

Estimating the Location of the States in Legal Policy Space

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Prepared for presentation at the 2014 Annual Meeting of the American Political Science Association, Washington, DC, August 28-31. This paper is based upon work supported by the National Science Foundation under Grant No. SES-1351922. Research assistance was provided by Kayla Canelo.

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The states are a unique and important set of “interests” that advocate before the Supreme Court, yet there currently exists no measure of their location in the legal policy space in which the Court operates. To generate such a measure, we rely on the states’ amicus curiae filings at the Court and treat the positions taken in these briefs as akin to the votes cast by the justices. We then use item-response models to estimate the states’ ideal points. In doing so, we consider the implications of two types of missing data problems: Court cases in which there are no state votes and cases in which some states do not vote. Our estimates reveal that states have increasingly taken more conservative positions than the justices. We also find interesting cross-sectional and longitudinal variation in the positions of the states. With this measure, scholars can now better test spatial theories of the causes and consequences of state participation at the Court, including theories of how states do or do not represent public preferences while advocating before the Court.

One of the most common and powerful theoretical underpinnings of contemporary judicial research involves a spatial understanding of the law.¹ For any given legal dispute or set of disputes, it is assumed that there exists a spectrum of alternative legal policies (i.e., legal precedents or rules) that could be established. A spatial model of judicial decision making predicts the location of policy outcomes in this space based upon the combination of the locations of the relevant actors in this legal policy space and the nature of the rules governing the decision making process. To empirically test hypotheses derived from spatial models of the law, it is necessary to locate the positions of the relevant actors in legal policy space. There has thus been a good deal of effort to estimate the locations, often referred to as “ideal points,” of Supreme Court justices (e.g., Lauderdale and Clark 2012; Martin and Quinn 2002), lower federal court judges (Epstein et al. 2007), and the other branches of federal government (e.g., Bailey 2007).

One of the most active and important sets of actors involved at the U.S. Supreme Court are the states. States are directly involved in litigation that ends up at the Court and actively lobby the Court through the filing of amicus curiae briefs. Given both the unique position of the states in our federal system and their particularly high rates of participation at the Supreme Court, recent scholarship seeks to understand both the determinants and consequences of state involvement at the Court (Goelzhauser and Vouvalis N.d; Nolette 2014; Nicholson-Crotty 2007; Provost 2011). These studies imply a spatial logic in which the ideological location of the states

¹ Research on the U.S. Supreme Court, for example, explicitly or implicitly relies on spatial models to generate hypotheses regarding certiorari decisions (e.g., Owens 2010), oral argument (e.g., Black, Johnson, and Wedeking 2012), judicial votes on the merits of cases (e.g., Segal and Spaeth 2002), bargaining and accommodation during the majority opinion-writing process (e.g., Carrubba et al. 2012; Maltzman, Spriggs, and Wahlbeck 2000), separate opinions (e.g., Corley 2010), and the legal interpretation of precedent (e.g., Hansford and Spriggs 2006).

in the legal policy space in which the Court operates is of critical importance. Our goal here is to provide the first set of estimates of the locations of the states in legal policy space.

By better understanding where the states are located in a given year, scholars will be able to build better models of state involvement at the Court (e.g., Provost 2011) and the potential constraints that the positions occupied by decision-implementing governments might place on Court decision making (see Carrubba and Zorn 2010). Sophisticated measures of the locations of the states in legal policy space will also allow researchers to evaluate for the first time the extent to which state governments represent and/or are responsive to their constituents when expressing policy positions in the legal arena. Do states with more conservative publics express more conservative positions in legal policy space? Is the connection between public opinion and the spatial location of the state conditioned by institutional structure, such as how the state's attorney general is selected? These are the sorts of questions that future research can tackle with a meaningful measure of the expressed ideal points of the states.

To estimate the locations of the states, we rely on their amicus curiae filings at the Court and treat the positions taken in these briefs as akin to the votes cast by the justices in these cases. Armed with data on these "votes" by the states and the justices, we utilize the approaches employed to create the most sophisticated measures of judicial ideology (Martin and Quinn 2002; Bailey 2007) and estimate item-response models that treat the ideal points of these actors as a latent, unobservable trait to be estimated via Bayesian Markov chain Monte Carlo methods. In doing so, we consider the implications of two types of missing data problems: Court cases in which there are no state votes and cases in which some states do not vote.

The results of these estimations reveal interesting features of how the states have positioned themselves in the Supreme Court's legal policy space. The estimates obtained for the

states when the justices are also included in the model show that the states have increasingly taken more conservative positions than the justices. When just the states are included in our item-response model, we find interesting cross-sectional and longitudinal variation in their positions. As with other aspects of American politics, we see increasing partisan polarization in terms of the relationship between the party of a state's attorney general and the position that state occupies in the Court's legal policy space.

An IRT Model of State Ideal Points

Following recent measurement innovations, we use the item response framework to estimate the ideal points of interest (Bailey 2007; Clinton, Jackman, and Rivers 2004; Martin and Quinn 2002). Item response theory (IRT) was developed in the context of educational testing (Baker 1985; Baker and Kim 2004; Lord and Novick 1968), where researchers assume that the ability of a test-taker is a latent trait that cannot be directly observed. With the two-parameter item response model, the probability of a person correctly answering a question (i.e., an item) is a function of both the difficulty level of the question and the person's ability, as conditioned by the extent to which this question discriminates between high and low ability individuals.

This same approach has been used by political scientists to estimate the location of political actors in policy space. In this context, an actor's location in policy space (i.e., their ideal point) is the latent trait. Instead of answering questions, per se, these actors are voting yes or no on policy items. These votes are then modeled as a function of an actor's ideal point, the "difficulty" of the item being voted on, and the extent to which this item differentiates actors based on their ideal points. Using this approach, ideal points have been estimated for members of Congress (e.g., Clinton, Jackman, and Rivers 2004), Federal agencies (Clinton et al. 2012),

Supreme Court justices (Martin and Quinn 2002), and combinations of these actors (Bailey 2007).

Here, we use an item response model to estimate the location of the states in the Supreme Court’s legal policy space. Each Supreme Court case j presents an actor i with the choice of voting to reverse ($v_{ij} = 1$) or affirm ($v_{ij} = 0$) the lower court decision. Importantly, we treat the positions advocated by states in their amicus curiae briefs as equivalent to votes. Thus, if the state of Maryland files an amicus brief advocating that the Court reverse a lower court decision it is treated as if Maryland voted to reverse the decision. The use of the positions expressed in amicus briefs as votes in a case has the desirable feature that these briefs can be very reasonably considered as the same thing as the votes cast by justices. After all, both the justices and the states are formally expressing positions on the outcome of the case (i.e., item) in question. The potential issue with this approach, however, is that Maryland, for example, can and does choose not to vote in most Supreme Court cases. A justice serving on the Court is expected to vote on all cases, except when there is a need to recuse. This an issue to which we return below.

The probability of a vote to reverse is modeled as:

$$P(v_{ij} = 1) = \Phi(\alpha_j + \beta_j' x_{it}),$$

where $\Phi(\cdot)$ represents the standard normal distribution function, α_j is a case-specific “difficulty” parameter, β_j is a case-specific “discrimination” parameter, and x_{it} is the ideal point of voter i at time t in unidimensional legal policy space.² The difficulty parameters essentially allow case-to-

² We assume that the underlying policy space is unidimensional. We do so for reasons of theory, practicality, and convention. Spatial theories of courts and judging are typically based on the assumption that there is a single, fundamental dimension that can reasonably represent legal policy space (e.g., Owens 2010). On the practical side, there are likely not enough “votes” by the states to relax this assumption and allow for a second dimension. Finally,

case variation in the location of the “cut point” separating the votes to reverse and affirm. The discrimination parameters allow cases to vary in terms of how well they sort the voters along the lines of a single policy dimension. These parameters also capture the ideological directionality of votes to reverse. As is convention (see Martin and Quinn 2002), we ultimately orient these measures so that lower values of x correspond with more liberal ideal points and higher values correspond with conservative ideal points. Thus, for example, a positive β means that for the case in question a vote to reverse is a conservative vote while a vote to affirm is liberal.³ As β approaches zero, the case stimuli in question does not lead to voting based on the latent trait, i.e., the spatial locations of the justices and the states.

Adopting Martin and Quinn’s (2002) dynamic IRT model, we allow the ideal points for justices and states to change over time as random walk processes. This allows Maryland’s location in legal policy space to change from term to term, but while incorporating information about its location in the previous term. We specify a somewhat higher level of smoothing than Martin and Quinn do when estimating the locations of the justices, due to the smaller number of votes for the states.⁴ Nonetheless, as discussed below, we see a good deal of both aggregate and individual-level movement in the location of the states over time.

with the exception of Lauderdale and Clark (2012), current work on ideal point estimation for justices (e.g., Martin and Quinn 2002), judges (e.g., Epstein et al. 2007), interest groups (e.g., Bonica 2103), legislators (Bailey 2007), and agencies (e.g., Clinton et al. 2012) typically assumes unidimensionality. This dimension is usually referred to as the typical left-right ideological dimension.

³ Thus, we do not impose an ideological direction for a given case outcome and instead treat the directionality and its associated weight as a quantity to be estimated. We therefore avoid any potential confirmation bias issue with the Supreme Court Database’s directional codes (see Harvey and Woodruff 2013).

⁴ Specifically, we set the delta parameter to 0.05 for all justices and states, except for Justice Douglas. Following Martin and Quinn’s (2002) recommendation, we set his delta to 0.001 (which indicates a higher degree of smoothing from term to term). Martin and Quinn’s estimates for all of the other justices are based on deltas set at 0.10, though they indicate that they still observe significant trending even when delta is set as low as .01 (147). Our choice of .05 is thus well within the boundary of their assessment.

We employ a standard Bayesian Markov chain Monte Carlo (MCMC) approach to estimate the parameters in the IRT model presented above. Within the Bayesian framework, priors are specified, which reflect levels of (un)certainty about parameter values. These priors act as weights for the data (or likelihood) in the estimation process. The end goal within the Bayesian paradigm is to estimate (i.e., converge upon) the probability distribution for a given parameter called the posterior distribution, which is a product of the data and prior beliefs or knowledge about the parameter being estimated. The process for computing the posterior distribution for a model parameter is an iterative process that involves implementing MCMC techniques where a Markov chain is constructed for each model parameter using Monte Carlo (simulation) techniques. This chain represents an approximation of the posterior distribution, which is then summarized and used to produce model estimates. Unlike conventional estimation algorithms (e.g., expectation maximization), MCMC relies on sampling techniques to estimate the model parameters and form the Markov chain.

The specific aim of MCMC is to reproduce the posterior density. Solving for the posterior requires high-dimension integration and this makes it difficult to compute directly. As a result, solving for the posterior is often carried out through sampling repeatedly from the distribution. Specifically, a sampling process is implemented that samples observations from the posterior distribution in order to create a sampled approximation of the posterior distribution.⁵ As samples are being drawn from the posterior distribution via the MCMC estimation process, convergence of the chain is monitored. When convergence is detected, then it can be concluded that an adequate number of samples were drawn from the posterior distribution.⁶ Once

⁵ We sample 50,000 times, after an initial burn-in of 20,000.

⁶ We used the Geweke convergence diagnostic (Geweke, 1992) and the Heidelberger and Welch diagnostic (Heidelberger and Welch, 1983) to assess chain convergence for all model parameters. These diagnostics revealed

convergence has been established, then it is possible to determine the characteristics of the posterior distribution such as the mean and the variance. These characteristics of the posterior distributions are then used to summarize features of the population parameters, which in our model are the case-specific parameters (α_j, β_j) and ideal points (x_j) . We utilize Martin and Quinn's (2002) unidimensional dynamic IRT model in MCMCpack, as implemented in R, to perform all of our MCMC estimations.⁷

Data

To construct our dataset, we begin by identifying in the Supreme Court Database all the orally argued Supreme Court cases from the 1953 through 2010 Court Terms.⁸ We then drop the cases in which there is a unanimous vote in one direction or the other, including the votes of the states.⁹ For each of the remaining cases ($N = 4,015$), we then include the votes of the participating justices, coded zero for affirming the lower court decision and one for reversing. Data on the amicus curiae briefs filed by the states comes from a combination of the *U.S. Supreme Court Records and Briefs*, Lexis, and Gibson (1997). These briefs almost always include a clear statement about whether the state(s) in question advocates that lower court decision be affirmed or reversed and these "votes" are coded as zeros and ones, respectively. Note that we include all the states signing onto an amicus brief as casting votes in the case. There are a total of 12,014 state votes in our data. These votes occur in a minority (885) of the Court cases included in our data, though. This issue is explored further below.

that the 20,000 iterations used for burn-in were sufficient, and the 50,000 posterior samples showed stability (i.e., convergence).

⁷ See <http://mcmcpack.berkeley.edu/index.html>

⁸ See <http://scdb.wustl.edu/>

⁹ We also drop the cases that do not have a clear outcome (e.g., reverse in part and affirm in part).

IRT Models and Results

We estimate and present three different dynamic IRT models. These models primarily vary in terms of how we deal with the issue of missing data. Our data include missing votes for the states.¹⁰ Unlike the justices serving on the Court, the states have no obligation to vote in a given case and most of the time choose not to vote. There are two types of abstention for the states: universal abstention and selective abstention. The former occurs when not a single state “votes” in the case (all states abstain). The latter occurs when only some states vote in the case (some states abstain). The former type of abstention will occur when a case involves an issue of insufficient interest to the states. The latter likely indicates that while the case is of interest to the states, thus generating some state votes, abstaining states are relatively indifferent between the two possible outcomes.

Our first model treats both types of state abstention as votes that are missing at random. We thus include all the votes of the justices and the states in all the cases in our data and estimate the dynamic IRT model as described above. In other words, we treat the states exactly as if they are justices. Our second model deals with universal abstention by excluding all the cases in which there is universal state abstention. Our third model deals with both universal and selective state abstention by including only the votes of the states and treating abstentions as indications of indifference.

Model 1: Treating States like Justices

Our starting point is to estimate the dynamic IRT model while including the votes of both the justices and the states in all the Supreme Court cases described in the data section. We thus implicitly treat all state abstentions, universal or selective, as missing at random. For

¹⁰ There are also missing votes for each justice. Justice Kagan, for example, did not cast a vote in *Roe v. Wade*. Though these votes are not missing at random, we follow the lead of Martin and Quinn (2002) and Bailey (2007) and treat them as such.

identification purposes, we use Martin and Quinn's (2002) priors for several of the justices and add a set of constraints.¹¹ We use diffuse priors for the rest of the justices and for all of the states. Before considering the estimates for the ideal points of the states, it should be noted that the inclusion of the state votes has little effect on the estimates for the ideal points of the justices. The patterns of estimates for the justices that we obtain here are quite similar to those reported by Martin and Quinn (2002), who do not include votes by the states.

Figure 1 presents the minimum, mean, and maximum state ideal point estimates over the 50+ Supreme Court terms included in our data. For the sake of comparison, we also include the minimum, mean, and maximum estimates for the justices during the same time span. To be clear, by "minimum state estimate," for example, we are referring to the lowest of all the means of the posterior distributions for the states. This figure reveals three interesting patterns in the estimates. First, excluding Justice Douglas' very low (i.e., very liberal) estimate for the first two decades of the time period, there is roughly similar cross-sectional variation between the states as there is between the justices. Second, while the mean justice very slightly trends in the conservative direction over time, the states trend much more strongly in this direction. The third and most notable pattern in the estimates is that the states are located far to the right of the justices throughout this time period, particularly over the past couple decades. The least conservative state in these more recent years is considerably more conservative than conservative stalwarts on the bench such as Justices Rehnquist, Scalia, Thomas, and Alito.

*** Figure 1 Here ***

¹¹ We use their informative priors for Harlan, Douglas, Marshall, Brennan, Frankfurter, Fortas, Rehnquist, Scalia, and Thomas (see Martin and Quinn 2002, 147). In order to replicate their general results when the states are excluded, we also find it necessary to add reasonable constraints to the sign for the ideal points of Rehnquist (+), Scalia (+), Thomas (+), Brennan (-), Marshall (-), Stevens (-), and Ginsburg (-). Without these constraints, the directionality of the scale is prone to flipping (i.e., liberals suddenly switch to positive estimates while conservatives suddenly switch to negative estimates).

Figure 2 displays the ideal points for California, Ohio, and Texas, three states that might be ex ante classified in the modern era as liberal, moderate, and conservative, respectively. Throughout this time span, the estimated ideal points for Texas are the most conservative of the three states. California occupies a more liberal position, relatively speaking, until the early 1990s. From this point on, these estimates indicate that Ohio's ideal point is the most liberal, or perhaps more accurately stated, the least conservative.

*** Figure 2 Here ***

At first blush, the results illustrated in Figures 1 and 2 range from plausible to quite surprising. Do the States of California and Ohio, for instance, truly prefer more conservative legal policy outcomes than those preferred by the most conservative justices? Or, are the cases in which states are voting fundamentally different from the cases in which the states are apparently uninterested? In other words, is the inclusion of cases in which there is universal abstention by the states affecting our ability to make comparisons between the ideal point estimates of the justices and the states? Furthermore, is it plausible that California's position in legal policy space is to the right of Ohio's in the 2000s?

To start to assess whether the inclusion of cases in which there is universal state abstention might bias the estimates of the positions of the states vis-a-vis the justices, we estimate the dynamic IRT model while including only the votes of the justices.¹² We then compare the item parameters across two types of case: cases with universal state abstention and cases with at least one state vote (though, again, these state votes were not included in this particular estimation). There are two item parameters that take on different values for each Court case. The difficulty parameter (α_j) is the cut-point for a case and the discrimination parameter

¹² It is important to exclude the votes of the states in this analysis to ensure that any revealed differences in the item parameters is not a function of the fact that there are states voting in some cases but not others.

(β_j) is the weight or coefficient for the effect of the spatial location of the voter. If the discrimination parameter is positive, then the case is one in which a vote to reverse is a conservative vote. If this parameter is negative, then the case is one in which a vote to reverse is a liberal vote. The larger the absolute value of the discrimination parameter, the greater the effect that the ideal points of the voters have on their votes. If this parameter equals zero, then the case can be thought as one that does not cleave the justices along ideological lines. If there are systematic differences in the types of case in which there is universal state abstention, then it should be revealed by comparing the estimates for the difficulty and discrimination parameters across the two types of case. Figure 3 presents kernel density plots of the distributions of item parameters for both case types.

*** Figure 3 Here ***

The distributions for the difficulty parameters are not markedly different between the two types of case. The distributions for the discrimination parameters look quite different, though. The distribution for cases with universal state abstention has a larger mode on the negative end of the scale while the distribution for cases with state votes has larger modes at zero and the positive end of the scale. The cases in which states cast amicus-based votes are more likely to be ones in which a vote to reverse is a conservative vote (i.e., cases in which the lower court decision was liberal). These cases are also more likely to be ones in which the latent trait, location in legal policy space, only weakly differentiates votes. In short, there are systematic differences between the cases with universal state abstention and cases with at least one state vote.

Model 2: Discarding Cases with Universal State Abstention

Due to the systematic differences between cases with state votes and cases without, we estimate the dynamic IRT model while excluding all the cases for which there is universal state abstention. We include the votes of both the justices and the states and use the same priors and constraints as used for Model 1. Because there is only one case with state votes in the 1953 Term, the data used for this model starts with the 1954 Term.¹³ The advantage of including only cases in which there is at least one state vote is that it allows for a better apples-to-apples comparison of the location of the justices and the states, since the estimates for the justices will only be informed by their votes in cases in which the states are also voting. The downside to this strategy, however, is that we are discarding a good deal of information about the location of the justices. Interestingly, however, the Model 2 estimates for the justices are relatively similar to those obtained with Model 1 ($r = .780$).¹⁴

Figure 4 presents the range and mean of the Model 2 estimates for the states and the justices. Despite the fact that the majority of the votes cast by the justices are excluded from this estimation and thus these estimates should be more comparable than those presented above, we see a very similar pattern. Again, the justices move slightly in a conservative direction during the time frame, while the states move much more in this direction. Furthermore, the states consistently occupy much more conservative positions than the justices. The gulf between the expressed preferences of the states and those of the justices is apparently not due to differences in the types of case with and without universal state abstention.

*** Figure 4 Here ***

¹³ This also means that we now exclude Justice Jackson, who did not cast any votes in the cases included for this model.

¹⁴ Less surprisingly, the estimates for the states are very similar to the Model 1 estimates ($r = .987$).

Again, we examine the specific ideal points for California, Ohio, and Texas (see Figure 5). The pattern here is fairly similar to that revealed in Figure 2, though now California and Texas have very similar ideal points for the 1990s and 2000s, which is not necessarily what one would expect to see. Other than overall upward, the pattern for the 1950s through 1980s is more in-line with informal expectations.

*** Figure 5 Here ***

Universal abstention in most Court cases does not appear to explain the result that state ideal points are far to the right of those of the justices. It could be the case that there are structural reasons for the conservative positions staked out by the states. Federalism cases, for example, involve conflicts between state and federal power. States have an obvious and strong structural incentive to “vote” for state power in these cases, which puts them in the company of the more conservative justices. More generally speaking, there has been a rise in the tension between the legal positions advocated by the states and those advocated by the federal government (Nolette 2014). The current attorney general for Texas, Gregg Abbott, has described his job in the following terms: “I go to the office. I sue the federal government. And then I go home” (Nolette 2014, 451). While this may be a somewhat extreme view of the preferences of the states in legal policy space, the unique place that states occupy in U.S. government may help explain their apparently conservative positions.

Similarly, the sizable number of criminal justice cases on the Supreme Court’s docket may also contribute the conservative position of the states. After all, most criminal justice cases at the Court involve a state and a criminal suspect, defendant, or convict. The states will generically tend towards supporting pro-law-and-order positions in these cases. As we discuss below, while there are perhaps strong structural forces leading states to take conservative

positions in the Court's legal policy space it is important to emphasize that there is substantial variation in state support for these positions.

Model 3: Treating Selective Abstention as Informative

The results above suggest that universal abstention is not driving the differences between the positions of the justices and the states. Instead, it is possible that there are genuine structural differences at work. There is a second missing data issue to address, however, once cases with universal state abstention are discarded. Selective abstention occurs when a state does not "vote" in a Court case, even though other states are voting in the case.

We assume that these selective abstentions are a function of indifference between the possible outcomes of a case. That is, we assume that if there is at least one state voting in a case, then this is a case dealing with a legal issue that is of interest to states. Abstentions are then due to indifference over the outcomes. This is a reasonable assumption, as there is little evidence for the states filing, or not filing, amicus briefs for non-policy-related reasons, such as the size of attorney general's budget (Provost 2011).

On the one hand, indifference-generated abstentions are problematic, as they constitute a non-ignorable source of missing votes (Rosas, Shomer, and Haptonstahl N.d.). On the other, indifference-generated abstentions provide us with more information about the positions of the states. For our third model, we treat all selective abstentions by the states as votes of indifference. This is in contrast with the previous two models, in which these abstentions are assumed to be randomly generated. Here, we instead leverage the information provided by these selective abstentions. We should point out that there are a lot of selective abstentions in our data. On average, a case with state votes has votes from approximately 14 states. There is not a single case in our data in which all 50 states took a position via amicus brief.

If there were regularly states voting on both sides of a case, our approach here would imply an ordinal trichotomy of responses/votes: affirm, indifferent, or reverse. There are almost no examples of states taking opposing positions on a Supreme Court case, though, so the choices by the states in a given case are effectively dichotomous. For some cases, a state's choice is to vote to reverse or abstain due to indifference. For other cases, the choice is to vote to affirm or abstain due to indifference. Either way, the choice set reduces to a binary set of positions for each case, allowing us to use the same dynamic IRT model as long as we only include the votes of the states.¹⁵ We cannot include the votes of the justices in this model, as they do not engage in informative abstention. Moreover, their inclusion would lead to a trichotomous choice set since we would then have all three types of votes in a given case. This would necessitate the use of a dynamic ordered choice IRT model. To our knowledge, one has not yet been developed that accommodates new items at each point in time.¹⁶ Thus, the advantage of this third model is that it will allow us to better differentiate the ideal points of the states. The disadvantage is that we are not simultaneously estimating the positions of the justices.

The previous two models were identified and scaled through the use of priors and constraints for the justices. Since we do not include the justices in this model, we now need to include identifying information about the states. We use a positive starting value for a state we expect to be on the conservative side of the spectrum at the start of our time frame (Virginia = 2) and a negative starting value for a state we expect to be on the liberal side (Vermont = -2).¹⁷ All

¹⁵ We still only need to include one difficulty parameter to act as the cut-point between the two possible types of "vote" for a given case.

¹⁶ There are dynamic ordered choice IRT models designed for situations in which the same items exist at each time point (e.g., Treier and Jackman 2008). In our situation, an item is a Court case and only occurs once in the data. Each new time point brings with it a new set of items.

¹⁷ The choice of starting values is informed by both our results from the previous models (where Virginia is particularly conservative in the early years and Vermont is relatively more liberal) and the Common Space scores

other states have starting values of zero. Given that the justices are excluded and that that the states did not vote much on cases in the 1950s, our time frame for this analysis starts with the 1960 Term.¹⁸

The estimates of state ideal points resulting from this third model display a good deal of cross-sectional and longitudinal variation. To illustrate, Figure 6 presents the estimates for the same three states considered earlier. The estimated positions of California, Ohio, and Texas in the 1960s look similar to what was obtained before, though these new estimates indicate, for instance, that during the 1990s California was located to the right of Texas in legal policy space.

*** Figure 6 Here ***

To examine the face validity of one state's estimates, we examine more closely California's estimated position over the past five decades. Specifically, an investigation of the attorneys general (AGs from here on out) for California during this period lends a good deal of credence to the estimates produced for this state by our third model (see Figure 7). The AGs are a good starting point for the purposes of validating these estimates since they exert a great deal of influence of the legal positions adopted by the states (Nolette 2014; Provost 2011; Spill, Licari, and Ray 2001).

*** Figure 7 Here ***

The first two California AGs in this time period were both Democrats. Stanley Mosk, in particular, could be fairly characterized as very progressive. He was responsible for creating the Civil Rights and Consumer Rights Divisions of the AG's Office. Before he became AG, Mosk

for congressional delegations in the 86th Congress (see Poole and Rosenthal 1997). On the first Common Space dimension, Vermont's delegation is the 7th most liberal while Virginia's is the 10th most conservative. On the second dimension, Vermont's delegation is the 3rd most liberal while Virginia's is the 9th most conservative. Other state delegations are more extreme on one dimension or the other, but these two states are particularly consistent across both dimensions.

¹⁸ As with the previous models, delta (the smoothing parameter) is set to 0.05.

was notable for being the California judge who struck down racially restrictive housing covenants (before the Supreme Court's decision in *Shelley v. Kramer*). As one would expect, our estimates reveal that California's ideal point was relatively liberal during the tenures of Mosk and Lynch. The next AG was nominally a Republican, but Evelle Younger quickly established a reputation for staking out strong environmental positions. For example, he pushed for broad applications of the California Environmental Quality Act (which remains a bane to businesses and conservatives). It is not surprising that California continued a relatively liberal course under his watch. California then moves to the right under George Deukmejian, who was then viewed as a moderate Republican once he was governor. A slight leftward move associated with the next Democratic AG is then followed by a much more conservative period of time under Republican AG Dan Lungren, who was subsequently elected to the House of Representatives. As a member of the House, Lungren had a Common Space score that placed him to the right of the GOP average (which was quite conservative during his tenure). The estimate for California then tracks in a more liberal direction under the next two, Democratic AGs. In short, the estimates for the location of California in the Court's legal policy space make a good deal of sense, given the AGs who have served.

To assess how the Model 3 estimates compare with measures of overall state ideology, Table 1 presents the correlation coefficients for these estimates and the three measures of state ideology created by Berry et al. (1998, 2010). We also include the correlations with our estimates for our first two models, though the first two models mostly reveal relative locations of the states in aggregate, as compared to the justices. The Berry et al. measures are scaled such that larger values correspond with liberal states, meaning that we ought to expect negative correlation coefficients when comparing the Berry et al. measures with our estimates.

*** Table 1 Here ***

The estimates of the location of the states in legal policy space that we obtain from Models 1 and 2 do not correspond with the Berry et al. measures in a reassuring manner. We strongly suspect that treating the selective state abstentions as missing at random effectively throws away important information that distinguishes the positions of individual states. The Model 3 estimates have negative and significant correlation coefficients, though the correlations are quite small. Why are these correlations not larger? One likely reason is that AGs have a good deal of control over their states' positions in litigation and are generally quite independent from the other branches of government (Nolette 2014; Provost 2011; Spill, Licari, and Ray 2001). Provost (2011), for example, finds that the filing of amicus briefs by AGs in recent years is influenced by the AGs' partisanship, not the partisanship of the governor. Thus it is not surprising that the positions that an AG advocates on behalf of their state may not be all that connected to the ideological makeup of the rest of state government. Furthermore, given that both AG elections and the filing of amicus curiae briefs at the Court are relatively low information events for voters, it would not be surprising to find a relatively modest relationship between public preferences and the AG's positioning of the state in legal policy space.

It is also possible that the particularly small correlation coefficient for the relationship between the Common Space score based measure of state government ideology and our Model 3 estimates is due to the fact that this Berry et al. (2010) measure uses only the first Common Space dimension. To the extent that the dimension constituting the Court's legal policy space involves civil rights issues, the first dimension Common Space scores may not be directly translatable (see Bailey 2007). This apples-to-oranges issue would be particularly pronounced in the earlier part of our time span, since this is when the first Common Space dimension does little

to incorporate positions on civil rights-related issues (Poole and Rosenthal 1997). Indeed, the correlation between the Common Space-based Berry et al. measure of state government ideology correlates more strongly with our Model 3 estimates ($r = -.303$) if we only examine the second half of our time span (1985 – 2010 Terms).

To further illustrate the results of Model 3, Table 2 presents the five most liberal and five most conservative states per decade. Most of the states making multiple appearances on the liberal list are not surprising (i.e., California, New York, Minnesota, and Washington), though West Virginia may qualify as a nonobvious member of the list. The states making multiple appearances on the conservative list include, not surprisingly, Louisiana and Virginia. Somewhat less predictable is the appearance of New Jersey twice, though in the two earliest decades.

*** Table 2 Here ***

This table also indicates the predominant partisanship of the AG for each of these states during the decade in question. Interestingly, there is a real mix of Democratic and Republican AGs on both lists through the 1990s. It should be pointed out that even by the 1990s the ideological location of the parties in the states varies quite a bit, meaning that, for example, the Republicans in some state legislatures are to the left of Democratic caucuses in other states (Shor and McCarty 2011). In other words, the labels Democrat and Republican do not necessarily connote liberal and conservative, respectively, during the first several decades discussed here. By the 2000s, though, we see the type of partisan polarization with AGs that is seen with other elected officials. All the of the most liberal states have Democratic AGs while the most conservative states have Republican AGs, with the partial exception of Colorado.

Conclusion

The states are especially active and important “interests” that seek to influence the legal policies established by the U.S. Supreme Court, but scholars lack measures of the location of ideal points of these actors and this limits their ability to explain both participation patterns and any consequences of state involvement at the Court (Goelzhauser and Vouvalis N.d; Nolette 2014; Nicholson-Crotty 2007; Provost 2011). How the states position themselves in the Court’s legal policy space is particularly significant, given that these positions likely ought to reflect the preferences of their constituents. Recent research emphasizes the importance of better understanding the connection between state-level preferences and the positions adopted by state government (e.g., Berry et al. 1998; Lax and Phillips 2012; Shor and McCarty 2011). In order to do so, scholars need good measures of the policy positions adopted by the states, including the policy preferences expressed before the highest court in the nation. One of the attractive features of examining state ideal points in the Supreme Court’s legal policy space is that it allows for direct comparisons of the states. Otherwise, these comparisons can be quite difficult as, for instance, state legislatures do not vote on the same bills.

By treating the positions expressed in amicus curiae briefs filed by the states as equivalent to voting in Supreme Court cases, we are able to estimate the location of both the states and the justices in the same legal policy space. These estimates reveal that the states take much more conservative positions than the justices, likely for a number of structural reasons. When we treat selective state abstentions as indicators of indifference, we are able to better estimate the ideal points of the states, though without being able to include the justices. This latter set of estimates corresponds with Berry et al.’s (1998, 2010) measures of state ideology, though not as strongly as one might initially expect. The next step to take will be to assess and

explain variation in the connection between state-level public opinion and the locations of the states in the Court's legal policy space.

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Table 1. Relationships between Berry et al. measures and estimates for state ideal points

	Model 1	Model 2	Model 3
Citizen Ideology	.132	.193	-.258*
Government Ideology (Interest Group Scores)	.118	.167	-.200*
Government Ideology (Common Space)	-.038*	.014	-.072*

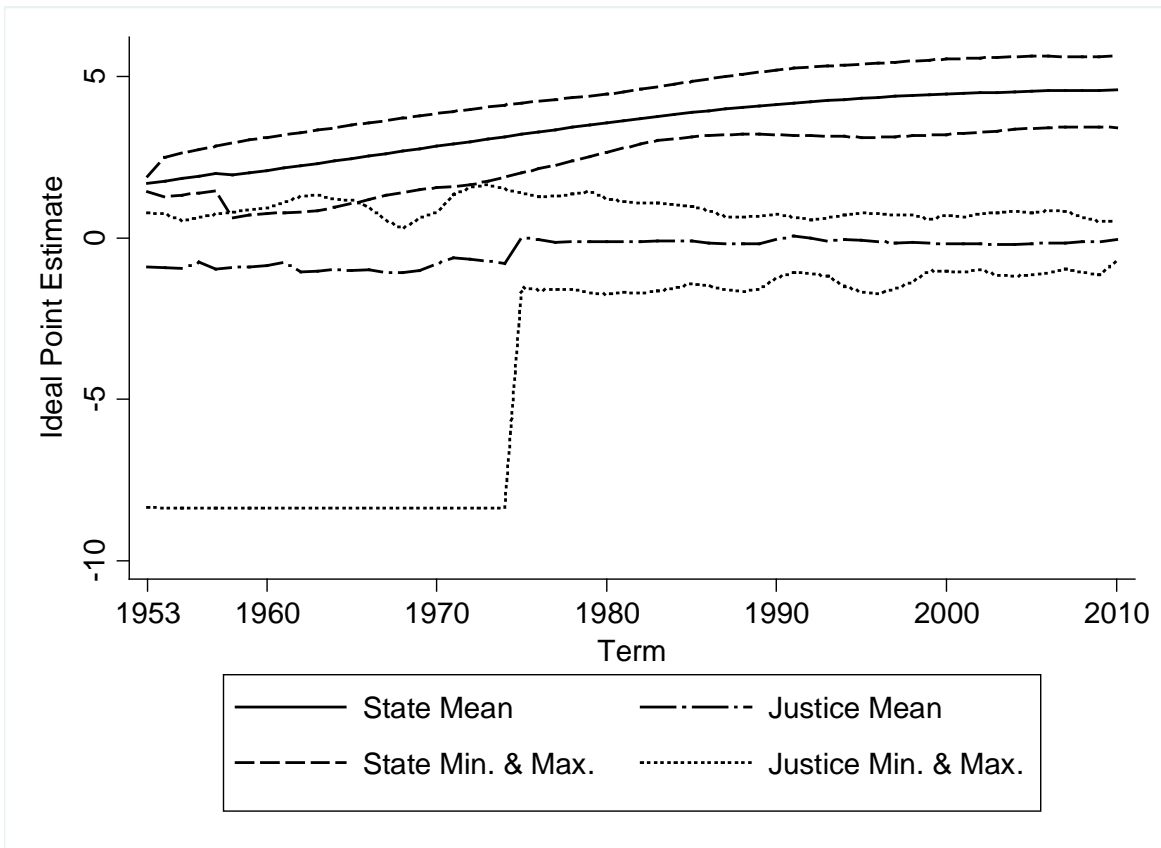
* $p \leq .05$ (one-tailed test). Entries are correlation coefficients. The Berry et al. measures are scaled such that liberal values are larger than conservative ones, thus the correlation between these measures and our estimates of state ideal points should be negative.

Table 2. The most liberal and conservative states by decade (Model 3)

Decade	Most Liberal	Most Conservative
1960s	New York (D) California (D) Oregon (D) Illinois (D) Massachusetts (D/R)	Louisiana (D) Georgia (D) Rhode Island (D) New Jersey (D) Indiana (D/R)
1970s	California (R) Washington (R) Montana (R) New Mexico (D) Idaho (D/R)	Ohio (D) New Jersey (D/R) Pennsylvania (D) Louisiana (D) Maine (D/R)
1980s	California (D) Nebraska (R) Washington (R) Minnesota (D) Arizona (R)	Pennsylvania (R) Virginia (D) Maryland (D) Delaware (D) Connecticut (D)
1990s	Maine (D) West Virginia (D) New York (D/R) Iowa (D) Wisconsin (D)	Nevada (D) Montana (D) California (R) South Carolina (D/R) Virginia (R)
2000s	New York (D) Minnesota (D) Rhode Island (D) West Virginia (D) Vermont (D)	Alabama (R) Utah (R) Colorado (D/R) Texas (R) Virginia (R)

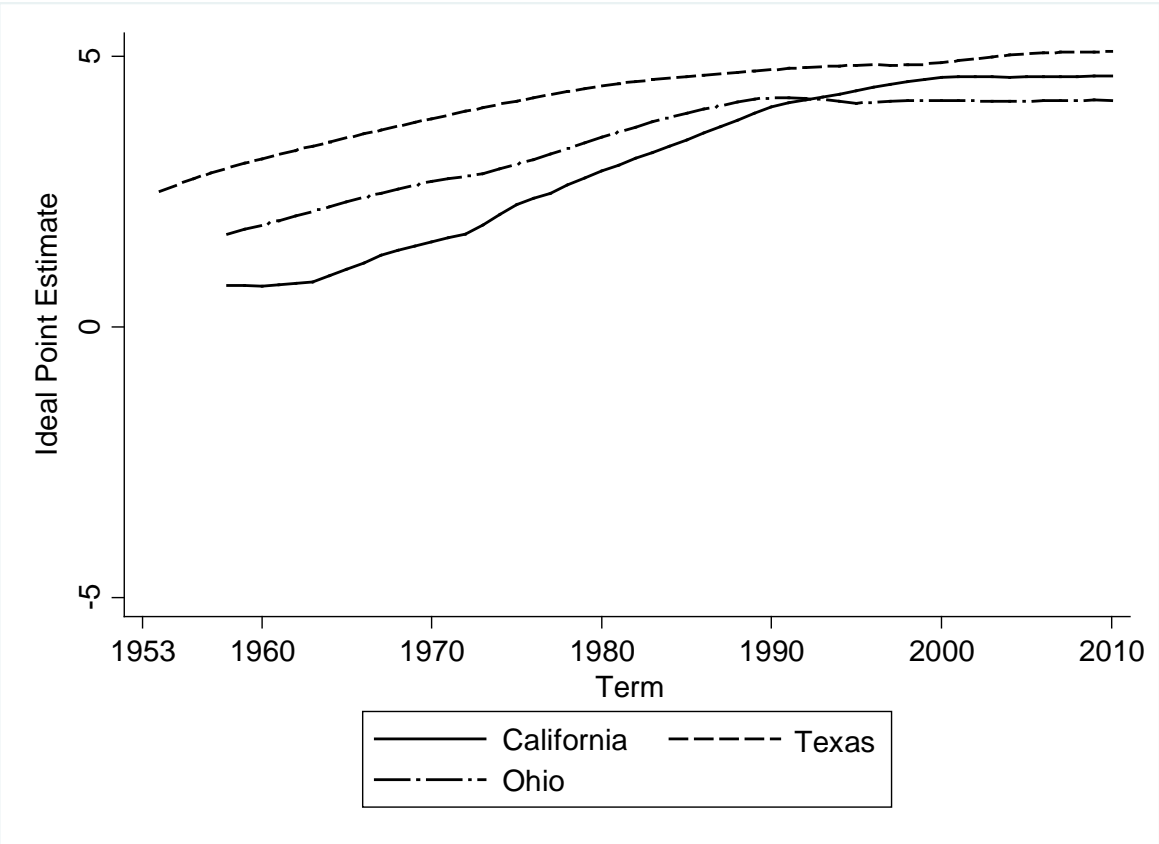
Note: (D) indicates that the state had a Democratic Attorney General for most of the decade while (R) indicates a Republican Attorney General. (D/R) indicates split party control of the position, where neither party controlled the position for more than six years.

Figure 1. Mean location of the states and the justices, Model 1



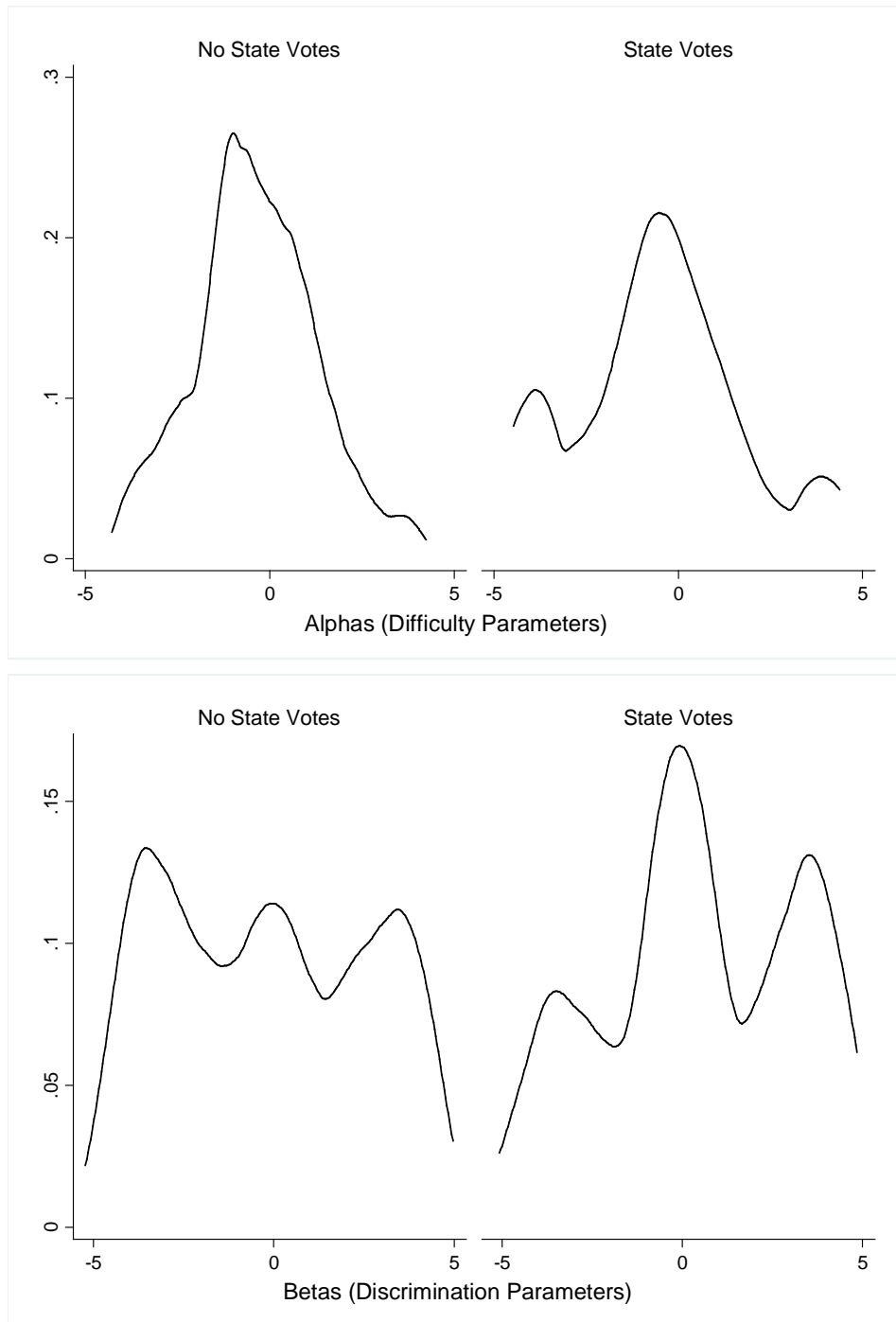
Note: These estimates are generated using all the data on the votes of the justices and the states. Missing votes are treated as missing at random.

Figure 2. Ideal points of select states, Model 1



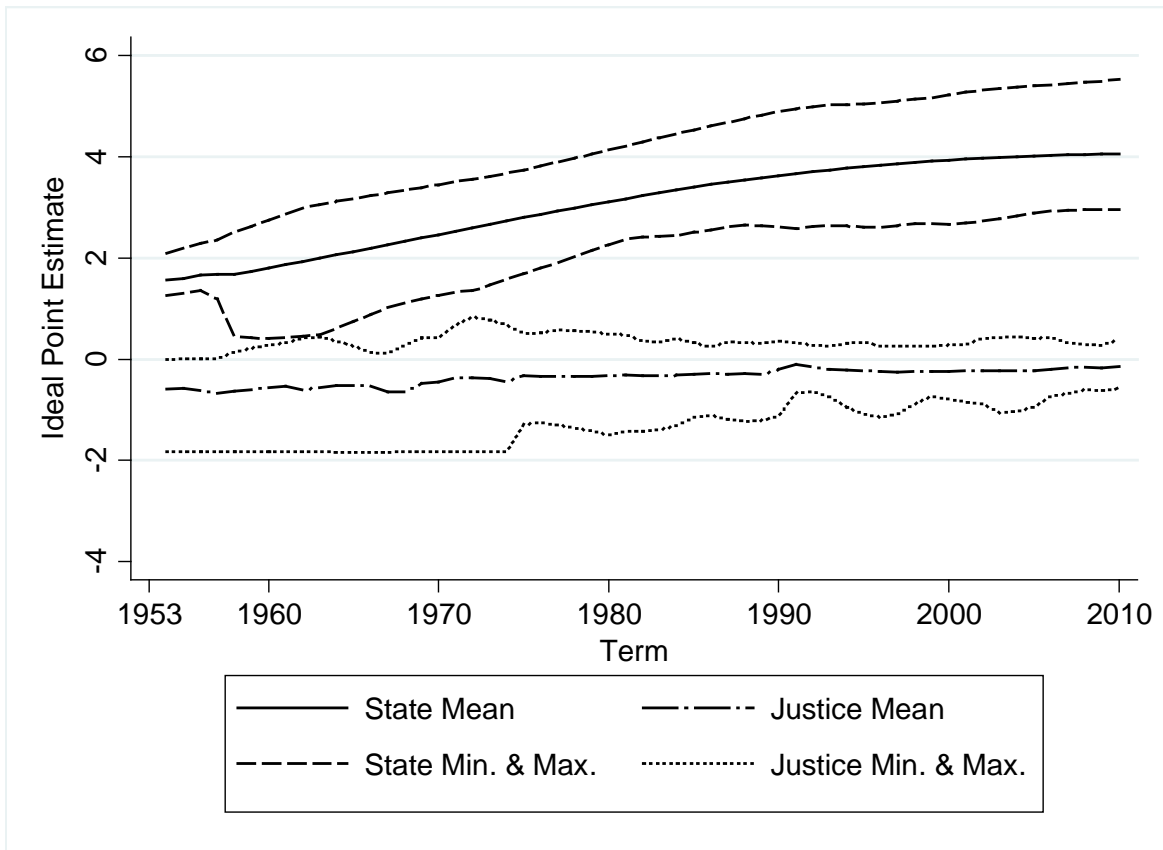
Note: These estimates are generated using all the data on the votes of the justices and the states. Missing votes are treated as missing at random.

Figure 3. Comparing item parameters for cases with and without state votes



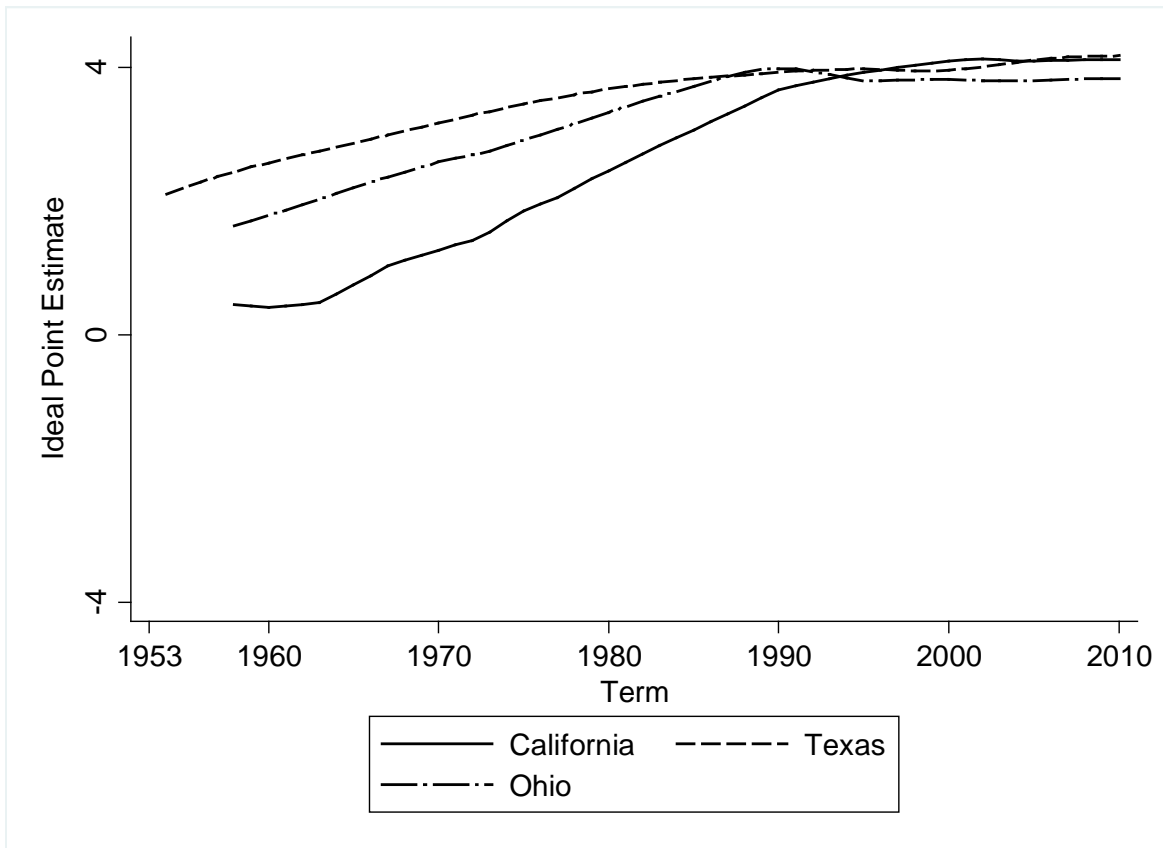
Note: Kernel density plots of the distributions of the difficulty and discrimination parameter estimates when only the votes of the justices are included in the estimation. The plots are separated by whether the item/case is one in which a state did cast a vote.

Figure 4. Mean location of the states and the justices, Model 2



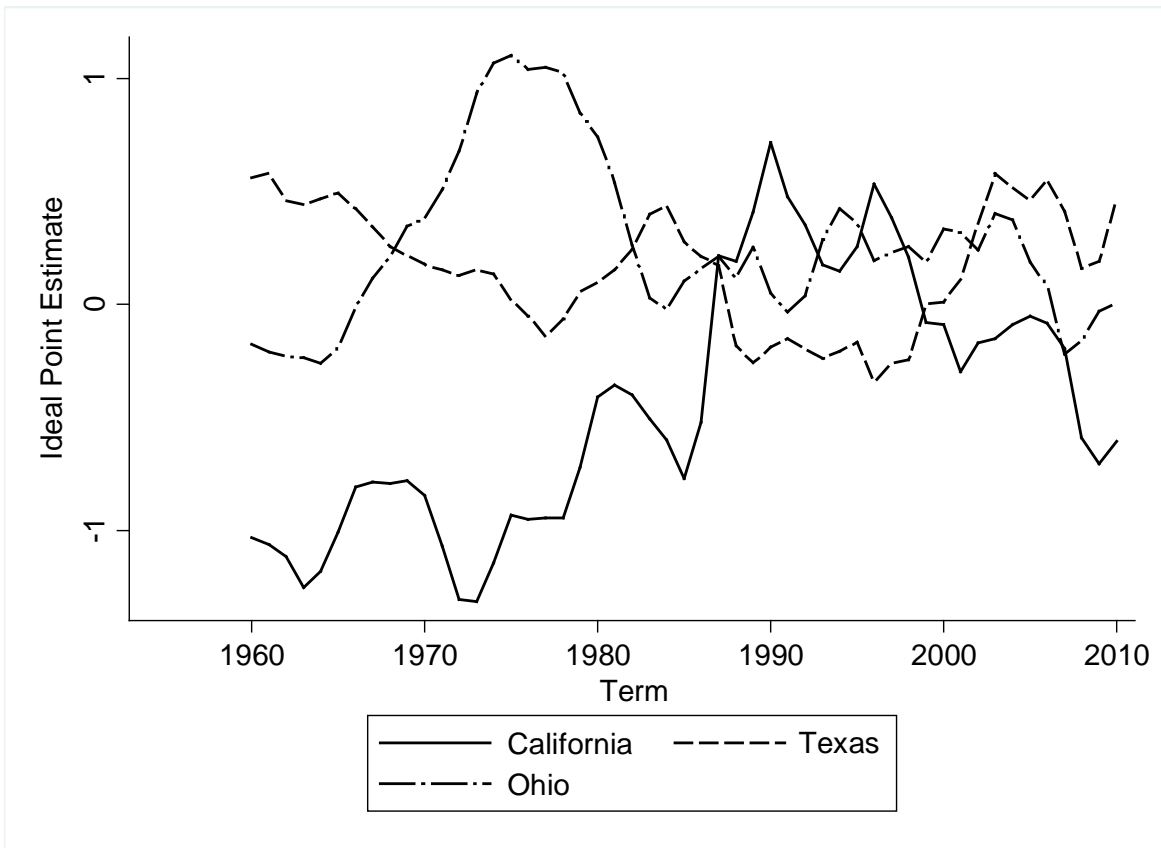
Note: These estimates are generated using the votes of the justices and the states, excluding votes in the cases in which there is universal state absence.

Figure 5. Ideal points of select states, Model 2



Note: These estimates are generated using the votes of the justices and the states, excluding votes in the cases in which there is universal state absence.

Figure 6. Ideal points of select states, Model 3



Note: These estimates are generated using only the votes of the states and treating selective abstention as vote of indifference.

Figure 7. California and its Attorneys General

