litigation when the expected monetary benefits of winning at trial outweigh the probability and cost of losing at trial.[19] While this body of literature adds to our understanding of motivating factors for litigants, it does not provide for judicial outcomes other than the desired determinative outcome. The utilization of judicial venues in policy reform is perhaps more broadly conceived by reformers.

Other more institutionalist based literature suggests that the configuration of institutions and resulting opportunity structures influence litigant strategy. Hanssen examines the institutional element of judicial selection as it relates to litigant strategy and finds that that appointed state court systems experience higher litigation rates consistent with his hypothesis that the "independence" achieved through the appointment process has a net positive effect on decision uncertainty.[20] Alter and Vargas argue that litigation is generally a last choice strategy because courts (appointed) are generally a less

[19] Farhang, Sean,"Public Regulation and Private Lawsuits in the American Separation of Powers System," *American Journal of Political Science*, Vol. 52, No. 4 (Oct., 2008), pp. 821-839.

[20] Hanssen, F. Andrew, "The Effect of Judicial Institutions on Uncertainty and the Rate of Litigation: The Election Versus Appointment of State Judges," *The Journal of Legal Studies,* Vol. 28 (January 1999) p. 205.

predictable venue and better at removing objectionable legislation rather than creating favorable policy.[21] According to Cross, Andrew Whitford's study on environmental litigation shows "how an interest group can form a stable coalition and use the courts at a time when the other branches of government are unsympathetic to that group's objectives,"[22] also insinuating the court is the option of "last-resort" for reformers. Songer, Cameron, and Segal empirically verify that litigants behave in a rational manner,[23] so the emphasis on predictability could indeed be a significant factor on litigant strategy; yet the factors that the litigant considers when evaluating potential actions regarding legislative *versus* judicial avenues of reform under an elected judicial system remains largely unexamined.

Other arguments regarding the utilization of courts by reformers in social policy making include Rosenberg (1991) who argues that courts will be successful in this endeavor only if his constraints are overcome and conditions met. His largely institutional analysis does not take into

[21] Alter, Karen and Jeannette Vargas, "Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy," *Comparative Political Studies,* Vol 33, Number 4 (2000) p. 472.
[22] Cross, Frank, "Business and Judicial Politics," *Business and Politics*: Vol.5 (2003), p. 4.
[23] Songer, Donald, Charles Cameron, and Jeffrey Segal, "An Empirical Test of the Rational-Actor Theory of Litigation," *Journal of Politics*, Vol 57 (1995).

account the intricacies of elected judges which this study incorporates or the extent that changes in party politics may affect reformers' decisions to take their battles to court. Epp (1998) argues that courts succeed in this regard only when there is a "support structure" for legal mobilization consisting of organizations dedicated to establishing rights, committed and able lawyers, and sources of financing.[24] However, like Rosenberg, Epp is focused on the impact of court decisions rather than on reformers' decisions to utilize courts to advance social policy reform. With regard to litigation strategy, Blom et al. (1995) argue that the more narrow the interest group's constituency, the more likely a group will turn to a court;[25] this may be evident in the federal context, however in the state context (Texas), not only do well-known broad based coalitions such as education groups utilize the court to advance policy change, but narrow constituencies also frequently utilize legislative-based reform strategies. Giles and Lancaster (1989) argue that democratic political contexts contribute to the use of courts, but do not

[24] Epp, Charles R. *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*. (Chicago: University of Chicago Press) 1998.
[25] Blom, J. Fitzpatrick, B. Gregory, J., Knegt, R., and O'Hare, U. (1995). *The Utilization of Sex Equality Litigation Procedures in the Member States of The European Community, A Comparative Study.* As characterized by Alter and Vargas (2000).

discuss variation in court usage within an "established" democratic context.[26]

Meyer and Boutcher attempt to answer their research question: "Given the difficulties of winning broad social change in the courts, why do activists continue to pursue litigation oriented strategies?" Their study examines social movements in the United States context in light of *Brown v Board of Education*.[27] They argue:

> Persistence in the face of an unfavorable environment is a function of ideological enticements, organizational interests, specialized expertise, and policy threats. First, activists are lured to the courts by what Stuart Scheingold called the "myth of rights." More than three decades ago, Scheingold warned that this myth, and the concomitant faith that the legal system, if properly challenged, could promote sweeping social change, was misdirecting activist attentions. Still, the popular understanding of Brown sustains activist faith in the same way that stories of lottery winners lead others to buy lottery tickets next time: you have to play to win.[28]

For Meyer and Boutcher, the post-*Brown* context is one in which activists' idealism about the legal systems ability to create sweeping social change influences the decision to litigate. They go on to include necessity for organizational survival (i.e. interest or activist group)

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[26] Giles, Michael W. and Thomas D. Lancaster. "Political Transition, Social Development, and Legal Mobilization in Spain," *American Political Science Review.* 1989 83 (3): 817-833.

[27] Meyer, David S and Steven A. Boutcher, "Signals and Spillover: Brown V. Board of Education and Other Social Movements,"*Perspectives on Politics* , Vol. 5, No. 1 (Mar., 2007), pp. 81-93.

[28] Meyer and Boutcher, 2007.

as well as the skill sets of those employed by interest groups as influencers of litigation strategy. They argue:

> Continued litigation fills a distinct organizational niche within a social movement, and makes use of well-established organizational expertise; even in the absence of social change, it is an organizational survival strategy.[29]

Thus, for Meyer and Boutcher, the desire for self-preservation among the professional activists involved in reform movements influences the decision to litigate on behalf of a larger group.

Similar to this study, Meyer and Boucher are interested in why reformers utilize courts in social policy reform. As mentioned above, they offer several factors that they argue influence reformers decisions to litigate, but their factors (the rights myth, self-preservation, etc.) are primarily focused on the attitudes of the reformer as an individual rather than the strategy a reformer uses to accomplish an objective. While it is possible a reformer may view the court system as a defender of rights and therefore a sexy venue to fight on behalf of a particular interest, this conception of reformers does not shed light on their strategic decision making or the processes utilized to ultimately accomplish an objective. In fact, Scheingold's lottery parallel as described by

[29] Meyer and Boutcher, 2007.

Meyer and Boutcher implies the absence of such strategic behavior.

It is clear from our survey that much scholarship has been produced in the areas of interest mobilization and litigant strategy, but the central questions of this study, where these bodies of literature intersect, have not been fully addressed. The strategic behavior of reformers in utilizing legislative versus judicial venues, utilizing venues in tandem, and utilizing judicial venues other than just courts to achieve policy reform remains largely unexplored.

CHAPTER 3

INSTITUTIONAL DESIGN AND POLITICAL CONTEXT OF COURTS

The primary objective of this study is to examine when, how, and why reformers utilize judicial institutions when engaging in policy reform. To restate, I argue that reformers do not distinguish between court based reform strategy and legislative reform strategy as separate and distinct avenues of reform. Rather, reformers formulate strategies that incorporate both venues of reform to advance policy agendas. By utilizing a synergistic approach between legislative and judicial avenues rather than a uni-dimensional approach, reformers are more likely to be successful in securing their preferred policy outcome. Constrained by the overall opportunity structures available, reformers choose a set of strategies that utilize available venues in ways that strengthen each other, so that the strategies are not just alternative or sequential but interdependent.

With regard to opportunity structures, I contend that institutional and political constraints influence how reformers assess venues of reform. A brief discussion of the literature related to institutional design and

political context and their effects on courts is therefore helpful in informing our discussion.

Institutional Design – US State Courts

As previously mentioned, over the last fifty years the American public law literature has been generally concerned with the federal court system. However, this project seeks to explore the above stated research questions within the context of the state of Texas. How does existing literature inform our discussion?

There has been a recent emergence of scholarship focusing on state judiciaries and state institutional configurations. Levinson noted the importance of this line of inquiry in his recent book:

> One might easily explain this disregard of state constitutions is state governments dealt with mere trivialities of no interest to ordinary people…Daniel Rodriguez has noted that the basic range of policies and policy choices made by state and local officials dwarf – indeed always have dwarfed national political activity…There can be no doubt that many issues of great public importance are decided – or, not adequately confronted – within the states.[30]

With regard to policy change, I suspect if one were to total the combined introduced legislation across state

[30] Levinson, Sanford, *Framed: America's 51 Constitutions and the Crisis of Governance*, Oxford University Press (2012), p. 29.

legislatures in a given legislative cycle along with state court activity, the sheer volume of attempted policy change would be enormous, as would the number of reformers participating in a policy change strategy. Certainly the state context is a rich laboratory for scholars interested in this type of behavior.

Nonetheless, theoretical formulation and inquiry related to the strategy of policy reform in the state context has been largely overlooked. Because our federal system provides for robust state policy making across a wide variety of issue types as Levinson suggests, examining reform strategy in the state context is likely fruitful ground for our study. The Texas case has been selected to explore the research questions in this project because of the unique access to data in this context.

Because of the primary focus on the federal court system in the public law literature, much theoretical formulation has developed around the particulars of that institutional configuration with regard to judicial selection. Judicial independence, the idea that appointed judges act independently, or at least are able to act independently from their political context to some extent, because they are appointed as opposed to elected, has been a central theme in the literature. Because this project

focuses on courts and policy reform in the Texas case, and Texas judges are elected through partisan popular elections rather than appointed, it is important to note a significant difference in institutional design from that of the vast majority of the literature. While partisan elected judges are not the unit of analysis for this study, we have previously examined literature regarding the importance of political context to court behavior and have posed questions as to how this context influences the strategic decision making of reformers. Therefore when examining the Texas case, I want to first briefly acknowledge literature regarding this specific institutional design and then discuss the institutional options available to reformers within this context.

Institutional Design and Elected Judges

According to Diamond's definition of liberal democracy, "individual and group liberties are protected by an independent, nondiscriminatory judiciary, whose decisions are enforced and respected by other centers of power."[31] While the United States is almost always considered to be a

[31] Diamond, Larry, *Developing Democracy* (Baltimore: Johns Hopkins UP, 1999) 12.

liberal democracy by most scholars (and certainly the public), the extent to which courts, particularly at the state level, fit within this definition is not as clear.

Much of the literature on the institutional design of courts is focused on the normative notion of an independent court. This independence is typically rooted in an institutional design defined by appointed judges and achieved through a balance of the separation of powers of the branches of government and democratic accountability. Perhaps the first major proponent of an independent judiciary is the French philosopher Baron de Montesquieu. In *The Spirit of the Laws*, Montesquieu writes:

> Again, there is no liberty, if the judiciary power be not separated from the legislative and the executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.[32]

As part of his philosophy on the merits of the separation of powers within a central government, he asserts the necessity of an independent judiciary to political liberty. In *Federalist 78*, Montisquieu's influence on Hamilton is evident, "…that as liberty would have nothing to fear from the judiciary alone, but would have everything to fear from

[32] Montesquieu, Baron de, *The Spirit of the Laws* (New York: Hafner Press ,1949) 152.

its union with either of the other departments."[33] Hamilton's contribution to this dialogue is the introduction of life terms for judges, a concept delineated in the constitution that Hamilton supports. "Permanency in office…is an indispensable ingredient…to a limited constitution."[34] In this context, Hamilton is operationalizing the normative value of Montesquieu's independent judiciary. In response to the permanent appointment of justices, a lone voice of dissent emerges from Brutus, writing as an Anti-Federalist. For Brutus, an independent judiciary is a direct threat to democracy in that "there is no power above them that can control their decisions or correct their errors," which will ultimately "enable them (judiciary) to mould the government into almost any shape they please."[35]

It is clear that the institutional design of judicial appointment was intentional on the part of the "founding fathers" and that their desired outcome of this design is a court insulated from political contexts. However, whether or not that outcome can be empirically verified is questionable.

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[33] Hamilton, Alexander, "Federalist 78," *The Federalist Papers*, ed. Garry Willis (New York: Bantam, 1982) 394.
[34] Ibid.
[35] Brutus, Essays XI and XII, *The Anti-Federalist*, ed. Herbert Storing (Chicago: Chicago UP, 1985).

In "The Supreme Court and Critical Elections," Richard Funston builds upon what he coins as the Dahl-Dooley hypothesis, that "the Supreme Court follows election returns."[36] He specifically tests the hypothesis that "over long periods of time, the Supreme Court reflects the will of the dominant political forces; however, during transitional periods…the Court will be more likely to perform the counter-majoritarian functions ascribed to it by traditional theory."[37] He finds that in fact the Court is normally in line with the law-making majority, and then ponders the Court's relevance and distinctive purpose in light of this research. He concludes that the "Court, by virtue of its institutional position, is able to deal with matters of principle, whereas Congress and the president, because they are responsible to the electoral whims of the moment cannot."[38] It is therefore the institutional characteristics of the Court rather than the actions of the Court that define its relevance. Extrapolating from Funston's assertion, the relevance of an elected judiciary becomes an interesting question for further study.

Roch and Howard consider the impact of political context on the decisions of elected courts and assert that

[36] Funston, Richard, "The Supreme Court and Critical Elections," *The American Political Science Review*, Vol 69 (1975) p. 796.
[37] Ibid. p. 796.
[38] Ibid, p. 810.

"Legislatures and courts are different and react to different state factors, although the more a court's institutional court structure resembles the structure of a legislature – that is, if the court is elected – the less clear are the distinctions between them."[39] For Roch and Howard, institutional design matters. They survey additional scholarly research that argues that elected judges often respond to the demands of the electorate and that judicial selection elections can be as contentious as legislative elections.[40] Appointed judges, on the other hand, are more independent of the electorate and therefore less likely to be responsive to voter preferences.

Huber and Gordon examine the effect of elections on judges' "impartiality." They summarize that the "near consensus among legal scholars is that this tradition – particularly in the form of partisan, competitive contests – is politically unassailable but insidious in its potential for compromising judicial independence."[41] They continue to summarize concerns with voter based judicial selection that are rooted in the premise elected judges may

[39] Roch, Christine and Robert Howard, "State Policy Innovation in Perspective: Courts, Legislatures, and Education Finance Reform.," *Political Research Quarterly*, Vol. 61 (2008) p. 342.
[40] Ibid.
[41] Huber, Gregory and Sanford Gordon, "Accountability and Coercion: Is Justice Blind when It Runs for Office?" *American Journal of Political Science*, Vol 48 (2004) p. 247.

base their decisions on political demands and/or their desire to be re-elected rather than legal tenets or an unbiased reading of the facts of the case.[42] Through the statistical analysis of sentencing data of trail judges, they find that elected judges in Pennsylvania alter their behavior because of the threat (albeit weak) of losing their office.[43]

Melinda Gann Hall characterizes judicial selection for the state court bench as "one of the most enduring issues on the American political agenda."[44] She goes on to state, "Almost universally, this discussion is framed as a conflict over the goals of electoral accountability and judicial independence."[45] Her study focuses on three types of election systems for judicial selection: partisan, nonpartisan, and retention. She finds that those interested in judicial selection reform generally underestimate "the extent to which partisan elections have a tangible substantive component" and calls for a reassessment of the premises that opponents of partisan judicial selection promulgate based on scientific inquiry.[46]

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[42] Ibid, p. 248.
[43] Ibid.
[44] Hall, Melinda Gann, "State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform," *The American Political Science Review*, Vol. 95, No.2 (2001).
[45] Ibid, p. 316.
[46] Ibid.

Hall continues this discussion in her recent book with Chris Bonneau, "In Defense of Judicial Elections." Through the examination of state supreme court elections from 1990 to 2004, they argue:

> …that, contrary to the claims of judges, professional legal organizations, interest groups, and legal scholars, judicial elections are democracy-enhancing institutions that operate efficaciously and serve to create a valuable nexus between citizens and the bench.[47]

Again, as in Gann Hall's previously discussed work, Gann Hall and Bonneau tackle the normative claims surrounding elected judiciaries through empirical election research rather than reformers utilization of an elected judiciary to advance policy change.

Specifically related to institutional design within the state context and its potential impact on litigation rates is Yates, Tankersley, and Brace's work in which they "explore the role that state legal institutions play in explaining variation in legal mobilization."[48] In their recent study, they focus on two structural aspects of state legal institutions:

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[47] Bonneau, Chris and Melinda Gann Hall, *In Defense of Judicial Elections*, Routledge Publishing (2009), p. 2.
[48] Yates, Jeff, Holley Tankersley, and Paul Bruce, "Assessing the Impact of State Judicial Structures on Citizen Litigiousness," *Political Research Quarterly*, Vol. 63, No. 4 (DECEMBER 2010), pp. 796-810.

> First, following a well-developed hypothesis in the literature, we posit that states' methods of selecting judges influence the degree to which citizens are disposed to using courts for the resolution of problems and grievances. Second, we argue that the degree to which a state's court system is professionalized may either impede or promote citizen legal mobilization. Finally, we posit that the effects of these institutional structural characteristics do not work independently but are conditioned on the ideology of the environment in which they operate.[49]

While Yates, Tankersley and Bruce set out to examine the impact that institutional design, specifically judicial selection, has on legal mobilization at the state level and note the importance of political context, they do not explore judicial institutions beyond courts nor do they frame their research in terms of an overall reform strategy.

It is therefore evident that much has been made in the literature regarding the significance of judicial selection, and that once the institutional design of judicial selection changes from appointed to elected judges, we can reasonably predict that judicial behavior will be responsive to the electorate, that is, if it was not already as Dahl contends. But what are the consequences of institutional design intentionally and unabashedly emphasizing judicial response to the electorate

[49] Ibid.

and to what extent do reformers operating within such a context strategically utilize this supposed responsiveness?

Political Context and the Court

In addition to institutional constraints, I argue that political context impacts the opportunity structure that reformers evaluate when seeking venues of reform. Because policy reform is inherently political, reformers do not engage in reform activities or craft reform strategies without acknowledgement or even utilization of their political context. While the extent to which political context affects reform strategy may vary according to political salience of reform issues, understanding scholarship that speaks to the relationship of political context to court behavior is necessary to analyzing the questions that this project seeks to answer.

Numerous scholars have suggested that the political environment in which a particular court is situated effects how the court will behave. Michael McCann discusses in great detail the "strategic interaction approach" which emphasizes the strategic interaction of courts with other political actors in "How the Supreme Court Matters in American Politics." He argues that where the dominant

lawmaking coalitions are either unwilling or unable to act in a decisive manner, the Court many enter into policymaking as an independent actor.[50] The important contribution of this approach is the acknowledgement that court action is part of a larger political environment in which "interaction among political agents is considered to be "strategic" to the extent that it is consciously deliberative, oriented toward instrumental "effectiveness" in advancing particular goals, and hence loosely understood as rational."[51] Giles and Lancaster argue that the willingness to use the courts will directly reflect the political context in which they are embedded.[52] Results of their study on Spain show support for a relationship between social development and increased use of courts in a democratizing society.

If court action is oriented within a particular political environment, then how does the makeup of that environment shape the court's behavior? In *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, Ginsburg argues that the more diffuse the political

[50] McCann, Michael, "How the Supreme Court Matters in American Politics," Gillman, Howard and Cornell Clayton, eds. *The Supreme Court in American Politics: New Institutionalist Interpretations*. (Lawrence, Kansas: University Press of Kansas) 1999.
[51] Ibid, p. 66.
[52] Giles, Michael W. and Thomas D. Lancaster. "Political Transition, Social Development, and Legal Mobilization in Spain," *American Political Science Review.* Volume 83, Number 3 (1989).

environment, the more courts have access to political space allowing for the exercise judicial review.[53] In his quantitative analysis of Asian countries, Ginsburg demonstrates a correlation between active judicial review and diffused politics; conversely, in dominant political party environments, judicial review is more constrained. Furthermore, in "The Construction of the Rule of Law in Argentina," Rebecca Bill Chavez argues that in an environment with political competition, the executive is unable to strip away the constitutional protections of the court because of pressure from the other powerful parties. If the system is competitive, it is unlikely that one party will be dominant over time, therefore divided government will exist, and "divided government makes it difficult for an executive to weaken the judiciary."[54] On the other hand, without significant party competition, the party in power will go unchecked in the executive and legislative branches, thus leaving the judiciary as the only remaining check on power and making it a target of the other branches. Unified government therefore permits the manipulation of institutional design. In conclusion,

[53] Ginsburg, Tom. *Judicial Review in New Democracies: Constitutional Courts in Asian Cases.* (Cambridge University Press: 2003). p. 18.
[54] Chavez, Rebecca Bill, "The Construction of the Rule of Law in Argentina," *Comparative Politics*, July 2003.

Chavez encourages further sub-national study in order to understand the conditions that foster the institutionalization of the rule of law.

Both Ginsburg and Chavez explore political conditions, specifically party competition, that foster judicial independence which they loosely define as the willingness of a judiciary to rule against the executive and/or legislature (the courts versus other branches of government). With regard to social policy reform (citizens (reformers) versus the government in general), might levels of party competition or the political salience of the issue in question affect how a court is utilized and its efficaciousness? If politics matter according to Ginsburg and Chavez for judicial independence then does it also matter in social policy making and in what ways?

The literature we have examined focuses on judicial capacity to engage in social policy making, the resulting impact on policy reform, and the relevance of political context to court behavior. However, the vast majority of these lines of scholarly inquiry have been focused institutional characteristics of courts, specifically appointed judges. Yet reformers must operate in the institutional structure where the desired policy change is located. Rather than focus on the institutional

characteristics across courts, reformers must act strategically given both the political and institutional context. Therefore, political context as defined by reformers in the field may differ from the understanding in the political science literature. Moreover, this literature treats court based reform as generally a homogenous venue with the desired reform outcome of a specific policy change. Therefore, this discussion may not fully take in to account variations in court based reform strategy that could shed light on our understanding of how reformers utilize courts and court based venues to achieve their goals.

CHAPTER 4

THE TEXAS CASE

This project seeks to systematically explore the relationship of courts to the process of social policy reform in the Texas. I predict that reformers within this context utilize judicial and quasi-judicial strategies in different ways than the current literature suggests, that is that courts and legislatures are used interdependently to advance a policy goal. Because of the stated significance of institutional constraints informing reformer venue selection, a brief description of the Texas institutional context is necessary.

Institutional Design – Elected Courts in Texas

As previously mentioned, the Texas judicial system is constructed by partisan judicial selection. In 1876, the Texas constitution was amended to create the popular election system that remains in place today, a partisan primary election for nomination and general election for affirmation. Judicial elections are held at the same time and in the same manner as other partisan elected offices in the state. According to Sheldon and Maule, "After

Reconstruction, Texas began a "long, detailed, and exhaustive program that was nothing short of a rebellion against government itself" to wipe the slate clean of carpetbagger judges and the restrictions of Reconstruction constitutions."[55] They go on to quote historian and former head of the Texas Historical Commission T.R. Fehrenbach, "Judgeships…were made elective, including the bench of the supreme court. No judge who had to run for reelection regularly was expected to decide cases against the popular feeling, on some new fangled point of law."[56] The institutional design is intentional; populism creates accountability. However, it should also be noted that judges in Texas are required to adhere to the Code of Judicial Conduct in which Canon 5 titled "Judges Should Refrain from Inappropriate Political Activity" specifically includes:

> A judge or judicial candidate shall not… make pledges or promises of conduct in office regarding pending or impending cases, specific classes of cases, specific classes of litigants, or specific propositions of law that would suggest to a reasonable person that the judge is predisposed to a probable decision in cases within the scope of the pledge.[57]

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[55] Sheldon, Charles and Linda Maule, *Choosing Justice: The Recruitment of State and Federal Judges.* (Pullman, Washington: Washington State University Press) 1997, p. 75.
[56] Ibid, p. 75 quoted in John Cornyn, "Ruminations of the Nature of Texas Judging," *St. Mary's Law Journal* 25 (1993): 373.
[57] Texas Code of Judicial Conduct, 2011.

Certainly much ado has been made about the plausibility of balancing the necessity of financing one's campaign though interest group contributions while at the same time adhering to the Code of Judicial Conduct on the pages of law journals and in the halls of the state capitol. However, populist sentiments remain high, and commitment judicial accountability through partisan elections appears to be the preferred judicial selection method for the citizens of the state of Texas for the foreseeable future.

Normative debate as to the proper value placed on judicial independence versus judicial accountability is beyond the scope of this project. Rather, I seek to explore how reformers react and craft strategy within this institutional design and how that context impacts the role of courts in policy making. Long before beginning his political career, United States Senator John Cornyn pondered criticisms of state supreme court rulings and the connection to the ballot box by conjecturing, "In other words, if one does not like the law as decided by a particular set of judges, what more effective way to change the law than by changing judges at the next election?"[58] If

[58] Cornyn, John, "Ruminations of the Nature of Texas Judging," *St. Mary's Law Journal* 25 (1993): 377.

that is the political context in which a court is situated, and as we have previously examined public law literature suggests political context does affect the extent to which a court will engage in policy making, then under what conditions will reformers choose court action versus legislative policy change? Is Roch and Howard's assertion that the functional lines between an elected court system and an elected legislature are blurred in this regard an accurate assessment, and, if so, how does that impact how reformers utilize courts?

Institutional Design - Venues of Judicial and Quasi-Judicial Reform in Texas

As I have previously discussed, traditional American Public Law literature has emphasized an examination of the federal court system in order to understand the role of courts in policy reform. While our understanding of courts and their relationship to reform strategy has been greatly enhanced by this body of work, an examination of the institutional structure of state courts in Texas reveals intricate and nuanced avenues of quasi-judicial reform, that is, reform strategy that is extra-legislative but not limited to a traditional court setting. While judicial avenues include

state district courts, quasi-judicial avenues also include available avenues at the state level that do not have a federal equivalent. Understanding how and when reformers utilize these various avenues at the state level, especially given the breadth and depth of policy within the state domain, contributes to our overall understanding of the role of courts in policy reform.

There are four main ways that reformers engage in a judicial or quasi-judicial strategy when seeking a particular policy reform in Texas.

Figure 1
Judicial and Quasi-Judicial Venues in Texas

Judicial Venues	**Quasi-Judicial Venues**
State District Court	State Office of Administrative Hearings
Federal Court	Attorney Generals Opinions

Judicial Venues

State District Court

Reformers, depending on the opportunity structure, may seek reform in state district court. Because Texas law requires a justiciable cause for court proceedings, reformers first must identify a controversy related to the policy outcome they are seeking before engaging a court in this manner.

According to Article V of the Texas Constitution, district courts are the trial courts of general jurisdiction of Texas. The geographical area served by each court is established by the Legislature, but each county must be served by at least one district court. In sparsely populated areas of the State, several counties may be served by a single district court, while an urban county may be served by many district courts.[59] As previously discussed, each district court is presided over by a partisan-elected district court judge.

While the state district court functions in a similar manner to the federal district court, reform strategy can be influenced to an extent by the judicial selection process as the previously examined literature suggests.

[59] http://www.courts.state.tx.us/courts/district.asp; March 7, 2012.

For example, reform strategy may include venue preferences based on the known political orientation of the judge. The tort reform movement in Texas has been successful in influencing legislation to restrict venue shopping, but, depending on the policy arena, venue shopping is possible.

While engaging the state district court in policy reform may conjure similarities to what we know about the federal district court and, generally speaking, the role of the federal court system in policy reform, its judicial selection mechanism as well as its orientation within the state context inclusive of the above identified quasi—judicial avenues distinguishes its nature. Sophisticated reformers view this avenue within its context; therefore, treating the state district court as a separate and distinct venue of reform from that of a federal district court can reveal fruitful insight about the relationship of courts to policy reform.

Federal District Court

While scholarship on how reformers utilize federal district court to engage in policy reform is developed and discussion of the institutional design of the American federal court system and its workings is unnecessary, it is

important to this study to orient this venue within the state policy reform landscape. Sophisticated reformers certainly acknowledge federal district court as a viable venue of achieving state policy reform (depending on the nature of the issue), and understanding how and why state reformers utilize the federal court system in the context of the other identified venues is important to understanding the complex and nuanced business of policy reform. For these reasons, it is important to acknowledge this venue in our study.

Quasi-Judicial Venues

State Office of Administrative Hearings (SOAH)

A discussion of the role of courts in policy reform in Texas would be incomplete without examination of the role of the State Office of Administrative Hearings (SOAH). Reformers in Texas may engage in quasi-judicial reform through the utilization of the SOAH, and, because of its breadth over everyday policy matters, understanding its role in the state government framework is critical to our overall understanding of the questions this project seeks to examine.

SOAH was created in 1991 by the Texas Legislature as a neutral, independent forum where Texas agencies or other governmental entities and private citizens or entities can resolve legal disputes. According to Texas Government Code section 2003.021, SOAH is to conduct fair and objective administrative hearings and provide timely and efficient decisions. These objectives are also reflected in the agency's mission statement: "…to conduct fair, prompt and efficient hearings and alternative dispute resolution (ADR) proceedings and to provide fair, logical and timely decisions."[60]

The SOAH court is presided over by licensed attorney serving as a judge and serves the purpose of providing due process for persons and/or activities regulated by the state. The presiding officer over a SOAH hearing is referred to as the ALJ, or administrative law judge (ALJ). The ALJ's duties are: to be a neutral presiding officer acting independently of the referring agencies, conduct the hearing, listen to the evidence and arguments of the parties, and in some cases, issue a final decision. All SOAH ALJs are licensed Texas attorneys.

The SOAH court is divided into several teams according to subject matter and the state agencies that refer cases.

[60] http://www.soah.state.tx.us/index.asp, March 6, 2012.

SOAH's teams are as follows: Alternative Dispute Resolution; Administrative License Revocation and Field Enforcement; Economic; Licensing and Enforcement; Natural Resources; Tax; and Utilities. This type of organizational structure creates specific areas of expertise within the agency's judges and is considered to be highly technocratic in nature.

SOAH literature describes an administrative hearing as

> …basically the same way as other trials with the parties, including the referring agency, presenting evidence to the ALJ, who acts as both judge and jury. The hearing is conducted independently of the agency that referred the case to SOAH, and the referring agency is prohibited from attempting to influence the ALJ's decision in any way.[61]

Typically, the issuance of a decision by SOAH marks the end of the dispute in question. However, Texas Statute permits a state agency to "disagree" with the decision of an ALJ. According to section 2001.058 of the Texas Government Code:

> (e) A state agency may change a finding of fact or conclusion of law made by the administrative law judge, or may vacate or modify an order issued by the administrative judge, only if the agency determines: (1) that the administrative law judge did not properly apply or interpret applicable law, agency rules, written policies provided under Subsection (c), or prior administrative decisions; (2) that a prior administrative decision on which the administrative law judge relied is incorrect or should be changed;

[61] Ibid.

> or (3) that a technical error in a finding or fact should be changed.[62]

While the statute lays out specific criteria by which an agency may vacate or modify an order of an ALJ, the criteria are broad enough to allow for significant agency discretion.

Additionally, Texas Statue also provides for judicial review of ALJ decisions. Section 2001.171 of the Texas Government Code states: "A person who has exhausted all administrative remedies available within a state agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter." Petition for judicial review of SOAH cases must be filed in Travis county district court. District court judgments may also be appealed according to the standards of general civil actions.

In FY 2010, SOAH reported a caseload of roughly 45,000 cases. Despite this large caseload, SOAH remains fairly insulated from the public eye. The agency describes their public perception in their 2011-2015 Strategic Plan:

> Although administrative law is not a well-known area of the law outside the administrative law bar or Austin, where the agencies are headquartered, the work performed by SOAH, and by the agencies and entities

[62] Texas Government Code, Section 2001.058.

> that refer cases to it, has an enormous public impact, far more than the public probably realizes. SOAH ALJs preside in hearings covering a wide range of subjects, including, for example, professional licensing and regulation of doctors, nurses, veterinarians, accountants, real estate agents, pharmacists, psychologists, dentists, teachers, insurance agents, electricians, plumbers, air conditioning technicians, and physical and occupational therapists; workers' compensation medical benefits; teacher and state employee benefits; child support; child abuse and neglect; elder care; financial and utility regulation; the payment of taxes owed to the state; and environment and natural resources.[63]

In summary, the SOAH is a quasi-judicial venue for reformers. While technically non-binding for state agencies and subject to judicial review for citizens, the SOAH has great breadth in dealing with everyday policy matters and is structured as an "efficient" gateway to the state district courts. Additionally, the SOAH is the designated legal gateway for citizen's to address and/or challenge the state in its regulatory role. Perhaps it is this breadth and insular, technocratic nature of the SOAH that makes it a strategic venue for sophisticated insiders engaging in policy reform.

[63] Agency Strategic Plan 2011-2015, State Office of Administrative Hearings; June 18, 2010.

Attorney General Opinions

Reformers in Texas may also engage in quasi-judicial policy reform by engaging the Office of the Attorney General. The Texas Attorney General is a statewide, partisan-elected official who serves a four year term. The Attorney General is the official lawyer for the State of Texas and, according to the Texas Constitution, is charged with defending the laws and the Constitution of the State of Texas, representing the State in litigation, and approving public bond issues. Additionally, the Texas Constitution and section 402.042 of the Texas Government Code grant the Attorney General authority to issue attorney general opinions, a written interpretation of existing law.

An AG opinion cannot resolve a dispute or address matters of fact, but it can, generally speaking, provide legal clarity in grey areas of public policy. Ordinary citizens cannot request AG opinions; rather only statutorily authorized requestors including the Governor, the head of a department or board of state government, the head or board of a penal institution, the head or board of an eleemosynary institution, a regent or trustee of a state educational institution, a committee of a house of the Texas Legislature, the chair or board of a river authority,

and a county auditor may request opinions.[64] According to the office of the Attorney General's website, "A person other than an authorized requestor who wants to ask for an attorney general opinion should approach someone who is named in section 402.042 as an authorized requestor."[65] Authorized requestors, specifically elected officials, regularly petition the Attorney General on behalf of constituents who are non-authorized requestors, but this type of engagement in the state system requires a fairly sophisticated understanding of one's available options.

The opinion drafting process is described by the Office of the Attorney General as follows:

> Once requested to write an attorney general opinion, the attorney general must interpret existing law in accordance with all applicable statutes and the Constitutions of the United States and the State of Texas. This process frequently involves extensive legal research by the group of assistant attorneys general known as the Opinion Committee. In addition to researching the law, the Committee solicits briefs from persons and groups that it deems likely to be affected by the opinion. The Committee welcomes additional briefs and any written commentary from the public, but the attorneys involved in the process do not engage in dialogue or explanation with interested parties or with the public. The draft opinion is reviewed by the attorney general and signed by the attorney general before it is issued. The written opinion speaks for itself.[66]

[64] Section 402.042 Texas Government Code
[65] https://www.oag.state.tx.us/opin/; March 6, 2012.
[66] Ibid.

After the issuance of the opinion, authorized requestors and/or their constituents may utilize the opinion to further a particular policy outcome or provide clarity in disputed matters, but the opinion is just that, a non-binding opinion. State agencies, whose legal representation is provided by the Office of the Attorney General, do not have to abide by attorney general opinions. According to the Office of the Attorney general, "Courts have stated that attorney general opinions are highly persuasive and are entitled to great weight. However, the ultimate determination of a law's applicability, meaning or constitutionality is left to the courts."[67]

Because the Texas Attorney General is a statewide elected official and his opinions are non-binding, the utilization and impact of attorney general opinions in Texas and their role in policy reform differs from our understanding of the utilization and impact of the United States Attorney General. Whereas the United States Attorney General is often seen as an extension of the President because the appointment structure, the Texas Attorney General is a separate and distinct political figure from the Texas Governor and the state agency boards

[67] Ibid.

that the Governor appoints. And yet because of the partisan makeup of the state, the Texas Attorney general is often a member of the same political party as the Texas Governor. Consequences of this unique institutional configuration are discussed by Marshall:

> Not surprisingly, a divided executive creates substantial opportunities and incentives for conflict. First, there are matters of simple politics… Moreover, even when from the same party, the two officers can, and often are, divided by personal rivalries or ideological differences. And even when the two officers agree on a particular issue, they may compete with each other to be the most aggressive in addressing the issue to curry favor with a particular constituency. Add to this the political reality that the Office of the Attorney General has long been seen by many of its occupants as a stepping stone to the Governor's office and the blueprint for confrontation and conflict is manifest.[68]

As argued by Marshall, the Office of the Attorney General in Texas is often viewed as a stepping stone to higher offices such as United States Senator or Governor, and consequently the "record" of the office holder has been utilized in a partisan manner. The complexity of the political incentives that this institutional configuration creates is not lost on reformers seeking to influence a

[68] Marshall, William P. "Break up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive," *The Yale Law Journal*, Vol. 115, No. 9, The Most Dangerous Branch? Mayors, Governors, Presidents, and the Rule of Law: A Symposium on Executive Power (2006), pp. 2446-2479.

particular policy outcome. Meyer describes the unique power of this office in the state sphere:

> The heart of the attorney general's power is found in the constitutional and statutory arrangements that create the office. Although the exact allocation of litigation authority varies from state to state, attorneys general, for the most part, have a monopoly, or a near monopoly, on the state executive branch's access to the courtroom. This means that litigation as a method to advance policy interests is a tool that rests almost exclusively in the hands of the attorney general. Furthermore, because the attorney general is responsible for defending other state agencies in court, he may also be able to shape the policies of other state agencies with which he has no hierarchical relationship.[69]

In addition, the politics of campaigning and assessment of the power structure among the Attorney General, Governor, and Legislature apply, and sophisticated reformers tend to be in tune with this dynamic. It is because of this complexity that seeking an attorney general opinion is a strategic, quasi-judicial venue of reform.

Taken together, it is evident that reformers in Texas have various avenues to pursue judicial or quasi-judicial strategies and that the institutional design of partisan elected judicial selection distinguishes this context from the American federal system literature, making questions

[69] Meyer, Timothy, "Federalism and Accountability: State Attorneys General, Regulatory Litigation, and the New Federalism," *California Law Review* , Vol. 95, No. 3 (Jun., 2007), pp. 885-914.

regarding the role of courts in policy reform in Texas a complex line of inquiry. But before we examine such questions fully, we must also recognize that courts and quasi-judicial venues of reform do not exist in a vacuum. Rather, reformers have the traditional legislative route at their disposal for achieving policy change. An examination of how these venues of reform fit together with regard to reform strategy and interest mobilization is therefore necessary to fully understand how reformers formulate and execute their strategies.

Interest Mobilization in Texas

Scholarly literature on interest mobilization in Texas also is largely focused on the legislative arena and the extent to which interest groups are entrenched into the political system. Hamm and Wiggins describe interest mobilization with regard to the legislature in Texas, "Certainly groups play an important role as policy initiators and campaign supporters and financiers in many states; but the power that they exert could hardly be more significant than that wielded by their counterparts in the Lone Star State." [70]

[70] Hamm, Kieth and Charles Wiggins, "Texas: The Transformation from Personal to Informational Lobbying," in Hrebenar, Robert and Clive

They go on attribute the state's weak party competition and highly fragmented governmental structure as reasons for "very influential" role interest groups have played in policymaking over the years.[71] But to use Thomas's definition of lobbyist, "a person designated by an interest group to represent it to government for the purpose of influencing public policy in that group's favor,"[72] it follows that one would evaluate all possible venues, including the courts, to achieve a desired policy outcome. If the role of the interest group is indeed "very influential" in the Texas political context and, as we have previously examined, the court system in Texas is highly responsive to the political context, then one would expect a rationally acting reformer to, at times, engage the court system in policy making. Under what conditions does the court system or other quasi-judicial avenues become the venue of choice?

Thomas, eds. *Interest Group Politics in the Southern States*. (Tuscaloosa, Alabama: University of Alabama Press) 1992.

[71] Ibid, p. 174.

[72] Thomas, Clive, "Understanding Interest Group Activity in Southern State Politics," in Hrebenar, Robert and Clive Thomas, eds. *Interest Group Politics in the Southern States*. (Tuscaloosa, Alabama: University of Alabama Press) 1992. p. 10.

These questions may still stop short of the complexity of reform strategy when layered upon the Texas context. It is possible that not only the strategic interaction between the legislature and courts is more complex that originally contemplated, but also the strategic interaction among judicial and quasi-judicial venues themselves. Thus, reformers not only have the ability to make strategic decisions with regard to a legislative versus court strategy but also among a variety of options within the court based strategy umbrella, or quasi-judicial venues. It is this complexity in state policy reform that this project seeks to uncover.

CHAPTER 5

METHOD

I hypothesize that reformers utilize institutions as a means to advance their policy goals as part of an overall strategy to accomplish an objective, rather than as ends that will deliver a specific outcome. As previously stated, the bulk of the public law literature has framed the decision of reformers to utilize a court to advance a policy goal as separate and distinct paths rather than connected and interdependent strategies. However, examination of professionalized reform movements shows the strategic decisions of reformers to be more complex, the details of which I more fully understand through in-depth case study analysis. Generally speaking, reformers are utilizing the courts and available quasi-judicial venues (in Texas) in conjunction with a legislative strategy rather than as a standalone strategy. My study reveals that reformers attempt to create synergistic environment between the legislative and judicial branches through complex maneuvering in order maximize their likelihood of success.

This project seeks to build upon the "new institutionalist" approach of understanding the relationship of courts to their larger political framework. Again by focusing on the external relationship of courts as institutions to other institutions in the political system, including interest groups and reformers, this project follows Gillman and Clayton's orientation of the United States Supreme Court and external influences on decision-making in which they state:

> The Court's ability to persist and even thrive in this political system is a by-product if an unformalizable combination of considerations, including: the general social patterns of conflict and consensus that are generated by specific cultural, institutional, and class frameworks; the relationship between the Court's jurisprudence and the beliefs, interests, and legal views of other powerful political actors such as Congress and the President; the ability of interest groups to mobilize support or opposition to the Court and its decisions; and the justice's ability to cope with setbacks, adjust to changing circumstances and more generally protect the Court's authority and legitimacy.[73]

Clayton also asserts that promising areas of research will require scholars to view judicial acts within their political context and that the label of the approach

[73] Gillman, Howard and Cornell Clayton, "Beyond Judicial Attitudes: Institutional Approaches to Supreme Court Decision-Making," Clayton, Cornell and Howard Gillman, eds., *Supreme Court Decision-Making: New Instutionalist Approaches.* (Chicago: The University of Chicago Press) 1999. p. 11.

"matters less that the recognition that understanding the *political* meaning and significance of judicial decisions requires placing them in appropriate political contexts."[74] This project seeks to understand the conditions by which the court is approached to engage in social policy reform and if the nature of action sought is limited to court decisions themselves. Should reformers engage in multi-venue reform then the desired behavior of a court may not be limited to a decision in one's favor but to a variety of other outcomes that help advance a reformer's agenda. By examining the political context that precipitates court action and orienting a court within a particular political context as Clayton suggests, a deeper understanding of the significance of the role of courts in the policy making process will be gained.

In addition, this project draws from the rational-choice approach, or positive theory of institutions (PTI,) in that it assumes strategic behavior on the part of judges. Maltzman, Spriggs, and Wahlbeck's define strategic interaction as "interdependent behavior with justice's choices shaped, at least in part, by the preferences and likely actions of other relevant actors…Institutions

[74] Clayton, Cornell, "The Supreme Court and Political Jurisprudence: New and Old Institutionalisms," Clayton, Cornell and Howard Gillman, eds., *Supreme Court Decision-Making: New Instutionalist Approaches.* (Chicago: The University of Chicago Press) 1999. p. 39.

therefore influence strategic decision makers through two principal mechanisms – by providing information about expected behavior and by signaling sanctions for noncompliance."[75] This project broadens their discussion of strategic behavior of the Court (United States Supreme Court) to include the actions of reformers and legislators, because the institutional configuration that defines the rules of the game for judges in Texas also applies to reformers and legislators all attempting to achieve their preferred course of action. Epstein and Knight add context to the concept of interdependence by defining strategic action by judges as the realization that their fate "depends on the preferences of other actors and the actions they are expected to take."[76] Gillman criticizes that PTI approach as an Attitudinal Model 2.0, reducing judicial decisions to individual preferences while recognizing the parameters of intuitional environment.[77] Gillman argues for

[75] Maltzman, Forrest, James Spriggs III, and Paul Wahlbeck, "Strategy and Judicial Choice: New Institutionalist Approaches to Supreme Court Decision-Making," Clayton, Cornell and Howard Gillman, eds., *Supreme Court Decision-Making: New Instutionalist Approaches.* (Chicago: The University of Chicago Press) 1999. p. 47.
[76] Epstein, Lee and Jack Kinight, "Mapping Out the Strategic Terrain: The Informational Role of *Amici Curiae*," Clayton, Cornell and Howard Gillman, eds., *Supreme Court Decision-Making: New Instutionalist Approaches.* (Chicago: The University of Chicago Press) 1999. p. 217.
[77] Gillman, Howard, "The Court as an Idea, Not a Building (or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision-Making," Clayton, Cornell and Howard Gillman, eds., *Supreme Court Decision-Making: New Instutionalist Approaches.* (Chicago: The University of Chicago Press) 1999.

a more holistic, "interpretivist" approach that also takes into account factors such as institutional mission.

However, this project seeks to understand the nature of the relationship among various actors within a given political context but across specific institutional contexts. The research questions at the heart of this inquiry are not limited to just the strategic decision making of judges but include the decision making processes of the reformers to approach the court in the first place based on the combined expectations of judicial and legislative action, therefore the discussion of institutional mission is not salient. Because the PTI approach recognizes the strategic interaction and interdependence of relevant actors in a broad sense, it does provide an inclusive framework for examining decision making.

Case Study Approach

In order to explore the questions presented in this study, I examine three reform movements in Texas in an in-depth manner. Through this in-depth case study analysis, I examine pathways of reform and the reform strategies utilized by those seeking policy changes. Research

gathered in this study stems largely from interviews and in-depth observation of reform movements and reform leaders operating within the Texas political and institutional context as well as first hand experiences associated with the particular case studies. This research study represents an exercise in theory development regarding the use of courts and quasi-judicial institutions by reformers engaged in policy change and is designed to lay the foundation for further study in this area.

Specifically, this study employs the comparative case study approach. According to Ragin, comparative case-oriented researchers see cases as complex configurations of events and structures rather than homogenous observations drawn at random from a fixed population of equally plausible selections.[78] In this type of research, "concepts are revised and refined as the boundary of the set of relevant cases is shifted and clarified. Important theoretical distinctions often emerge from this dialogue of ideas and evidence."[79] Following the selection of relevant cases, the next step is to identify the causal conditions that the cases share.[80] Finally, once the "theoretically relevant causal commonalities have been identified, the

[78] Ragin, Charles. *Fuzzy-Set Social Science*. (Chicago: University of Chicago Press) 2000, p. 57.
[79] Ibid, p. 58.
[80] Ibid, p. 59.

investigator constructs a composite portrait of the phenomenon under investigation."[81] This "theory-laden and concept-intensive process" [82] will be employed to examine the questions outlined in this project.

I depart from Przeworski and Teune[83] as well as Hall[84] in their contention that this strategy is relatively limited in providing generalizable knowledge. Rather, as argued in Rueschemeyer, Stephens, and Stephens, I break from the view that the use of small "n" comparative historical work cannot belong to the "context of validation."[85] By employing a strategy of analytic induction, or building arguments from the understanding of individual histories and then identifying potential theoretical insights, one is able to test and retest generalizations in other case analyses.[86] Therefore, through analytic induction, case studies are of great theoretical value in that they can be hypothesis-

[81] Ibid.,p. 59.
[82] Ibid. p. 61.
[83] Ibid, p. 34.
[84] A notion alluded to by Peter Hall's "Beyond the Comparative Method" in the APSA Newsletter, Vol. 15, Issue 2, Summer 2004.
[85] Rueschemeyer, Dietrich, Evelyne Huber Stephens, and John Stephens. *Capitalist Development and Democracy*. (Chicago: University of Chicago Press, 1992).
[86] Ibid, pp. 36-37.

generating, providing theoretical generalizations in areas where theory is yet to exist.[87]

Case Selection

Again, following the comparative case-oriented method as described by Ragin, I view each case as a" …whole entity purposefully selected and comprising of a complex arrangement of events." [88] The case studies selected for investigation are: the scope of practice battle between engineers and architects, transportation infrastructure, and voter ID.

Building Design – Engineers versus Architects Scope of Practice

Much of the business of policy reform with regard to state policy deals with highly technocratic areas of policy involving the regulation of professions. In Texas, the professions of engineering and architecture are both regulated by licensing acts. From time to time, disputes arise between and among professions as to who may provide a

[87] Lijphart, Arendt. "Comparative Politics and the Comparative Method." *APSR* 65:3 (Sept. 1971) pp. 682-693.
[88] Ragin, Charles. *Fuzzy-Set Social Science*. (Chicago: University of Chicago Press) 2000, p. 57.

particular service as did between the engineers and architects over the issue of building design. While this case study is certainly not the only example of a scope of practice battle in Texas, it is a representative example of a fairly large portion of policy reform at the state level. Therefore, in order to gain insight in to the strategy of reformers at the state level, it is important to include an example of this type of technical policy.

Transportation Infrastructure

While not as technical in nature as policy reform related to licensing statutes, the case study of transportation infrastructure represents a broad based reform movement lead by sophisticated reformers that does not rise to a high level of polarization related to the political climate. Policy change sought by reformers in this arena is related to public goods and infrastructure and is therefore also not typically defined by traditional party politics.

Voter ID

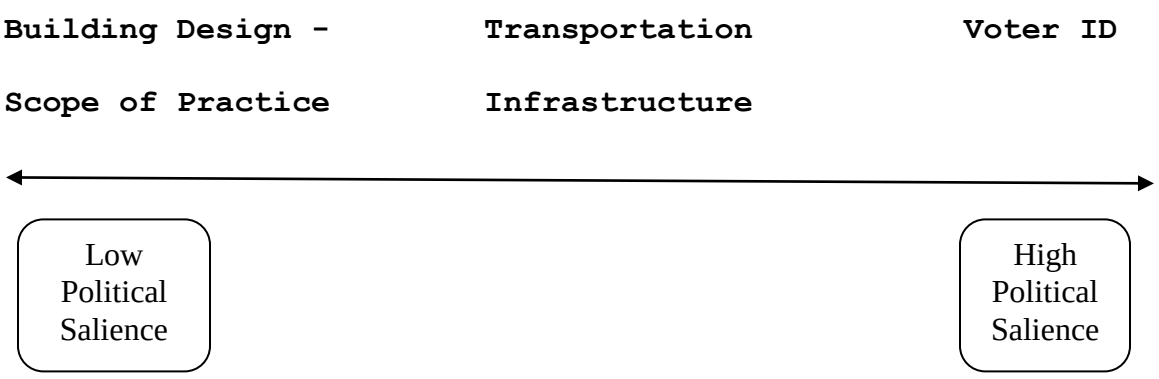
The issue of Voter ID is representative of a highly politically salient topic. It is also a case in which high degrees of polarization exist. Policy change related to voter ID was also highly publicized by the media and therefore presumed to be an issue that the electorate would have some knowledge of, at least more so than the above mentioned case studies. Reformers seeking change in this arena would be expected to craft strategies based on perceptions of linkages between decision makers and their party and/or constituency.

Each case study selected has been a significant issue in Texas state politics from 2005-2011. Major reform has been attempted on all of the issues selected in this time period, controlling for variation in political climate. However, these cases vary on many different factors and have quite different stories and endings. Each is rich in detail about the nature of partisan divides, nature of issues, etc. Although I cannot tease out the importance of each factor individually, I highlight through rich detail, as is often done with in-depth case studies, how, why, and when reformers utilized court based reform in their

endeavors to achieve policy change in an effort to better understand what these decision makers thought they were doing.

Because state policy making encompasses issues ranging from the mundane and technocratic to the highly polarizing, variation in types of issues will allow for us to see if reformers utilize multi-venue approaches in varying political environments. The following diagram summarizes the case study selection of this project according to political salience.

Figure 2
Political Salience Spectrum of Selected Cases



Why vary cases by political salience? It is important to note that not all issues are equally politically salient in nature. Perhaps multi-venue synergies can only be

achieved for issues with a high degree of political salience because of their alignment with party politics, or do multi-venue strategies play a role technical policy issues as well? Given the institutional and political context in which reformers in Texas operate, do they formulate similar reform strategies for issues spanning the politically salient spectrum or is reform strategy wholly issue specific?

For the purposes of this study "political salience" is simply a backdrop of variation among cases. Should interdependent, multi-venue approaches be revealed through cases study analysis across an issue spectrum, we may be able to better generalize how reformers formulate reform strategy. I am employing a simple definition of "political salience," that is an issue that it a litmus test for the primary voter, not simply Republican versus Democrat. When studying issues in contemporary Texas politics it is also important to examine issues that are not simply Democrat or Republican but also, with the advent of the Tea Party, the degree to which it is Republican. By defining political salience as an issue that is a litmus test for the primary voter, we can capture this nuance in Texas state politics.

Should interdependent, multi-venue approaches be revealed through cases study analysis across an issue spectrum, we may be able to better generalize how reformers formulate reform strategy. The utilization of each venue in a way that affects the issue in the other venue would support the contention that reformers craft strategies that utilize both legislative and judicial venues in tandem. Indicators of an interdependent, multi-venue approach would include, but are not limited to, the utilization of legislative processes in order to impact court proceedings and/or the specific utilization of court action or inaction by reformers in the act of legislative lobbying. Conclusions will then be drawn as to the behavior of reformers within the Texas political context and the subsequent implications for this line of scholarship.

Data Collection

The primary method of data collection for this study is participant observation. Nachmias and Nachmias describe participant observation as a method whereby:

> …the investigator attempts to attain some kind of membership or close attachment to the group he or she wishes to study. In doing so, the participant observer attempts to adopt the perspectives of the people in the situation being observed. The participant observer's role is that of conscious and systematic sharing in…the activities of a group of persons. [89]

Specifically, in the participant-as-observer role, "researchers make long-term commitments to becoming active members and attempt to establish close relationships with members of the group who subsequently serve as both informants and respondents."[90] Within this method, the researcher "gains a deeper appreciation of the group…and may also gain different levels of insight by actually participating rather than only observing."[91]

Since 2005, I have been actively engaged in reform movements in Texas through observation as well as direct participation as a reformer. The participant-as-observer method of data collection serves as the primary method of data collection for this study and is enhanced by interviews and where appropriate secondary data sources such as newspaper articles, public testimony, and archival documents.

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[89] Nachmias, Chava Frankfort and David Nachmias, *Research Methods in the Social Sciences.* (New York: St. Martin's Press) 1992, p. 273.
[90] Ibid, p. 275.
[91] Ibid, p. 276.

CHAPTER 6

BUILDING DESIGN: SCOPE OF PRACTICE – ENGINEERS VERSUS ARCHITECTS

We often examine political processes through highly salient, grand battles. Indeed such issues are well documented in terms of media coverage and party platforms. However, the vast majority of issues, particularly in the state legislative context, tend to be more technical, and perhaps to the general public even mundane. It is in the day to day business of political processes that we as political scientists can learn a great deal about the nature of our political institutions and the strategies that decision makers regularly employ. The scope of practice battle between engineers and architects in Texas provides a wonderful window into how an issue of relatively low political salience traverses legislative and legal institutions in a complex way.

Complex strategy and the utilization of both legislative and legal institutions by reformers are well illustrated by an in-depth examination of the scope of practice battle between engineers and architects in Texas.

Scope of practice issues are known for being particularly difficult and nasty because by definition they involve state regulated professions that do not often break along typical partisan lines and involve impassioned fundamental questions regarding one's ability to practice his profession and put food on the proverbial table. Consequently, successful strategies in this policy realm tend to be highly complex due to the difficulty in translating the plight of a specific profession to the general voter and the tendency of professions to view scope of practice issues as "die on their sword" in nature. The scope of practice battle between the engineers and architects waged over two decades in Texas exemplifies these characteristics. Former Texas Society of Professional Engineers President Patrick Kunz, PE described the conflict:

> The architect/engineer issue was an extremely contentious issue between two highly regarded professions. These practitioners are quite passionate about their area of practice and each saw the other as encroaching on their area of expertise, resulting in a total mistrust in each other and a passionate battle with emotions raised to a level that made it almost impossible to allow compromise and resolution.[92]

Through an in-depth examination of this scope of practice battle, the complex nature of the utilization of

[92] Personal Interview, October 3, 2011.

legislative and legal entities by reformers seeking policy change will be demonstrated. Moreover, because the regulation of trade by states to protect the public health, safety, and welfare represents such an integral component of the business of state government, an understanding of reform strategy and its complexity in this regard will hopefully provide further insight in the context of American public law literature.

The 45th Texas Legislature created the Engineering Practice Act over 70 years ago, within sixty-one days of the tragic "New London School Disaster" in which a natural gas leak caused an explosion that killed more than 295 students and teachers in New London, Texas. The Act made it unlawful for anyone to practice engineering, specifically the design of public buildings, unless they were authorized by the State Board for Registration of Professional Engineers to do so. Civil and criminal penalties were prescribed for violations, and the Attorney General was specifically directed to provide legal assistance to enforce the Act.

In 1965, the Legislature broadened the definition of professional engineering, stating that it includes:

> "any service or creative work, either public or private, the performance of which requires engineering education, training and experience in the application

> of special knowledge of the mathematical, physical, or engineering sciences to such services or creative work." Sec. 2.4 art. 3271a.

That language is substantially the same today, but with many more examples of what constitutes engineering. In Texas, engineers are licensed to practice engineering without being limited to a specific field of specialization. Licensed engineers have the statutory right to practice in any engineering field for which they have the appropriate education and experience. For example, mechanical engineers routinely practice both mechanical and electrical engineering. It is also common practice for civil engineers to practice civil and structural engineering in building design projects. Conversely, even though a licensed chemical engineer has the statutory right to practice in any engineering field, it is doubtful that a chemical engineer would have the education or experience to practice structural engineering. Architectural engineering (i.e. engineering for design of buildings) is a unique and highly specialized field of practice and is the specific area of engineering that is at the heart of this bitter scope of practice battle.

Like the Engineering Practice Act, the current Architecture Practice Act also resulted from the "New

London School Disaster." Until 1989, however, the architects operated under a "title" act. What constituted the practice of architecture was not defined, and there was no limit on who could engage in building design, except for section 19 of the original Engineering Practice Act, discussed above, which required that an engineer design such buildings. No law regulated the *practice* of architecture until 1989. As described in the brief submitted to the Attorney General of the Texas Society of Professional Engineers and the Consulting Engineers Council of Texas:

> There was no law regulating architects in the true sense of a practice act until the 71st session of the Texas Legislature in 1989. The original act was enacted in 1937…it was primarily an exclusive right to use the title architect – a truth in advertising or labeling law. Only those licensed by the architect's board could call themselves architects….From 1937 to 1989 the architect's law remained primarily a truth in advertising law. Anyone was free to do anything an architect did so long as he did not call himself an architect.[93]

In 1989, the Texas Legislature defined the practice of architecture and required a license under the Architecture Practice Act to engage in that practice.

[93] Babb, Charles, "RQ-156; Before the Attorney General of the State of Texas RE: Authority of the Texas Board of Architectural Examiners to Prohibit Professional Engineers from Designing Public Buildings," Brief of the Texas Society of Professional Engineers and the Consulting Engineers Council of Texas: July 21, 1992.

Reconciling Chapter 1001 of the Texas Occupations Code, the Engineering Practice Act, with Chapter 1051 of the Texas Occupations Code, the Architecture Practice Act, and the predecessors of those provisions has a long history in Texas. Because each licensing Act exempts those licensed under the other licensing Act, it is clear that the professions of engineering and architecture overlap in the area of building design. The Board of Architectural Examiners has interpreted the law to prohibit engineers from designing buildings intended for human use and occupation and to limit engineers to designing engineering aspects of buildings. The Board of Professional Engineers has disagreed with that interpretation, concluding that building design may be performed exclusively by a licensed professional engineer competent in this field.

When two state agencies in Texas disagree regarding interpretations of statute, they may request an Attorney General's opinion to provide further guidance as to the meaning of the law. As previously discussed, according to Texas statue, Chairs of state agencies are authorized requestors and may make an Attorney General Opinion request. Because the Office of the Attorney General is the official legal council of state agencies, attorneys in the Office of the Attorney General advise their client agencies

and ultimately can submit legal requests and briefs to the "Opinion Division" of the Office of the Attorney General. Under this model, attorneys representing state agencies from the Office of the Attorney General pose official questions to their co-workers in the same office. This detail is not meant to lead one to believe that requests are not taken seriously, but rather to establish that the relationship among attorneys involved in this process is familiar in nature because they all work together for the same boss – the Attorney General.

The Texas Board of Architectural Examiners decided to ask for a formal Attorney General Opinion on their ability to take disciplinary action against licensed professional engineers for engaging in building design which was in their interpretation constituting the practice of architecture. Theoretically, either board could make an official inquiry, but since it was the Texas Board of Architectural Examiners who wanted to take action against engineers and not the other way around, they made the initial request.

It is important to note the opportunity structure and context of the strategic decision making by the Texas Board of Architectural Examiners. First, the board, as with most state boards, is made up of gubernatorial appointees.

According to Texas lobbyist Jerry Valdez,[94] it is common understanding of political insiders that a channel of unofficial communication between agency appointees and the Governor's office is alive and well. While the Office of the Governor would likely not officially get involved in an agency disputes, it is common understanding that they are aware of them from both sides. Second, according to a former trade association executive, while state licensing boards operate independently from state trade and industry associations, there are open lines of communication between agencies and their constituents through trade associations. Often trade associations make recommendations to the Governor's office for board appointments and in some circumstances, appointed board members also serve in association leadership positions. When the decision making of an agency and trade association is consolidated, the reform strategy is assumed to be collaborative. Third, since the Office of the Attorney General represents both the Texas Board of Architectural Examiners and the Texas Board of Professional Engineers, an official Attorney General Opinion would be the first step in the agencies battling one another in legal arena as unofficial obstacles within the Office of the Attorney General prevent agencies

[94] Personal Interview, September 22, 2011.

suing each other directly. Finally, state agencies are prohibited by statute from engaging in legislative lobbying. Most boards rely on a strong relationship with trade association to accomplish legislative goals. Thus, if the consolidated architect strategy (the Board and the trade association combined) was to have the Board make the first move, institutional constraints require that the Board pursue legal rather than legislative remedies. The context of the Attorney General Opinion request by the Texas Board of Architectural Examiners is significant because it sheds light on the opportunity structure and strategic interaction of the stakeholders involved in this dispute – the respective boards and the industry trade associations.

Three briefs were filed in conjunction with the opinion request, and the arguments laid out by each stakeholder group provide great insight into the nature of the dispute itself. The Texas Society of Architects submitted an amicus brief in which they argued:

> Upon reviewing the plans, the Board determined that these plans were architectural plans and had not been prepared and sealed by a registered architect. Therefore, the Board determined that the engineer who prepared these plans had violated Article 249a…If the nature if the request is meant to include the resolution of the question of whether the plans are architectural plans or engineering plans, such request requires

> the determination of a fact question. However, the Board has already determined that the plans in question and prepared by the engineer were architectural and not engineering plans. This finding is clearly within the authority of the Board in its duty to enforce the law to prevent the unauthorized practice of architecture.[95]

According to trade association insiders, unofficially the Texas Board of Architectural Examiners had shared their initial opinion request with the Texas Society of Architects, and the Texas Society of Architects offered to unofficially help with drafting the question. However, the Texas Board of Architectural Examiners went forward with submitting their question without the aid of the Texas Society of Architects at the direction of their executive director who was leery of industry participation, although such participation is not legally prohibited. The Texas Society of Architects was less than pleased with the particular drafting of the questions because they were in their view too open-ended. Strategically, the legal counsel for the Texas Society of Architects had advised to never pose a question where you can't direct an answer. The Texas Society of Architects brief was meant to mitigate

[95] Armstrong, Gaylord, "RQ-156; Before the Attorney General of the State of Texas RE: Authority of the Texas Board of Architectural Examiners to Prohibit Professional Engineers from Designing Public Buildings," Brief of the Texas Society of Architects: December 12, 1991.

what they perceived to be a misstep in the drafting of the opinion request.

The Texas Board of Professional Engineers, under advisement from their own Office of the Attorney General legal counsel, cited other scope of practice battles in their brief establishing a legislative history of overlapping scope in other professions and left the heavy hitting to the engineer industry associations:

> In opinion number JM-795, the Attorney general addresses the functional overlap of state licensed plumber and air conditioning contractors. JM 795 concluded the two regulated trades were not mutually exclusive, in that the Legislature considered some aspects of air conditioning contracting to also constitute the practice of plumbing.[96]

For the Texas Board of Professional Engineers, an overlap with the practice of architecture was not of great concern from a territorial standpoint because the overlap encompassed only a small facet of engineering, architectural engineering. But for the Texas Society of Architects, at stake was the very definition of architecture – if an engineer can do architecture, then what is special and unique about being an architect?

[96] Letter Tiled "Brief Pertaining to Opinion Request from Texas Board of Architectural Examiners" addressed to Attorney General Dan Morales from Charles Nemir, P.E.: September 6, 1991.

Finally, the Texas Society of Professional Engineers and the Texas Council of Engineering Companies submitted a brief that took the engineers argument a step further:

> Long before the architect's statue was ever enacted and for more than half a century since then professional engineers and consulting engineering firms have been preparing engineering plans and specifications for public buildings of every nature and performing the overall design of such buildings without any public outcry from the State of Texas or the general public…It is indeed regrettable that the Attorney General should be disturbed with this issue. Architecture and Engineering are respected but separate disciplines with their beginnings reaching back to antiquity.[97]

Defining the overlap between the practices was both problematic and unnecessary for the engineers:

> Courts and legislatures have been attempting, for more than a century, to define and distinguish between the practice of engineering and architecture…Architecture and engineering are definitely separate and distinct professions; however, in the area of designing buildings they frequently overlap. Most state laws make it clear that architects are to design architectural plans and engineers are to design engineering plans…Frustrations arise for legislatures and courts when a dispute gets down to the issue of whether a specific set of plans and specifications are architectural plans or engineering plans. Scholars and courts have solved the problem by saying that as far as the public safety, health and welfare are concerned it doesn't make any difference. Both disciplines are well trained by education and experience to design buildings…The federal government and most state governments have long since abandoned any effort to distinguish architectural vis-à-vis engineering services for contracting purposes. The standard practice of all of the major federal agencies

[97] Babb, Charles, 1992.

> is to designate contracts for all kinds of buildings or facilities as architect/engineer contracts.[98]

As a result of the Texas Board of Architectural Examiners request for opinion, Attorney General Dan Morales issued opinion DM-161 which states that the architect's act:

> ...does not bar a professional engineer licensed under article 3271a, V.T.C.S., from preparing the plans and specifications, the preparation of which requires the application of engineering principles and the interpretation of engineering data, for 'a new building that is to be constructed and owned by a State agency, a political subdivision of this State, or any other public entity in this State if the building will be used for education, assembly, or office occupancy and the construction costs exceed $100,000.[99]

The opinion also states that "…Licensed engineers continue to have the authority to prepare building designs and specifications that they had prior to the adoption…in 1989."

This opinion was perceived to be a victory for the engineers. However, as previously discussed an opinion of the Attorney General is not binding and may actually change with the election of a new Attorney General. State agencies do have statutory latitude to "disagree" with an official Attorney General Opinion, but to do so is out of the ordinary because of the political costs at stake.

[98] Ibid.
[99] AG opinion DM-161, August 27, 1992.

Recall that that state boards operate under the direction of gubernatorial appointees and that unofficial communication between appointees and the office of the Governor is common place. Under normal circumstances, a state board might be unofficially discouraged from further action as rejecting an Attorney General Opinion may be viewed as "going rogue." But this can depend on the nature of the relationship between the Governor and the Attorney General as political figures and the relevance of the issue at stake. Also, recall that scope of practice battles tend to be "die on their sword" issues. For the architects, DM-161 meant that architecture was relegated to a subset of engineering. Furthermore, because the Office of the Attorney General represents the agency, there is no actual cost of continuing the fight against architectural engineers. Individual engineers, on the other hand, under enforcement action by the Texas Board of Architectural Examiners would have bare the cost of a legal defense.

The Texas Board of Architectural Examiners issued the following official response directed to Attorney General Dan Morales:

> The Texas Board of Architectural Examiners respectfully requests that you withdraw and reconsider your opinion of DM 161…the conclusion of the Opinion is clearly erroneous." …"The Opinion is also flawed because it makes a finding of fact to support the

> erroneous conclusion…that is beyond the purview of the Opinion process and cannot be made by an Opinion of the Attorney General but only by a judge or jury of by a state agency to which such authority is given by the Legislature.[100]

According to former trade association staff, General Morales communicated unofficially with the Texas Society of Architects that he felt that he had made a bigger mess of things with the issuance of DM-161, but could not issue a retraction because he had recently issued a retraction on a different matter. Too many retractions would have a negative political affect.

After suffering a perceived defeat, the relationship between the Texas Society of Architects and the Texas Board of Architectural Examiners was damaged according to those involved. The Texas Society of Architects considered a legislative solution at this time, but were advised by their lobby counsel to wait until their practice act, which had just been passed a few years before, had time to be better established. Without a legislative strategy, The Texas Society of Architects urged the Board of Architectural Examiners to seek a new Attorney General Opinion. Fearing further negative consequences, the Board

[100] Letter addressed to Attorney General Dan Morales RE: Opinion DM-161: September 30, 1992.

decided to wait. Meanwhile, the Texas Board of Architectural Examiners and the Texas Board of Professional Engineers began discussions on how to try to work together to resolve issues of overlap within their statutory authority.

To recap, those involved in this dispute had utilized a quasi-judicial strategy to bring about a resolution to the dispute by seeking an Attorney General Opinion. Recall that resolving the dispute has been previously identified as one way in which reformers decide to utilize a quasi-judicial strategy. This opinion was perceived to be a victory by the Texas Board of Professional Engineers; however, the architects (both association and licensing board) did not give up. Therefore, despite a victory in this realm, the end goal of resolving the dispute in this arena was not achieved.

In 2001, the Texas Board of Architectural Examiners was slated to go though the Texas Sunset Review process, a legislatively created process by meant to identify and eliminate waste, duplication, and inefficiency in government agencies. All state agencies go through this process on a statutorily outlined cycle. Due to a consolidation of cycles by industry sector, the Texas Board of Architectural Examiners and Texas Board of Professional

Engineers were set to be examined in tandem in 2003. Recall that agencies are statutorily prohibited from legislative lobbying. However, during Sunset Review process agencies provide a self-evaluation report to the Sunset Advisory Commission, and through this mechanism are able to identify suggested clean-up, clarification, and policy changes to their statues. The Texas Board of Architectural Examiners utilized this opportunity to address the overlap issue. According to their 2001 Self-Evaluation Report:

> Article 249a mandates that an architect prepare the architectural plans and specifications for certain types of buildings, such as all institutional residential facilities and certain government buildings. However, there has been significant confusion regarding the meaning of these requirements. For example, some engineers who have designed such buildings from start to finish without the involvement of architects argue that no "architectural" plans and specifications were prepared. The law should be revised to eliminate this ambiguity. If the intent of the law is for an architect to be involved in certain types of projects, the law should clearly state that an architect must be engaged for such projects without exception.[101]

Addressing the issue in this environment provided the agency with the opportunity structure to pursue a legislative channel. In doing so, this evidences

[101] Self-Evaluation Report submitted to the Texas Sunset Advisory Commission by the Texas Board of Architectural Examiners, 2001.

Tarrow's[102] conception of opportunity structures in that the actors themselves created and manipulated opportunities through incentivizing decision makers to act. The Texas Board of Professional Engineers did not address the issue in their self-evaluation report because in their view, DM-161 provided an adequate answer to the question. For the engineers, bringing the issue up would signify ambiguity where they believed clarity existed in an engineer's ability to design buildings.

The legislative outcome of the Sunset Process was to establish a Joint Advisory Committee (quasi-governmental committee) between the Texas Board of Architectural Examiners and Texas Board of Professional Engineers with the mission of addressing issues of overlap. The architects (the association and the Board) perceived this to be a victory because in their view addressing the overlap was equated to defining the overlap i.e. what constituted architectural plans. For the engineers, on the other hand, addressing the overlap meant creating a process by which the agencies would examine each other's licensees. In their view, since engineers could legally perform

[102] Tarrow, Sidney, *Power in Movement: Social Movements and Contentious Politics*, 2nd ed. (Cambridge, New York and Melbourne: Cambridge University Press, 1998.)

building design, their desired outcome was for the Texas Board of Architectural Examiners to refer questions about licensed engineers to the engineer's board, the appropriate authority for disciplinary action against engineers.

By all accounts, the Joint Advisory Committee (JAC) was a colossal failure. The JAC was required to hold their hearings under the Open Meetings Act and activities of the JAC were subject to open records law. The result was a series of hearings over a two year period where each side publically displayed their position. It was clear to the associations that little was being accomplished in this forum, and, in order to resolve the issue, either the associations would have to convince the Boards to come to an agreement or go back to the legislature for a resolution.

Rather than begin an all out legislative battle, the associations at this point began unofficial negotiations in an attempt to present an agreed upon memorandum of understanding to the JAC. The opportunity structure was strategically assessed by those involved that it would be easier to convince JAC Board members of a solution than legislators because of the close connection between the associations and the Boards. These negotiations were between the Texas Society of Architects and the Texas

Council of Engineering Companies, the business association of Texas engineering firms. The Texas Society of Professional Engineers was not involved in the negotiations at this point in time which turned out to be significant to the negotiation process. Tensions were heightening between the professions to the point that from a business perspective the issue required resolution. Engineering companies commonly have numerous architects and with the involvement of each association in this battle, such firms were paying a significant portion of the dues for engineers and architect to wage this battle through the Texas Society of Architects and the Texas Society of Professional Engineers, the society representing individual engineers with an emphasis on the profession of engineering. It was not uncommon for partners in A/E firms to be on opposite sides of this ongoing dispute. The Texas Society of Professional Engineers and Council of Engineering Companies have an unofficial policy of not fighting each other legislatively, so for the Council of Engineering Companies to be successful in resolving this dispute their best venue was by influencing the JAC.

Negotiations between the Texas Society of Architects and the Council of Engineering Companies progressed along the lines of defining each profession with more

specificity. However, this line of negotiation was seen by the Texas Society of Professional Engineers to be relinquishing part of the profession of engineering since engineers could engage in building design. The Texas Society of Professional Engineers requested an official Policy Advisory Opinion from the Texas Board of Professional Engineers, a statutory authority granted by the legislature during the 2003 Sunset process, asking the question if a licensed professional engineer practicing in his/her area of competency could engage in comprehensive building design. The Board issued their opinion that this was well within the statutory authority of the Engineering Practice Act, and consequently could not agree to further defining the practice of engineering as was contemplated by the JAC process because the legislature had not granted them the authority to do so. The JAC, at this point, was defunct.

Without a functioning JAC, tensions were higher than ever between the professions. With staff changes and time, relationships were mended between the Texas Board of Architectural Examiners and the Texas Society of Architects. This time, with the unofficial aid of the Texas Society of Architects, the Texas Board of Architectural Examiners requested an Attorney General

opinion related to the Texas Board of Engineers Policy Advisory opinion on building design. In 2006, the Texas Board of Architectural Examiners filed complaints against two licensed engineers engaged in building design for practicing architecture. One week later, Attorney General Greg Abbott issued a different opinion, GA-0391, in response to the Texas Board of Architectural Examiners request which stated:

> Chapters 1001 and 1051 of the Occupations Code do not provide a basis to answer categorically whether an engineer may comprehensively design a building without the involvement of an architect...Rather, the answer to that question will depend on whether the adequate performance of the particular service or work requires a person with engineering education, training, and experience. Whether adequate performance of a particular service or work requires a person with engineering education, training, and experience is a question of fact that cannot be resolved in the opinion process.[103]

Interestingly, according to newsletters published by both the Texas Society of Architects and Texas Society of Professional Engineers, both sides claimed the opinion as a victory, and the Texas Board of Architectural Examiners continued to pursue disciplinary action proceedings against the engineers.

In January of 2007, as the cases against the engineers in question meandered through the administrative law

[103] AG opinion GA-0391, January 10, 2006.

process, the 80th Legislative Session of the Texas Legislature was getting into full swing. The Texas Society of Professional Engineers (TSPE) saw an opportunity to solve the dispute legislatively by clarifying the law as it pertained to the issue of building design, thereby clarifying the activity of the engineers in question in the disciplinary action proceedings. This strategy was chosen by TSPE because in the view of these reformers, while unpredictable because of the nature of the issue, the legislative process was finite and they could retain control of the statutory language through the process. Because their lobbyist was writing the legislation, a standard practice in the Texas system, they could be reasonably assured that they would be happy with the legislation should it be successful in passing. In their view, they would not have this degree of control in the court system, and the issue was ripe for legislative action. The Council of Engineering Companies did not oppose this strategy by TSPE, but they in essence remained neutral due to the significant amount of architects employed by the member engineering firms.

Knowing the Texas Society of Architects would likely be monitoring all proposed legislation involving building design, TSPE engaged in an "under the radar" approach; the

organization proceeded by having a legislator file what lobbyists refer to as a "vehicle," a piece of benign legislation that is able to move through the legislative process with little attention but that is also germane to the more controversial issue that one is seeking to address. By moving a vehicle, TSPE only needed the support of the bill's author to amend the bill's language in the final hours of the legislative session. One just hopes that no one notices the last minute change in the language. According to seasoned reformers, this type of scope of practice issue was not likely to receive board legislative support because most legislators would fear retaliation at the voting booth by either the architects or engineers in their districts across the state. This attempt was ultimately not successful, and the dispute continued.

In June of 2007, immediately after the legislative session, the Texas Society of Professional Engineers filed suit against the Texas Board of Architectural Examiners raising several issues related to their rulemaking and jurisdiction, and, according to former TSPE President Pat Kunz, their motivations for doing so were simply to resolve the dispute.[104] Because the issue in question was related to state agency rulemaking, the matter was under the

[104] Personal Interview, September 10, 2011.

jurisdiction of the State Office of Administrative Hearings (SOAH). The SOAH judge ruled that the rules in question were overbroad and invalidated the rules by which the Texas Board of Architectural Examiners were citing to discipline engineers practicing building design. However, the SOAH judge also ruled the licensed engineers were prohibited from practicing architecture without a license but did not determine if the plans in question constituted architecture.

Meanwhile, the cases against the specific engineers were dismissed by summary judgment by the SOAH judge in February of 2008. The Texas Board of Architectural Examiners held another hearing on the contested cases on the specific engineers in question, ignoring the summary judgment, and voted to take action against the engineers in question for practicing architecture without a license because they had determined that the plans in question were architectural in nature. The engineers in question then appealed to the District Court.

When the 81st Texas Legislative Session began in January of 2009, tensions between the professions remained very high. It was the desire of the Texas Society of Professional Engineers to again attempt a legislative resolution because of the uncertainty of the judicial

process and the mounting legal bills associated with the cases. The Texas Society of Architects, on the other hand, was not involved in the cases financially speaking. The Texas Board of Architectural Examiners, a state agency, was waging the battle for the architects in the court system; therefore, legislative reform was not as high of a priority for the Texas Society of Architects. According to TSA staff, TSA's strategy for the 81st Legislative Session was simply not to lose any statutory ground. Finding little to no legislative appetite for taking the issue head on, a similar approach as the previous session, or "under the radar" approach, was contemplated and attempted by the Texas Society of Professional Engineers, with the Council of Engineering Companies remaining neutral. Numerous legislators were approached to consider legislation but few were willing to wade into what they considered to be a nasty scope of practice battle that could potentially bring negative consequences in future elections by angering either engineer or architect constituents and/or the trade associations involved. Again, the legislature declined to take any action on this issue.

In October of 2009, the District Court reversed the actions of the Texas Board of Architectural Examiners against the engineers in question but remanded the cases

back to the administrative law judge for additional hearings. This action by the District Court Judge was seen as "splitting the baby" by both sides of the dispute. Discussions with both engineers and architects revealed the perception that the judge was influenced by the same electoral pressures that resulted in the legislature's refusal to act. The potential for this dispute to continue well into the future at the Third Court of Appeals level and eventually the Texas Supreme Court was a great concern to the Texas Society of Professional Engineers, again due to the uncertainty of judicial process and additional legal expenses.

In the fall of 2010, the Texas Society of Professional Engineers developed a legislative strategy for the 82nd Legislative Session that would use the ongoing lawsuits as a way to reframe the issue. Instead of legislation the clarifies the statutory definition of building design, they would pursue legislation that prohibited an agency from interfering with an individual's ability to practice their profession so long as they were lawfully within their practice as defined by their licensing board. Numerous bills were drafted and filed by a variety of legislators who were now seemingly more sympathetic to a legislative solution due to the lack of clarity and resolve by the

courts. Instead of a scope of practice battle, the issue was now framed as undo governmental intrusion that was prohibiting individuals from "making a living." This new approach, exemplifying a reframing strategy by reformers, resonated with legislators, and, because of an apparent willingness on the part of legislators to intervene, the Texas Society of Architects came to the negotiating table with the Texas Society of Professional Engineers to attempt a compromise solution. Despite many legislative twists and turns, a compromise bill was eventually agreed upon and passed in the final days of the 82nd Legislative session. Paramount to the bill's passage was the consensus nature of the legislation, quelling legislator concerns of backlash in the following election cycle. After two decades of fighting, it appears a solution to this scope of practice battle has been achieved.

In summary, this case study provides evidence that reformers utilize interdependent, multi-venue strategies over time to advance a policy goal. The theoretical tenants present in this case study are as follows:

Figure 3
Venues and Strategies Utilized by Reformers in the Scope of Practice Battle between Engineers and Architects

Multi-Venue Approach	Interdependent Strategies Present
Legislative Judicial: State District Court Quasi-Judicial: State Office of Administrative Hearing, Attorney General Opinion	Reframing Agenda Setting

According to the decision makers for the Texas Society of Professional Engineers, the engineering organization driving the reform, the strategy related to executing their preferred policy outcome included active participation in the legislative, judicial, and quasi-judicial arenas in an interdependent manner. The quasi-judicial arena was accessed by the use of Attorney General Opinions and the State Office of Administrative Hearings, and the judicial arena by the district court at various points in time based on the opportunity structure that was present. The legislative arena was also utilized in conjunction with and

interdependent to the judicial strategy over multiple legislative sessions.

Since the legislature declined to act on the issue both 2007 and 2009, the Texas Society of Professional Engineers continued to pursue resolution in the court system. After the District Court ruling in 2009 that still did not provide resolution, and because of the nature of the opinion itself, attorneys for the organization conveyed their opinion that the likelihood of the case continuing to the Third Court of Appeals and eventually the State Supreme Court was high and that such a process could take as long as 8-10 years. Desiring to achieve a solution in a more timely fashion, the organization again pursued legislative reform, this time utilizing activity in the judicial realm to reframe the policy issue by focusing on the court systems failure to resolve the dispute and the ongoing consequences for the individuals involved in the suits. This strategy was successful as numerous legislators that were not interested in the issue in previous sessions became interested in resolving the issue because in their opinion swift resolution through the court system was now unlikely.[105] This difference in legislative interest is evidenced by the lack of bills filed on the issue in

[105] Observation of interaction with legislators, January –March 2011.

previous legislative sessions compared to the numerous bills filed on the issue during the 82nd Legislative Session. Additionally, in June of 2010, Representatives Wayne Smith and Bill Callegari both wrote official letters to each licensing board describing their intent to solve the issue should the dispute continue due to TSPE's reframing of the issue from a technical interpretation of the practice of building design to the right of an individual to practice their profession. Moreover, TSPE was able to frame the ongoing activity in the judicial arena as a state budget issue; according to House Appropriations Committee staffers, budget conscious legislators inquired as to the cost to the state of the lawsuits involving a state agency against the licensees of another agency continuing.[106] Thus, the utilization of outcomes in judicial and quasi-judicial venues to reframe the battle from a technical discussion of what constituted building design to an issue of right to practice as well as a budget concern proved to be successful legislatively; resolution was finally achieved in 2011 with the passage of HB 2459 that clarified both the engineer's and architect's practice acts with regard to the issue.

[106] Personal Interview, June 15, 2010.

This in-depth examination of the scope of practice battle between the architects and engineers in Texas reveals a highly complex and adaptive strategy by reformers in the state policy realm. Legislative and legal institutions were utilized time and again to advance a policy agenda by reformers. Oftentimes, legislative and legal strategies were used interdependently, with movement in one realm effecting outcomes in the other. Motivations for the utilization of quasi-judicial venues included attempts of resolution as well reframing the issue to ultimately stimulate resolution. Institutional configurations constrain reformer strategy by setting the "rules of the game," but reformers in this example did not simply utilize a legal or legislative strategy. Rather, the experience of reformers engaged in this issue suggests a much more complex relationship of legislatures and legal entities than previous public law literature has portrayed.

CHAPTER 7

TRANSPORTATION INFRASTRUCTURE

The previously examined case study regarding a scope of practice battle between engineers and architects demonstrates the complexity of strategy that two highly organized factions utilize in waging a policy war. However, this complex strategy can also be seen in an in-depth examination of transportation infrastructure policy reform in Texas. In contrast to scope of practice type issues where two rent-seeking groups are pitted against one another, transportation infrastructure policy at the state legislative level is traditionally viewed as a public good because the legislature does not engage (at least generally speaking) in contract awards or the allocation of funds to particular projects. Therefore, reformers involved in this policy arena rarely have a defined "opposition." According to professionals in this area, it is uncommon to find opposition to infrastructure in general; rather, you may find groups interested in one mode over another, i.e. roads, rail, etc., or geographic disputes such as urban versus rural or Dallas versus Houston. Additionally, this issue does not tend to be influenced by partisan agendas.

As Senator Kirk Watson noted in a speech to the Texas Business Leadership Council, there do not seem to be Democrat bridges or Republican overpasses.[107] In framing transportation infrastructure as a policy area, "we all tend to be for transportation."[108]

And yet, transportation infrastructure policy is not without its share of contention. Modal and geographic factions aside, transportation advocates have experienced difficulty in advancing an agenda of overall investment. Currently, the state of Texas spends approximately $8 billion annually on the state's transportation system. Despite this large budget, over the past decade Texas has experienced a shortfall with regard to transportation infrastructure investment due to the state's growth outpacing the existing infrastructure capacity. This funding shortfall is well documented by both academic researchers and the Texas Department of Transportation and widely accepted by legislators. Hence, transportation advocates have been actively engaged in this issue over the past decade.

Specifically, in 2006, the Texas Governor's Business Council reported in their report, "Shaping the Competitive

[107] Texas Business Leadership Council speech, May 10, 2012.
[108] Interview with transportation professional, May 16, 2012.

Advantage of Texas Metropolitan Regions," that the state was facing a $66 billion funding shortfall for identified transportation improvements over a 25 year period.[109] Failure to adequately fund the state's transportation infrastructure, according to the report, would result in decreased economic activity and staggering congestion on the state's roadways. Subsequent reports were also produced, most notably the 2030 committee report commissioned by the Texas Department of Transportation. According to the 2030 Committee website:

> The 2030 Committee was originally formed in May 2008 by Texas Transportation Commission Chair Deirdre Delisi, at the request of Texas Governor Rick Perry. This volunteer committee of experienced and respected business leaders was initially charged with providing an independent, authoritative assessment of the state's transportation infrastructure and mobility needs from 2009 to 2030. In July 2010, Chair Delisi reconvened the 2030 Committee and charged the panel with developing an updated analysis of the current state of the Texas transportation system, determining the household costs of under-investing in the system and identifying potential revenue options to fund transportation improvements.[110]

The 2030 Committee concluded that the state of Texas would be required to invest an additional $315 billion over the next 20 years in order to adequately meet the state's

[109] "Shaping the Competitive Advantage of Texas Metropolitan Regions," Texas Governor's Business Council, 2006.

[110] http://texas2030committee.tamu.edu/about/

mobility needs. Consequently, public advocacy groups involved in transportation around the state began to focus on a policy solution for the state's impending needs.

In addition to the identified critical funding shortfall, the Texas Department of Transportation reported that "diversions" from the State Highway Fund, a constitutionally dedicated account for motor fuel tax and motor vehicle registration fee receipts, were on the rise at approximately $1 billion a biennium, representing approximately $10 billion in lost revenue for transportation since the practice began in the mid 1980's. Article 8, Section 7a of the Texas Constitution states:

> Subject to legislative appropriation, allocation and direction, all net revenues remaining after payment of all refunds allowed by law and expenses of collection derived from motor vehicle registration fees, and all taxes, except gross production and ad valorem taxes, on motor fuels and lubricants used to propel motor vehicles over public roadways, shall be used for the sole purpose of acquiring rights-of-way, constructing, maintaining, and policing such public roadways, and for the administration of such laws as may be prescribed by the Legislature pertaining to the supervision of traffic and safety on such roads.

Therefore, the state Constitution requires that all revenue from the motor fuel tax and motor vehicle registration fees be used for specifically enumerated transportation purposes, but there was growing concern among transportation advocates that the Texas Legislature was not

abiding by this constitutional provision, thus making funding matters worse. In a May 2009 Policy Brief, the Texas Public Policy Foundation writes:

> These are funds that could have been used to pave new roads, ease traffic congestion, improve transportation infrastructure, etc. Instead, these tax dollars are going to supplement the budgets of the Historical Commission, the Commission on the Arts, and the Texas Department of Public Safety.[111]

Additionally, veteran political journalist Paul Burka described the diversion practice in a 2010 blog:

> Those who call for ending the diversions conveniently overlook that the problem is not the diversions; it's why we have to divert, which is that the state's revenue stream is inadequate to fund the services that the state provides. Sure, we ought to end the practice of diverting gasoline tax revenue to fund DPS. That $1,234,108,574 would buy a lot of concrete. But the moment that you end the diversion to DPS, you are confronted by the problem of how to fund the state's law enforcement agency. [112]

In summary, not only had the state of Texas identified a critical shortfall with regard to transportation infrastructure funding, but also monies currently collected to fund transportation were being diverted from their constitutionally dedicated purpose to plug other holes in the state budget. In response, public advocacy groups

[111] Texas Public Policy Foundation, Policy Brief, May 2009.
[112] Burka, Paul. "The Gasoline Tax Diversions." The Burka Blog; Texas Monthly, December 5, 2010.

related to transportation began to coalesce in order to advance a policy solution for what they believed to be of critical importance to the state's long term economic vitality.

In 2007, the Texas Urban Transportation Alliance along with other public interest groups such as the Gulf Coast Regional Mobility Partners, Dallas Regional Mobility Coalition, Tarrant Regional Transportation Coalition, and the San Antonio Mobility Coalition, attempted to legislatively correct the practice of diversions and push for additional transportation infrastructure funding. The membership of these groups mainly consisted of private businesses, private citizens, chambers of commerce, and some local governmental entities.

At this time, issues related to transportation infrastructure were not viewed as partisan in nature, but factions did exist, although not divided along party lines, as to the appropriate method for enhancing infrastructure investment specifically around the issue of private sector investment in toll road development and the increased use of debt by the state. While numerous bills were filed related to the transportation issue and the various controversial issues listed above that divided the transportation advocate community, reformers were able to

coalesce around the diversion issue in support of HB 3713 which was captioned "Relating to Permissible Uses of the State Highway Fund." This bill limited the use of the State Highway Fund as follows:

> Sec. 222.0025. LIMITATION ON USE OF STATE HIGHWAY FUND. Notwithstanding any other law, money in the state highway fund that is described by Section 222.001 or 222.002 may not be transferred to or appropriated for use by:
> (1) the Department of Public Safety;
> (2) the Texas Department of Criminal Justice;
> (3) the Texas Transportation Institute;
> (4) the Department of State Health Services;
> (5) the Department of Aging and Disability Services;
> (6) the Department of Assistive and Rehabilitative Services;
> (7) the Department of Family and Protective Services;
> (8) the Health and Human Services Commission or any other health and human services agency or entity;
> (9) the Texas Historical Commission;
> (10) the Texas Commission on the Arts;
> (11) the Texas Higher Education Coordinating Board;
> (12) the Texas Education Agency; or
> (13) the Texas Workforce Commission.[113]

This bill, along with two other bills on the same subject were filed, but did not receive committee hearings, amounting to the pigeonholing of the issue. Additionally, Senator Carona filed SB 165, which would index the rate of the state gasoline and diesel fuel taxes to the Highway Cost Index. Interestingly, SB 165 also did not receive a

[113] Text of HB 3713, Krusee, 80th Regular Legislative Session, 2007.

committee hearing, despite the fact that Senator Carona was the Chairman of the committee to which his bill was referred. This type of legislative activity i.e. bills filed without subsequent hearings, according to veteran transportation reformer Blanca Laborde, indicates that while reformers were able to garner a moderate amount of legislative attention in getting their desired reforms filed in the form of bills, that the issue was extremely low on both the bill author's personal legislative agenda as well as the legislature's agenda as a whole. While reformers focused their attention on the 80th Legislative Session, the legislature did not take significant action on either ending diversions or increased infrastructure funding.

After the legislative session, the Texas Urban Transportation Alliance (TUTA) contemplated pursuing an Attorney General's opinion related to the legislature's use of the State Highway Fund for non-transportation purposes. According a former TUTA Board member, this particular action was contemplated due to the lack of traction that advocates experienced legislatively and receiving a favorable AG opinion might force the legislature to move

the issue up on their agenda.[114] Therefore, TUTA leaders identified an agenda setting purpose for engaging in a judicial-like reform strategy. The strategy was not to look for the Attorney General to end diversions, but rather for the issuance of an Attorney General Opinion that could motivate the legislature to act. While funding per se was not viewed as an issue that would be a good fit for judicial or quasi-judicial interventions based upon the institutional opportunity structure, the use of constitutionally dedicated funds outside of constitutionally stated purposes did pose an interesting question that might be a good fit for a quasi-judicial venue, an Attorney General opinion. Additionally, the TUTA board consisted of three county judges, constitutionally authorized Attorney General Opinion requestors making this judicial-like venue easily accessible. Once the Attorney General Opinion request was drafted, however, the TUTA board and transportation advocates declined to pursue this venue of reform.

How did advocates evaluate the strategic decision of whether or not to pursue an Attorney General opinion in this instance? Interviews with TUTA leadership about the decision making process and the strategy of reform reveal

[114] Personal Interview and Observation, September 2007.

the following: first, reformers do not consider potential avenues of reform in a vacuum; rather, they evaluate opportunity structures based upon institutional and political constraints. Reformers had to consider the repercussions of a perceived victory in this quasi-judicial arena to potential legislative outcomes. While they had no conversations with legislators to this effect, a conservative strategic analysis would have to take into account the possibility that even a favorable AG opinion which would require the entirety of the State Highway Fund to be appropriated to transportation purposes might cause a reduction in transportation funding from other sources. Therefore, in this case the relationship between venues regarding both strategy and outcome were evaluated interdependently. Reformers also evaluated how this type of request would be perceived by legislators i.e. challenging powerful appropriators on their methods of allocating billions of dollars of state money was not an attractive position. In evaluating this strategy, reformers had to weigh the benefits of agenda setting, their primary objective from seeking an Attorney General Opinion, with the potential for legislative backlash in other funding sources, thus demonstrating the interdependent nature of a multi-venue approach.

Secondarily, reformers had to account for the fact that the Attorney General also does not operate in a vacuum and is subject to opportunity structures as well. How might the Attorney General rule in this manner and what would be the ramifications to the Attorney General of ruling against this legislative practice? Would the legislature abide by this type of ruling? If not, what would be the incentive for the Attorney General to rule in the favor of transportation advocates? As previously discussed in the engineers versus architects case study, sophisticated reformers prefer to ask questions when they have a fair amount of certainty in what the answer will be with regard to AG opinions. The high degree of uncertainty surrounding this venue of reform, albeit at first glance an easily accessible venue of reform for transportation reformers, influenced the ultimate strategy of not to move forward with seeking an Attorney General Opinion at that point in time. Despite fervent support of the issue, highly strategic and interdependent thinking about the interaction of the legislature and quasi-judicial venues of reform produced a cost benefit analysis that supported inaction in this realm.

In summary, through interviews and participant observation in the decision making process of TUTA, a cost

benefit analysis of the decision to engage the Attorney General is revealed. Reformers considered the potential positive outcome of succeeding in utilizing this venue to agenda set their issue legislatively versus the potential negative outcomes of losing their moral high ground on the legality of the issue or creating additional adversarial legislative relationships. Thus, the decision to be inactive in this venue was indeed highly strategic.

The decision to be inactive in the quasi-judicial realm caused transportation advocates to focus heavily on traditional legislative-based reform. The same previously identified coalition of groups continued to push for additional funding during the 81st Legislative Session and similar bills were filed as in the past session regarding the ending of diversions and indexing the motor fuels tax to inflation. However, transportation reformers also pushed for additional legislation on the issue. Specifically, an alliance lead by the Tarrant Regional Transportation Coalition (TRTC) began a push for local option legislation that would empower local governmental entities to levy voter approved fees for transportation infrastructure improvements. In order to accomplish this goal, TRTC engaged the high profile lobbying firm, HillCo

Parnters. According to a February 15, 2009 Fort Worth Star Telegram article quoting HillCo founder Bill Miller:

> The company's (HillCo) lobbyists are working en masse to pass the legislation, he said, adding that HillCo is engaged in the most comprehensive deployment of "manpower and womanpower" since he co-founded the firm more than a decade ago.
> "I've seen more HillCo people at these meetings than any other deal I've done," Miller said. "We have a big pool of talent, and we're deploying it as fast and furiously as we can."
> Although elected officials also participate in the effort and make contact with lawmakers, Miller said, HillCo is "quarterbacking the play" and directing strategy.
> "We have to persuade people to support it, to find ways to make it attractive to them," he said. "Or to persuade them that their opposition is unwarranted. It's a classic lobby deal."[115]

Interestingly, what began as a described "classic lobby deal" by the lobbyist involved on the local option legislation in February turned in to an all out legislative battle in the spring of 2009. The "TLOTA" legislation, because of the high profile lobby effort, caught the attention of numerous partisan and grassroots organizations, a turn that the transportation advocates did not anticipate due to the relatively low degree of political salience the issue had experienced in the past. The "TLOTA" bill, muscled through the Senate by Senate Transportation and Homeland Security Chairman John Carona,

[115] Montgomery, Dave. Fort Worth Star Telegram, February 15, 2009.

eventually died during the last days of the legislative session in the House of Representatives. Reformers actively working on this issue report that the bill did not make an important calendar deadline due to Republican House members not wanting to take a vote on the issue fearing that it would be perceived by grassroots organizations as vote for more taxes. Vic Suhm, Executive Director for the Tarrant Regional Transportation Coalition, describes the events:

> Part of the reluctance of House members of course stems from the crusade put on by the Texas Public Policy Foundation, Empower Texans, Americans for Prosperity, and the Republican Party of Texas, the Chair of which actually stood in the lobby, called members out of the House chamber and threatened them if they voted for local option. This coupled with a grass roots effort to generate phone calls, e-mails, and faxes to members urging them to vote against local option certainly made it harder for House members to support the bill. So – the NO TAX lobby was effective.[116]

Organizations that did not support the bill were successful in framing the issue as a broad tax-hike despite the provisions that required voter approval similar to other infrastructure bond elections. The Republican Party base became both energized and mobilized to the point that the

[116] Personal Interview, October 5, 2011.

significant lobby muscle employed to pass the bill was unable to overcome the opposition.

According to Vic Suhm, Executive Director of TRTC and leader of the TLOTA lobby effort, it was decided by transportation advocates not to pursue additional "TLOTA" legislation in the 82nd Legislative session because of the Tea Party success in the 2010 election cycle.[117] Instead, their new focus became changing the collective mind of the Republican primary base and/or reframing the issue centered on the "cost of doing nothing."[118] According to polling data, the process has been slow to garner significant levels public support. In Suhm's view, until that base of voters supports additional infrastructure investment, it is unlikely that reform will be achieved. With both the legislative and judicial avenues of reform stymied, transportation advocates have retreated to grass roots messaging efforts. This type of approach is considered to be very expensive and difficult, but advocates of this issue feel that it is really the only avenue of reform available at this time.

[117] Personal Interview.
[118] Ibid.

In summary, this case study also provides evidence that reformers utilize interdependent, multi-venue strategies over time to advance a policy goal. The theoretical tenants present in the transportation case study are as follows:

Figure 4
Venues and Strategies Utilized by Reformers Engaged in Transportation Infrastructure Funding Reform

Multi-Venue Approach	Interdependent Strategies Present
Legislative Quasi-Judicial: Attorney General Opinion	Abstaining

This examination of the experience of transportation advocates demonstrates how reformers evaluate legislative and judicial arenas interdependently to advance a policy goal. While those involved in the engineer-architect scope of practice battle were ultimately successful in achieving a desired policy outcome, transportation advocates have yet to achieve their goals of ending diversions from the State Highway Fund and increasing infrastructure funding in general. Because of the opportunity structure in place for accessing the judicial system and/or quasi-judicial venues

of reform, those involved in the engineer/architect dispute were able to use a variety of entry points and strategies that were quasi-judicial in nature. Transportation advocates, on the other hand, perceive the Office of the Attorney General to be their only viable point of access at this time based upon the opportunity structure related to the issue itself. Should the cost benefit analysis to pursue change in the legal realm yield a different result or unforeseen opportunities arise to further engage in quasi-judicial strategies in this policy arena, transportation advocates indicate that they will aggressively pursue this course.

The experience of transportation advocates shows that public interest groups as well as rent seeking groups utilize highly strategic approaches in evaluating when and importantly when not to use a particular venue of reform and that legislative and judicial venues are not viewed as insulated branches but rather as complimentary avenues of achieving a particular policy goal. This case provides a good example of the decision to not engage in quasi-judicial reform despite the relative ease in which that venue was available through the use of an Attorney General Opinion, thus providing greater insight as to how reformers evaluate how and when to utilize such venues.

Despite the fact that the particulars of the desired reform involve technical aspects of the state budgeting process and a sophisticated understanding of state accounting, the transportation infrastructure case study can be categorized as moderately politically salient due to the fact that grassroots organizations and the Tea Party grabbed a hold of the issue. Thus, the in-depth examination of both the engineers and architects scope of practice case study and the transportation infrastructure case study demonstrate how reformers think about the utilization of courts and judicial-like venues alongside the legislative process even given that the nature of the issues themselves varies according to their political salience. Furthermore, the experience of transportation advocated suggests that despite the use of a sophisticated interdependent, multi-venue approach, limitations do exist on reformers abilities to produce their desired change. Next I will examine the highly publicized and polarized issue of voter ID.

Chapter 8

Voter ID

The previously examined issues of the engineer/architect scope of practice battle and transportation infrastructure funding show the use of complex, interdependent strategy in venue selection throughout the policy reform process. Reformers in both case studies continued to evaluate the use of the legislature in conjunction with the use of judicial and quasi-judicial strategies as they progressed in their respective policy reform movements. The engineer/architect case study highlighted strategy in the context of two highly specialized and organized professions in a fairly technical policy arena. Reformers first sought to resolve the issue through the use of quasi-judicial institutions. This approach was not successful, but reformers were eventually able to utilize quasi-judicial and judicial venues to reframe the issue and ultimately spur legislative action. The transportation infrastructure case study examined the use of strategy in the context of public interest groups advancing policy on what they believe to be a public good in a moderately politically salient context. In this case, reformers ultimately

decided against utilizing a quasi-judicial venue because they perceived that a victory in that arena had the potential to undermine their overall policy objective. Do the complexity of strategy and the use of the legislative and judicial venues interdependently also apply in a highly politically salient context where policy is defined along partisan lines? We will examine the use of reform strategy in this context through an in-depth discussion of the issue of voter ID.

The issue of voter ID has been at the forefront of partisan politics in Texas for almost a decade. The issue is on its face a simple matter of showing one's photo identification to vote, much like other everyday activities that require a verification of identity such a using a credit card. Underneath that surface, however, lies a political hotbed of issues related to race, poverty, and corruption.

First proposed legislatively by Republicans in 2005, the issue of voter ID has consumed a great deal of both time and political capital in Texas politics. Democrats in Texas argued that voter ID legislation would disenfranchise poor and minority voters who traditionally vote Democratic. On the other hand, Republicans in Texas argued that voter ID legislation was needed to prevent voter fraud. Although

outnumbered in the Legislature, Democrats succeeded in blocking voter ID bills for three straight sessions. However, the results of the 2010 state legislative elections in Texas surprised even the staunchest Republican insiders. Most political analysts predicted that Republicans would pick up between 8 and 10 seats in the state House of Representatives in which Republicans previously held slim 76 to 73 majority. No one predicted the landslide Republican victory that created a 101 Republican super-majority, an opportunity that was not lost on reformers whose goals aligned with the party in power.

With Republicans holding a two-thirds majority in the state House of Representatives and the Governor designating voter ID as emergency legislation that could be acted on within the first 60 days of the legislative session, Democrats simply would not be able to procedurally block the legislation in the 2011 session.

While this reform had been attempted and failed in previous session, the manner in which the legislation was defeated in the 2009 legislative session intensified the desire on the part of reformers and the Republican Party to achieve success in 2011, a type of payback for the derailing of numerous Republican legislators' legislative packages through the running out of the constitutionally

dictated legislative clock for passing bills. According to the rules of the Texas House of Representatives, bills generally must be taken up in the order that they appear on the House calendar. Bills are placed in order on the House calendar by the powerful Calendars committee normally chaired by the party in power. Thus, the party in power ultimately decides which bills come up for a vote on the House floor. With a little over a week to spare in the 2009 legislative session, the Republican-led House, and specifically the Calendars Committee, placed the voter ID bill on the calendar and prepared for lengthy debate and resistance lead by Democrats, but also knew that they had the votes to ultimately get it passed. But Democrats did not give in easily and crafted a plan that would run out the clock on the legislative session because of the number of bills that preceded the voter ID bill on the calendar. Utilizing the House rules to their advantage, the Democrats began to "chub" bills that appeared before the voter ID bill on the calendar in a similar fashion to a rotating filibuster. The Texas Tribune explains the process of "chubbing:"

> The long-winded House counterpart to filibustering is known as "chubbing." To chub a bill, representatives extend their conversations on legislation that's closer to the front of the line, wasting time and slowly closing the window of opportunity to vote on

> the bill they don't like. The term "chubbing" first appeared in Texas newspapers in the 1950s, according to the Legislative Reference Library, and the Oxford Dictionary of American Political Slang cites the term as uniquely Texan in origin, but provides no insight on its etymology...The Texas House has time limits. A representative has 10 minutes to speak but can go longer if a majority approves. If the majority wants to get things moving, the minority has to find another way to slow progress. They chub, using the full 10 minutes on each piece of legislation in front of their target, delaying consideration until the majority gives up or the legislative clock runs out.[119]

Despite around the clock and through the weekend debate, Democrats were able to run out the legislative clock, but in doing so they not only successfully blocked the voter ID bill, but hundreds of other pieces of legislation that were behind the voter ID bill on the calendar. Some Republicans saw their entire legislative packages derailed as well as "must pass" legislation related to continuation of important state agencies such as the Texas Department of Transportation and the Texas Department of Insurance. Democrats loudly declared victory.

The "chub-a-thon" staged by Democrats in 2009 produced a visceral environment between Democrats and Republicans on the voter ID issue in 2011. From the beginning of the legislative session, Republicans began a systematic affront

[119] Weber, Andrew, "Texplainer: What is Chubbing?" Texas Tribune, February 2, 2011.

on any procedural tactics that Democrats might be able to use to stop the legislation. First, Republican Governor Rick Perry designated voter ID as an "emergency" legislative item at the beginning of the 2011 session. From a procedural standpoint, emergency legislation can be considered by each chamber of the Legislature before the 60th day of the legislative session. By addressing the issue early in the legislative calendar, in this case before what would prove to be a difficult and controversial budget cycle, the chances that the voter ID legislation would be held hostage by Democrats would be diminished. Next, the state Senate presided over by Republican Lieutenant Governor David Dewhurst, who watched their legislative packages die on the House side during the 2009 Democratic torpedoing of legislating calendar, suspended the 2/3 rule in the state Senate which requires that bills in the chamber have the approval of 2/3 of senators in order to be debated. Since rules are adopted by a majority vote at the beginning of the legislative session, Senate Republicans exempted the voter ID issue from the 2/3 rule, running over attempts by Democrats to again block the legislation. The ability to act on legislation within the first 60 days of the legislative session combined with only needing a simple majority to vote on the issue in the

Senate insured little legislative recourse for Democrats opposing the bill.

After the suspension of the 2/3 rule, Senator Juan "Chuy" Hinojosa, a Democrat from the Rio Grande valley, gave an interview to the Texas Tribune in which he is quoted, "We (Democrats) are not just going to roll over and play dead. Now our work is to set parameters for the possible challenge in federal court."[120] This public declaration of strategy is important to our investigation as it demonstrates how both venues are utilized interdependently. Notice that he did not say that "our work" is to challenge to the legislation in court after the legislative session, but to *set parameters* for the upcoming court challenge. At first glance, one might conclude that a federal court challenge supports the litigation strategy literature that argues that judicial venues are utilized as a last resort strategy. While that is partly true, a closer look reveals the perceived interdependence on the part of reformers of the legislative and judicial branches.

According to reformers involved in the issue, witness testimony on SB 14, the voter ID bill, was lengthy and highly strategic. Those in support of the bill framed

[120] Texas Tribune Interview with Senator Juan Hinojosa, "Republicans Can Still Expect a Fight Over Voter ID," January 24, 2011.

testimony in an effort to build the case that voter fraud is a problem that must be addressed while those against the bill framed testimony as to the discrimination and hardship such legislation would cause, particularly on minority populations. Journalists covering the hearings described the testimony as a legal record – not testimony on the merits of legislation in order to persuade legislators how to vote on the issue as committee testimony is traditionally conceived but as a record to be used in the building of offensive and defensive litigation strategy. Ross Ramsay of the Texas Tribune reported:

> Democrats are left to build a legal record, getting expert and nonexpert witnesses to testify (Republicans are doing the same) for the inevitable court fight ahead. Both sides are dug in, and dug in on partisan lines. And the issue is arguably more about politics than about policy, anyway, a proxy for other wars about party politics, about immigration and minorities, about security and freedom.[121]

Democrats and Republicans in the state House dug in as well. Recalling the 2009 debacle, House Republicans showed no quarter. A newspaper article describes the event:

> After more than 11 hours of debate, seven points of order, more than 60 amendments and nearly as many heated exchanges, a mentally vanquished and emotionally exhausted Texas House preliminarily approved the controversial voter ID bill late tonight.

[121] Ramsay, Ross, "Few Obstacles Face Voter ID in the Legislature," Texas Tribune, February 2, 2011.

> They (Democrats) tried — and failed — time and again through amendments to loosen the strict voting requirements.
>
> State Rep. Patricia Harless, R-Spring, the bill's House sponsor, bore the brunt of the Democrats' frustrations. But she and Republican supporters of the measure dug in, and rejected even moderate proposals for change. With Republicans accounting for 101 of the 150 legislators in the House, the bill's approval was never in doubt.[122]

As SB 14 made its way the Governor's desk, Republican reformers finally got the victory they had been seeking on the issue.

However, Senator Hinojosa's description of the Democrats' game plan was well underway. Section 5 of the Voting Rights Act gives the federal government the authority to review state laws that affect voter participation. In a statement to the Justice Department, a coalition of reform groups submitted arguments that the law is meant to disenfranchise minorities.

> The coalition argues that the bill unfairly targets minority and elderly voters, echoing the argument Texas Democratic lawmakers made during the debate over the bill at the Capitol. "This will adversely and disproportionately affect citizens of color who do not have the financial wherewithal as their White counterparts to secure the documentation necessary to meet the Act's strict requirement," states a letter submitted as public comment by the Advancement Project, the American Civil Liberties Union, the Asian American Justice Center and the Southwest Workers

[122] Aguilar, Juan, "Voter ID Passes House After Long, Emotional Debate," Texas Tribune, March 3, 2011.

> Union. The groups wrote that instead of actually providing proof the legislation was enacted for non-discriminatory reasons, the state relied simply on its claim that officials did not intend on diluting the voting strength of minority groups.[123]

Interestingly, the coalition's argument is based largely on the framing of witness testimony during the legislative process, indicating that the testimony provided during public hearings held on potential legislation during the legislative process were part of their overall judicial strategy, evidence of an interdependent, multi-venue approach in a highly politically salient context.

In a separate proceeding, the state filed a lawsuit seeking preclearance in the D.C. District Court in January, 2012 in order to apply the provisions of SB 14 in the 2012 election cycle. Both sides of the dispute utilized bill analyses, witness testimony, committee hearings, floor debate, and other legislative material to frame their arguments regarding the legislation as evidenced by the supplemental documentation that they provided to the court.

On August 30, 2012, the federal court issued its ruling in *Texas v Holder*, finding SB 14 violates Section 5 of the Voting Rights Act. This ruling meant that Texas

[123] Aguilar, Juan, "Updated: Groups Urge Feds to Stop Voter ID Bill," Texas Tribune, September 14, 2011.

could not enforce SB 14 in the 2012 November elections. The ruling states:

> Uncontested record evidence conclusively shows that the implicit costs of obtaining SB 14-qualifying ID will fall most heavily on the poor and that a disproportionately high percentage of African Americans and Hispanics in Texas who live in poverty… We therefore conclude that SB 14 is likely to lead to retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.[124]

Despite the *Texas v Holder* ruling, the voter ID debate continues. Attorney General of Texas Greg Abbott has claimed that Section 5 of the Voting Rights Act is unconstitutional and at the time of this writing is contemplating pursuing action by the United State Supreme Court pending Court action on similar voting rights cases.

The case study of voter ID is a good example of a highly partisan policy reform in Texas. The issue of voter ID was portrayed as a litmus test for the primary voter in both the Republican and Democratic parties and was widely discussed along the campaign trail. Reformers seeking to advance voter ID policy reform attempted legislative change several times before they achieved their policy goals. Interestingly, reformers pushing this issue did not seek reform in the court system after their initial legislative

[124] Opinion of State of Texas v Eric Holder, United States District Court for the District of Columbia, August 30, 2012, p. 55-56.

attempts were unsuccessful like the cases of transportation finance or the engineers versus architects' scope of practice battle. Unlike cases where the legislature chose not take action, in the case of voter ID, the Republican majority attempted to take action but was ultimately defeated by parliamentary maneuvering. Each time reformers approached the legislature on this issue, they expected to win because it was a partisan issue and the issue was in line with the sentiment of the dominant party.

According to reformers, their analysis of the alignment of the issue with the goals of the Republican Party led them to choose a legislative strategy each time. And each time they believed they would win. Reformers engaged in supporting voter ID legislation reported that an initial judicial strategy had been considered as an avenue of reform and that they expected the issue would be challenged in the judicial arena by the opposition. Specifically, they chose the legislative arena as opposed to the judicial arena because of institutional limitations of accessing the court system. Cases relating to voter fraud could conceivably access the state judicial arena and had been contemplated, but by their evaluation would be more difficult to pursue and they would ultimately have less control over the outcome.

However, the decision of reformers in favor of voter ID not to utilize a judicial reform strategy does not mean that a multi-venue approach was not present in this case. A close look at the voter ID case reveals that reformers who worked in opposition to the voter ID bill were not optimistic that the tactics that had worked in past legislative sessions to block the legislation would be successful in 2011. Therefore, their plan shifted to the utilization of the legislative process for reframing their judicial strategy. Reformers in the minority political position with regard to voter ID assessed their odds of success based on the partisan make up of the state political context and concluded that the federal court system would be a less adversarial playing ground not because they perceived it to be less political necessarily, but that it was at least different than the partisan context in Texas. Opportunity structures related to the issue itself allowed them to easily transcend the state political context and reformers wasted no time after the bill became law to move their issue in to that realm.

The voter ID case study provides good insight into reform strategy in a highly politically salient context. Despite Republican legislative majorities, Democrats were successful in blocking voter ID legislation session after

session. Their defeat of the legislation in the 2009 legislative session through "chubbing" in the state House set the stage for an intensely partisan environment in the 2011 legislative session where the normal "rules of the game" were suspended and the legislation was passed through what was called by insiders as a "Republican juggernaut." The legislative process, however, was not wasted by either party. Reformers on both sides viewed the traditional legislative steps of witness testimony, committee hearings, and floor debate as instrumental in framing a future judicial strategy rather than to the actual passage of the bill.

Additionally, this case study reveals interesting nuances regarding the juxtaposition of the federal court system on the state political context and the perceived institutional constraints the judiciary as a venue of reform. Related to the identified institutional constraints, reformers again saw an issue's access to the court system as more complicated as compared to a more open legislative process where almost any issue can be on the table. Secondly, reformers perceived lack of control over the outcome was a disincentive to seek reform through employing a judicial strategy. Third, reformers in this context were unable to access other quasi-judicial

strategies such as Attorney General opinions or the State Office of Administrative Hearings due to the opportunity structure of those institutions and the nature of the voter ID issues; such venues were not a good fit because neither had adequate oversight over this issue to be a viable strategy.

Additionally, the effect of the federal court system on the state political system is also highlighted in this case study. The extent to which a federal court could block a legislative "Republican juggernaut" at the state level is an important nuance to the public law literature and how we understand the strategy of reform. The desire of the reformers in the political minority to seek refuge in the federal court system lends credence to the age-old conception of the United States Supreme Court as a protector of minority rights. While numerous scholars have challenged this notion, it may be that we need to examine concept of political minority in the state political context and how that concept transcends that context into the federal system. A political minority in the state political context may be a majority in the federal context. As demonstrated by the voter ID case study, the ability of a federal court to overturn a majority favored policy outcome at the state level creates additional layers to the

counter-majoritarian debates in the public law literature, particularly if the state's policy is in the minority position at the federal level. Additionally, the understanding of the state legislative process as a foundation for future court action is also a valuable distinction within the public law literature. In this sense, venues of reform are not separate and distinct tracts but fluid and overlapping tools to advance a policy goal.

In summary, the voter ID case study also provides evidence that reformers utilize interdependent, multi-venue strategies over time to advance a policy goal in a highly politically salient environment. The theoretical tenants present in the voter ID case study are as follows:

Figure 5
Venues and Strategies Utilized by Reformers Engaged in the Issue of Voter ID

Multi-Venue Approach	Interdependent Strategies Present
Legislative Judicial: Federal Court	Reframing Venue of Last Resort

The voter ID case study supports the notion that reformers view legislative and judicial venues of reform as interdependent rather than separate and distinct. In the

scope of practice battle between the engineers and architects case study as well as the transportation infrastructure case study, we see how reformers utilize judicial and judicial-like reform venues to stimulate legislative activity through instances of reframing and agenda setting, and even as last resort. The voter ID case study, on the other hand, shows the utilization of the legislative process to stimulate and "set parameters" for future court action. Therefore, it is not a one-directional relationship in that judicial and quasi-judicial venues are utilized to shape legislative activity. Legislative activity, as demonstrated by the voter ID case, is also used by reformers to shape judicial proceedings. Taken together, these in-depth case studies reveal that reformers do not approach venues as isolated institutions, but rather perceive a strategic interdependence in the venues of legislative and judicial reform.

CHAPTER 9

CONCLUSIONS

The primary focus of this study has been the strategy that reformers employ when seeking public policy change in order to better understand the role of courts in policy reform. The nature of the judicial system and its ability to affect policy change has been a central theme in public law literature from both a practical and normative perspective. While numerous scholars have studied issues related to court capacity and impact related to social policy reform from the federal perspective with regard to the US case, the literature is not fully developed from the state perspective.

I hypothesized that varying opportunity structures shape reformers decisions about when, how, and why to utilize a court as a means to shape/make social policy. Additionally, I hypothesized that reformers in the field utilize institutions as a means to advance their policy goals as part of an overall strategy to accomplish an objective, rather than as ends that delivers a specific outcome. These questions contemplate courts in the policy making arena more broadly than courts themselves; rather,

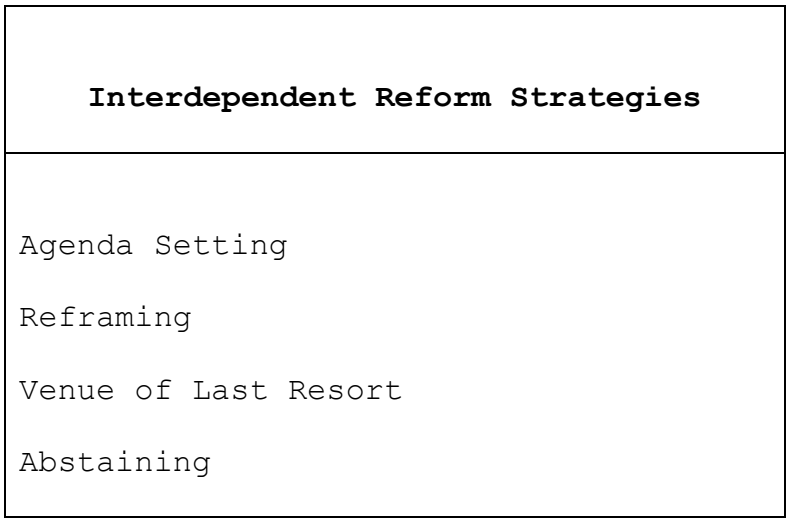
court based strategies can and do encompass other quasi-judicial institutions available to reformers to advance their policy objectives. Constrained by the overall opportunity structures available, reformers choose a set of strategies that utilize available venues in ways that strengthen each other, so that the strategies are not just alternative or sequential but interdependent. Based upon volumes of public law scholarship that tells us that courts are not very good at achieving standalone reform, sophisticated reformers utilize this interdependent, multi-venue approach in order to maximize their likelihood of success.

Building upon the social movement literature which develops the concept of opportunity structures, I contend that opportunity structures as applied to reform strategy are both intuitionally and politically defined. Institutional constraints with regard to opportunities to engage in a particular venue vary and professionalized reformers are aware of the rules associated with barriers to entry for the menu of potential venues that the underlying separation of powers structure dictates. Additionally, opportunity structures, in the US case, are also influenced by federalism. My examination of a state context sheds light on the opportunity structure assessment

of reformers related to their goals and the variation institutional and political contexts between a state and the federal system. Finally, opportunity structures are also politically informed. By varying case studies in this project by political salience, we are able to examine evidence of interdependent, multi-venue reform strategies along this spectrum.

Once opportunity structures have been assessed, reformers craft a multi-venue strategy that contemplates the utilization of legislative, judicial, and quasi-judicial venues. Reformers utilize these venues in an interdependent manner, that is incremental movement in one venue is purposefully meant to create action in another venue. As such, venues may be utilized to achieve smaller objectives on the path to the desired end. To restate, a multi-venue approach logically entails various desired outcomes other than simply achieving the end policy objective. Such strategies are listed in the following table.

Figure 6
Interdependent Reform Strategies



An in-depth examination of the case studies in this project reveals an additional richness in the understanding of the court's role in policy reform. Because reform strategy is not utilized in a vacuum, we see reformers in the examined case studies using the legislative process in conjunction with the judicial process in order to achieve a desired outcome. Therefore, the findings of this research reveal valuable nuances to the way we understand the strategic interaction of the legislature and judiciary and how reformers utilize these venues hand in hand. Reformers do not seem to simply put forward a one-dimensional strategy

of reform of either the legislature *or* the court. It is more accurate to discuss the nature of reform strategy, then, as the legislature *and* the courts. Framed in this light, the question becomes not which venue of reform but how can the interaction between these two branches be utilized to advance a policy goal. The state court can be a catalyst of legislative reform or stymie attempts of reform, even legislatively speaking, depending on reform strategy. Conversely, the state legislative process can be utilized as a building block for future court battles creating dual purposes for the traditionally legislative steps of bill analyses and witness testimony.

Secondarily, the in-depth investigation of reform strategy in the state context adds to our understanding of courts and their role in policy reform as it relates to federalism as an opportunity structure. The juxtaposition of the federal court on the state political dynamic with regard to public policy reform is an important nuance to the public law literature and how we understand the strategy of reform. The desire of the reformers within a state political system to seek refuge in the federal court system lends credence to the age-old conception of the United States Supreme Court as a protector of minority rights. While numerous scholars have challenged this

notion, it may be that we need to examine the concept of political minority in the state political context and how that concept transcends a state context into the federal system because a political minority in the state political context may be a majority in the federal context. As demonstrated by the voter ID case study, the ability of a federal court to overturn a majority favored policy outcome at the state level creates additional layers to the counter-majoritarian debates in the public law literature, particularly if the state's policy is in the minority position at the federal level. As reformers work to remove highly partisan issues from the state to the federal environment, they are assessing the political dynamics of the state versus federal political schemes, as they are not one in the same. When political scientists are discussing the normative implications of the counter-majoritarian dilemma, these discussions are typically limited to the political makeup of either Congress or the country at large. More thought should be given to the concept of counter-majoritarianism at the federal level with regard to state politics. As revealed through examination of the voter ID case in Texas, a Republican tidal wave at the state level is subject to a potentially Democratic majority at the federal level. Scholars interested in normative

aspects of the United States court system could gain further insight through the examination of the juxtaposition of the federal political environment on to individual state environments.

Keeping in mind that the reform process is iterative and the real world is complex, reformers formulate strategy and utilize both the courts and the legislature jointly, but in different manners based on the nature of the issue, to execute their plan and achieve their desired outcomes. In the case of the scope of practice battle between the engineers and architects, reformers were able to use the lack of decisive action by the court to eventually push for a legislative solution. In this case, the state court system was utilized as a catalyst of legislative reform through agenda setting and reframing.

In the case of transportation infrastructure, reformers attempted to engage in quasi-judicial reform strategies as a way to break free of legislative gridlock, but, after carefully assessing the opportunity structures present, decided on an abstaining strategy. This case shows that interdependent, multi-venue strategies are not always successful but are nevertheless evaluated by reformers in their pursuits. Therefore, we must not confuse the lack of activity in one venue to be less

strategic in nature that the presence of activity in another. Due to the perceived barriers to entry to the state court system and challenging political landscape, reformers are currently attempting to reach the Republican Party base in the hopes of changing the characterization of their issue in Texas.

The highly politically salient issue of voter ID shows additional ways in which reformers utilize the judicial and quasi-judicial strategies hand in hand with legislative reform. Despite an overwhelming legislative majority, those fighting against voter ID seized every legislative opportunity to lay the foundation for a court based strategy. Thus, it is not simply a one-directional relationship between the courts and the legislative process (judicial-based strategies utilized to push or curtail legislative reform). The legislative process also is utilized by reformers to directly impact a pre-defined court strategy – legislative process is used to drive court centered reform just as and judicial and judicial like strategies are used to push legislative agendas.

The above discussed case studies vary from highly technical and mundane areas of state policy to highly public and polarizing. Yet across all three case studies, evidence supports a multi-venue strategic lens utilized by

reformers. Thus, we see the presence of a perceived interdependence of legislative and judicial venues by reformers across issue type in the state of Texas context. But how generalizable is this context that is defined by partisan judicial selection, brief legislative session on a biennial legislative cycle, and one-party domination across reform venues? The theoretical framework that I have put forth builds upon well documented literature regarding social movements (opportunity structures) and courts and social policy making. The transcendence of context in the argument that opportunity structures shape reform strategy is well documented. Thus we would expect the notion that reformers across contexts assessing the institutional and political rules of the game to be generalizable, paying attention to the specific institutional design harnessing the availability of venues. In the Texas case, I orient the discussion in light of the nuances of institutional design to make sense of the case studies, but I do not argue nor do the case studies show that the design itself drives reform. Rather, reformers assess the opportunity structure based upon the design and political factors. This argument, therefore, is not overly constrained to the Texas context.

The argument underlying why a reformer would utilize a multi-venue approach to maximize the likelihood of success is also well documented within the public law literature i.e. that courts are not all that good at effecting standalone reform. The particular institutional design characterized by this literature is overwhelmingly appointed judicial selection. While the Texas case differs along these lines, it stands to reason that the logic supporting multi-venue reform is highly generalizable. This study did not draw comparisons in reform strategy in cases that varied according to judicial selection and that may well be an area of fruitful research. My primary argument that reformers who are constrained by the overall opportunity structures available choose a set of strategies that utilize multiple venues in ways that strengthen each other, so that the strategies are not just alternative or sequential but interdependent, builds upon well established, broad-based scholarly literature that is readily generalizable across contexts. The rich case study analysis that the examination of the Texas case provides allows us to uncover rich detail in reform strategy as it applies to broader arguments in the literature.

It may be that with further scholarly investigation and testing, we are able to make broader generalizations as

to the strategic behavior of reformers. Potential large n studies may examine the strategy of policy change across states with varying levels of partisanship. The in-depth case studies in this project reveal a multi-venue approach across issue areas, but perhaps the extent to which the legislature is divided may (or may not) impact the strategy of policy change with regard to both judicial and legislative venues. Additional studies may also examine the extent to which reformers are professionalized. Correlation may exist as to the occurrence of multi-venue avenues of reform with highly professionalized groups. Much could also be gained from a comparative analysis of reform strategies in other democratic environments potentially teasing out a "strategic reform culture" that is either uniquely American or common in established democracies. Furthermore, additional in-depth case studies at the state level will add to our body of knowledge with regard to the strategy of policy change from which additional hypotheses can be generated.

The fact that the examined case studies support this intertwined relationship between judicial and legislative reform may at first blush seem common sensical and therefore less interesting in the scholarly community. However, the public law literature has primarily focused on

the role of courts in policy reform. My contention is that the examination role of courts in policy reform, as demonstrated by this research, must be situated within the framework in which reformers truly operate. Institutional frameworks may vary from case to case, but taking into account the framework as a whole is critical to understanding how judicial and quasi-judicial strategies are really utilized by reformers to advance their goals. If we isolate discussions of courts and policy reform to just the institution of federal courts, we may miss valuable insight as to how reformers actually think about institutions. Imagine the voter ID case study previously examined with such a lens. Hypothetically, the story in a few years might be explained by traditional counter-majoritarian means that reformers utilized the Court in its role as a protector of minority rights; but without 1) contextualizing the Court within a federal framework and 2) examining the reform strategy in light of both the legislative and judicial process at the state level, we would miss out on the utilization of the legislative process by both sides to either advance or inhibit the United States Supreme Court from being able to act in the first place. In the state arena, the explanation of the scope of practice battle between the engineers and

architects may support impact arguments, or lack thereof, that courts are not really good at policy reform in the first place because final resolution was not achieved through court ruling. By viewing judicial reforms in the context of overall reform strategy where reformers utilize both the legislature and judicial system interdependently, we understand more clearly that reformers were utilizing the court to produce a specific legislative outcome.

The significance of this research is that the legislative and judicial arenas of reform are not viewed by reformers as separate pathways but rather synergistic in nature. Each case study demonstrates how reformers utilized both venues interdependently to achieve a desired goal. By reorienting the lens by which we hypothesize, investigate, and study the use of courts, perhaps more nuances of the inter-workings of government systems will be revealed. More research within the public law discipline regarding the use of judicial and quasi-judicial avenues reform in conjunction to legislative reform is needed to further our understanding of the relationship of role of courts in policy change.

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