JUDICIAL ACTIVISM IN STATE SUPREME COURTS: INSTITUTIONAL DESIGN AND JUDICIAL BEHAVIOR

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I. Introduction

The impact of judicial elections on state court judges' independence, quality, and perceived legitimacy is the subject of intense debate among scholars, journalists, and activists. Although the debate is longstanding, it has intensified recently in light of several modern developments: (1) the U.S. Supreme Court's decision in *Republican Party of Minnesota v. White* (2002),[1] which in-

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[1] 536 U.S. 765 (2002). The literature on the impact (or potential impact) of *Republican Party of Minnesota v. White* is voluminous. *See, e.g.,* Eakins, Keith Rollin and Karen Swenson, "An Analysis of the States' Responses to Republican Party of Minnesota v. White," 28(3) *The Justice System Journal* 371-384 (2007); Solokar, Rebecca M., "After *White:* An Insider's Thoughts on Judicial Campaign Speech, 26 *The Justice System Journal* 149 (2005); Bonneau, Chris W., and Melinda Gann Hall, *In Defense of Judicial Elections* (2009), at Ch. 2-3 (showing that *White* had no impact on challenges to incumbents, voter turnout, or campaign costs); Pozen, David, "The Irony of Judicial Elections," 108(2) *Columbia Law Review* 265-330 (2008)(noting recent "dramatic developments" in judicial elections, including changes wrought by *White* case). The Court's later decision in *Citizens United v.* FEC, 130 S. Ct. 876 (2010), caused further alarm to those concerned about the influence of corporate campaign contributions, as it imposed constitutional limitation on the government's ability to regulate campaign contribution

validated state restrictions on campaign speech for judicial candidates, (2) the politicization of judicial elections and the concomitant rise in costs and campaign spending in those elections, and (3) the resulting threat to public confidence in the state judiciary.[2] These developments have energized reform movements to persuade policy makers in states that elect judges to adopt alternative appointive judicial selection systems.[3]

Reform efforts to eliminate judicial elections typically focus on the unseemly influence of money in campaigns to elect judges who should be impartial to all litigants regardless of campaign support.[4] The "injection of partisan politics" into judicial selection, according to critics, threatens the integrity of the court system by causing citizens to question whether money from corporate or other special interests influences court decisions.[5] Reform efforts have been somewhat successful, at least to the extent that lawmakers in a number of states have recently proposed legislation to change their states' selection method.[6]

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by business interests. Although the Supreme Court recognized the potential for campaign contributions to create the appearance of bias in *Caperton v. A.T. Massey*, 129 S. Ct. 2252 (2009), that decision is not likely to have a substantial impact on the prevalence of judicial qualification. *See* Rotunda, Ronald D. "Constitutionalizing Judicial Ethics: Judicial Elections After *Republican Party of Minnesota v. White, Capertron,* and *Citizens United*, 64(1) *Arkansas L. Rev.* 1-70 (2011).

[2] *See, e.g.,* Editorial, "Judicial Elections, Unhinged," *New York Times* (November 1, 2012), at A20 (noting record spending in judicial elections in 2012 campaigns and calling for revisions to judicial selection mechanisms in states that elect judges); Streb, Matthew J, ed., *Running for Judge: The Rising Political, Financial, and Legal Stakes of Judicial Elections*, New York: New York University Press, 2009.

[3] To be sure, these criticisms are not new. In his 1906 presentation to the American Bar Association, for example, Roscoe Pound lamented the introduction of politics into judicial selection, arguing that "putting courts into politics and compelling judges to become politicians in many jurisdictions" threatened respect for judicial institutions. 29 A.B.A. Rep. 395, 410-411 (1906), reprinted in 8 *Baylor L. Rev.* 1, 19-20 (1956).

[4] As Professor Ronald Rotunda has noted, "the apprehension with judicial elections . . . . reflects . . . concern (1) that we do not produce tbe best judges by electing them; (2) that the increasingly high costs of judicial campaigns leads to a perceptions (and a correct perception, according to its adherents) that there is a link between contributors and the results of judicial decisions; (3) that campaign speech by judges is unseemly and leads to judicial disqualification; and finally, (4) that new protections for corporate and union campaign expenditures will further undermine the concept of an impartial judiciary." Rotunda, Ronald D., "Constitutionalizing Judicial Ethics: Judicial Elections After *Republican Party of Minnesota v. White*, *Caperton*, and *Ctizens United*," 64 *Ark. L.Rev.* 1-70, at 4 (2011).

[5] *See* Justice at Stake, "Judicial Election TV Spending Sets New Record, Yet Voters Reject Campaigns to Politicize the Judiciary" (Press Release, November 7, 201), accessed at www.justiceatstake.org/newsroom/, March 4, 2013.

[6] At the time of this writing, lawmakers in a number of states are considering proposals to change their state's method of judicial selection, including Pennsylvania, Illinois and Minnesota (eliminating elections and adopting merit selection plan), and

The debate over judicial elections has been joined by those who defend elections as "efficacious institutions of democracy" that provide citizens with an important influence over judicial policy making and elected judges with an important source of independence from legislative or gubernatorial control. Perhaps most prominently, Professors Chris Bonneau and Melinda Gann Hall counter the argument that citizens are insufficiently informed about judicial candidates to make intelligent decisions about who should serve on the state bench.[7] Other researchers, including Professor James Gibson, argue that judicial elections *increase* rather than undermine the legitimacy of state legal institutions in the eyes of the public.[8] Professor Matthew Streb agrees: "Although there may be many reasons to oppose judicial elections, the argument that they undermine the public's faith in the judiciary is not the most persuasive one."[9]

No doubt the impact of elections on the public's perception of the justice system is a serious matter that should be carefully investigated using survey instruments or experimental design, as Professor Gibson has done. Beyond the public's perception of courts' legitimacy, however, the debate also turns importantly and critically on whether selection (or retention) methods actually influence court outcomes.[10] One of the key concerns in this area, as noted above, is that campaign dollars influence votes in cases involving litigants who contributed to the campaigns of judges hear-

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Kansas and Tennessee (eliminating judicial nominating commission in favor of Senatorial confirmation process); Reddick, Malia, "State Legislatures Take Up Judicial Selection Reform (Updated), Institute for the Advancement of the American Legal System," IAALS Online, http://online.iaals.du.edu/2013/02/04/state-legislatures-take-up-judicial-selection-reform/, accessed March 1, 2013.

[7] Bonneau, Chris W., and Melinda Gann Hall, *In Defense of Judicial Elections* (2009), at (location 6135) at Table 4.10 (showing that voters differentiate among judicial candidates on the basis of types of judicial experience).

[8] Gibson, James L. *Electing Judges: The Surprising Effects of Campaigning on Judicial Legitimacy,* Chicago: University of Chicago Press, 2012; Gibson, James L., "Judges, Elections, and the American Mass Public: The Net Effects of Judicial Campaigns on the Legitimacy of Courts" (March 8, 2011), available at SSRN: http://ssrn.com/abstract=1780936.

[9] Streb, Matthew J., "Judicial Elections and Public Perception of the Courts," in Bruce Peabody, ed., *The Politics of Judicial Independence,* at 14 (2011); *but see* Benesh, Sara C., "Understanding Public Confidence in American Courts," 68(3) *Journal of Politics* 697-707 (2006)(using survey data on public perceptions of state courts, analysis concludes that where courts are elected via partisan ballot, public confidence in state judiciary is reduced).

[10] See Choi, Stephen J., G. Mitu Gulati, and Eric A. Posner, "Professionals and Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary," 26(2) *Journal of Law, Economics and Organization* 290-336, at 291 (2008)("The relative merits of appointment and selection systems are an empirical question . . . .").

ing their appeals.[11] But in addition to the direct or indirect influence of campaign contributions in electoral systems, selection and retention mechanisms obviously have the potential to shape outcomes in other ways.[12] *How* outcomes differ across state courts with different selection or retention systems remains of central importance to the debate over reform efforts. And it is incumbent on scholars to assist policy makers in assessing the likely consequences for the legal system that follow from the institutional choices they make regarding how to staff the state judiciary.

A. Focus of this Study

This paper enters the debate by addressing how institutional variation across state judicial systems—with a particular focus on methods of retention—affects two dimensions of judicial decision making that have profound consequences for the rule of law. First, the paper presents an empirical analysis of state courts' willingness to invalidate legislative enactments through the power of judicial review. Although judicial review by state supreme courts has been studied previously, the results are mixed or in conflict, with some studies finding that state retention systems influence court decisions to invalidate legislation enactments and others finding no such influence.

Second, this paper presents an empirical model of the extent to which retention mechanisms affect courts' willingness to overrule existing precedent. Shifting doctrinal standards as enunciated in court doctrines also cause disruption to the legal status quo and destabilize citizens' expectations about how courts will rule on matters that affect their legal or transactional relations. Both the exercise of judicial review and the choice to defect from the norm of stare decisis thus shape the stability and predictability of legal standards. These judicial behaviors are critical to the nature and durability of the rule of law in the affected jurisdictions.

Although elected courts are often criticized for politicized decision making, the influence of retention systems on rule of law values is rarely addressed. Yet the manner in which retention mechanisms shape the rule of law should be of central concern to re-

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[11] For empirical evidence regarding the effect of campaign contributions on judicial decision making, *see* Kang, Michael S., and Joanna Shepherd, "The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions," 86 *N.Y.U. L.Rev.* 68-129 (2011).

[12] Hanssen, Andrew F., "Political Economy of Judicial Selection: Theory and Evidence," 9 *Kansas J.L. & Pub. Pol'y* 413-424, at 417 (2005)(variations in judicial institutions affect judicial behavior by altering the costs and benefits associated with particular actions).

formers. To be sure, the corrosive influence of campaign contributions on judicial decisions threatens the rule of law by undermining the critical value of judicial impartiality. Other rule of law values may also be affected, however. In particular, judicial selection and retention methods may impact the stability and predictability of legal rules by shaping judges' incentives either to invalidate statutes through the power of judicial review or to undermine stare decisis by overruling court doctrines established through precedent.[13]

Of course, invalidating statutes or overruling precedents are not, in themselves, improper court actions. Legislatures enact unconstitutional legislation from time to time and courts properly check those unlawful actions when they exercise the power of judicial review. Similarly, court doctrines may become obsolete in the face of shifting norms or conditions such that overruling the obsolete precedent benefits society. Existing precedent may have been ill-reasoned or based upon invalid assumptions, rendering it suitable for later invalidation. Nevertheless, these judicially-engineered changes to the law alter the legal status quo and thus have the potential to disrupt expectations, existing transactions, or other legally proscribed relationships.

The question is therefore a relative one. Do certain judicial institutions promote certain forms of judicial behavior relative to other institutional arrangements? Are judges retained through election more likely than other judges to destabilize the legal status quo compared to appointed judges (or vice versa)? If so, the consequences are potentially profound and far reaching. Where legal systems produce rules that are in constant flux, for example, economic growth may be adversely affected.[14] And where courts demonstrate a willingness to invalidate legislation or overrule precedent frequently, their actions may reduce parties' willingness to settle disputes and thus burden court dockets with cases that would have otherwise concluded pursuant to alternative dispute resolution processes.

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[13] Lon Fuller identified a list of rule of law virtues that included: (1) consistency, which requires general rules; (2) transparency and publicity of law; (3) prospectivity; (4) internal consistency in the sense of a lack of contradictory rules; (5) possibility, in that rules do not make demands that cannot be implemented; (6) stability over time; (7) application as written; and (8) clarity. Fuller, Lon, *The Morality of Law* (1964), at 65-91.

[14] *See* Feld, Lars P., and Stefan Voigt, "Economic Growth and Judicial Independence: Cross-Country Evidence Using a New Set of Indicators," 19 *European J. of Political Economy* 497-527 (2003).

B. Judicial Activism and State Courts: A Theoretical Puzzle

Invalidating legislation or overruling precedent also implicates debates over judicial activism. Although critics often claim that the concept of activism is devoid of substantive content, a careful conceptualization of the term reflects certain critical components that may be measured. In our book *Measuring Judicial Activism,* Frank Cross and I identified several key elements to the concept in the context of a study of the U.S. Supreme Court.[15] As we pointed out there, judicial activism is reflected in certain behaviors that enhance the power of the judiciary at the expense of the elected branches or engage the judiciary in certain lawmaking activities more properly exercised by the legislature and executive.[16] At their core, charges of activism rest on the principle that judges should not "legislate from the bench"; by engaging in certain types of policy-making, critics claim that activist judges overstep the boundaries of courts' proper role in a democracy.

Activism is more likely to be present, for example, in court decisions that invalidate legislation adopted by the elected branches or that overturn existing precedent in favor of a new legal rule preferred by the current court majority. Such decisions may be considered activist in that they replace the judgments of democratically elected decision makers (in the case of judicial review) or thrust the judiciary into the role of law maker (in the case of the disruption of existing precedent). In both these situations, the judiciary's actions implicate rule of law values by destabilizing governing statutory or common law standards upon which citizens rely in the ordering of their legal affairs.[17] Although the exercise of judicial review and the overruling of precedent may be justified in individual cases, they nevertheless represent judicial behaviors that are clearly more activist than the alternatives (i.e. upholding legislation or following precedent).

State supreme courts offer intriguing twists on the typical theoretical treatments of judicial activism, however. Most criticisms of activism focus on the unelected federal courts and the challenge

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[15] Lindquist, Stefanie A., and Frank Cross, *Measuring Judicial Activism,* New York; Oxford University Press (2009).

[16] *Id.* at Chapter 2.

[17] *See* Swenson, Karen, "School Finance Reform Litigation: Why are Some State Supreme Courts Activist and Others Restrained?" 63 *Albany L.Rev.* 1147-1182, at 1150 (noting that public school finance cases in state supreme courts represent "quintessential example of judicial activism" because they involved the "least accountable branch of state government overrul[ing[the highly visible public policies set by state and local legislative bodies [using] relatively novel precedent").

to democratic theory that emerges when those courts counter the will of the majority as expressed through legislation.[18] Similar concerns arise when federal courts shift the doctrinal landscape by overruling precedents, as this move reflects the justices' decision to create new law and upset the status quo otherwise protected by the norm of *stare decisis*.[19] Simply put, compared to decisions that respect *stare decisis,* overruling precedent looks more like legislating from the bench in that the court has chosen a new policy direction in the face of preexisting and otherwise constraining legal rules.

Yet these concerns are turned on their head in the context of elected judiciaries, since they may claim a separate base of institutional legitimacy and accountability through their electoral connection to the voters. Given their accountability to the people, it is more difficult to challenge their law-making decisions as truly "countermajoritarian." Indeed, for one commentator, elected judiciaries raise instead the threat of a "majoritarian difficulty" which occurs when courts are pressured to *uphold* the actions of legislative majorities even in the face of clear constitutional problems.[20] Where majoritarian pressures influence elected judges' decision making, it may jeopardize those judges' commitments to constitutionalism and, in that respect, undermine the rule of law.[21]

State judicial selection and retention methods thus pose a theoretical puzzle in relation to traditional critiques of judicial activism. Where charges of activism stem from the "countermajoritarian difficulty," elected judges in state supreme courts may claim immunity. No countermajoritarian actions follow from their decisions to invalidate legislation, especially when the enacting legislative majority fails to reflect the current electorate's preferences.[22] Nor should an elected court's lawmaking ac-

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[18] Friedman, Barry, "The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Par Five," 112(2) *Yale L.J.* 153-259 (2002).

[19] *See* Epstein, Lee, and Jack Knight, "The Norm of *Stare Decisis*," 40(4) *American Journal of Political Science* 1018-1035, at 1022 (1996)(if precedent is regularly and systematically rejected, Court's legitimacy is undermined).

[20] Croley, Steven P., "The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law," 62 *U. Chi. L. Rev.* 689, 757 (1995)(noting that central problem identified in connection with the countermajoritarian difficulty—the fact that judges are not accountable to the democratic majorities—is missing in the case of elective judiciaries).

[21] *Id.* at 788.

[22] Reform movements to elect judges in the nineteenth century were motivated, in part, by reformers' concerns that judges' development of the common law involved the usurpation of legislative power. "To the extent that the courts were thought of as entrusted with powers which we should not regard as purely legislative, it was not unnatural to argue that they should somehow be subject to popular control." Haynes, Evan, *The Se-*

tivities through the creation of new judicial doctrines generate anxiety over "legislating from the bench," since these new policy pronouncements carry legitimacy conferred through the electorate's selection and retention of the judicial policy-makers themselves.

Even state judiciaries where judges serve for terms of years and are retained by the governor or the legislature may be said to remain accountable to the electorate, albeit indirectly through retention decisions by the elected branches. Such arrangements stand in stark contrast to the federal judiciary where indirect electoral accountability is present only at the time of selection; thereafter, federal judges serve for life on good behavior. Only three states—New Hampshire, Massachusetts, and Rhode Island—provide for life-tenure (or life tenure until age 70) following initial appointment by the governor or a merit selection committee. Otherwise, appointed judges stand for retention elections before the electorate or reappointment by the legislature or governor.

As a general matter, then, state judiciaries do not implicate the countermajoritarian difficulty to the same extent as the federal judiciary. As Robert Williams has observed, "'[s]tate courts are not simply 'little' versions of the federal courts."[23] Nevertheless, state judges' decisions to disrupt the legal status quo via judicial review or the rejection of precedent may be criticized on other grounds. First, as noted above, these behaviors disrupt citizens' expectations and alter legal relationships. To the extent that one set of judicial institutions encourages courts to engage in these actions more often than do judges operating in different institutional environments, it is worth noting when considering the consequences of institutional reform. Second, arguments related to institutional competence may shape normative perspectives on court actions that counter the legislative will or overturn court doctrines. [24] Unlike legislatures, courts are passive institutions that must await cases on their dockets in order to effect policy change.

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lection and Tenure of Judges (The National Conference of Judicial Councils, 1944), at 96 (quoted in Sheldon, Charles H. and Linda S. Maule, *Choosing Justice: The Recruitment of State and Federal Judges* (1997), at 4).

[23] Williams, Robert F., "Juristocracy in the American States?" 65 *Md. L.Rev.* 68-81 (2006), at 78.

[24] This observation does not, of course, address the question whether elected courts should defer to legislative judgments and prerogatives based on traditional notions of parliamentary supremacy. But where states have chosen to elect their judiciaries, it may be presumed that the electorate has essentially rejected the principle of legislative supremacy. The history of the rise of judicial elections suggests as much. *See* Shugerman, *supra* note ##.

Their decision making is constrained by the scope of the information provided through the adversarial process, which may include amicus briefs but cannot extend to the broad investigative functions available to the legislature or an administrative agency. And the orders courts enter are limited to the parties before them, although class actions and broadly phrased precedents may extend their rulings to affect citizens at large. In short, courts' comparative institutional competence as policy makers is limited relative to the legislative and executive branches.[25] These arguments have been articulated in the work of scholars such as Jesse Choper, Donald Horowitz, and Gerald Rosenberg, particularly in connection with U.S. Supreme Court policy making.[26] Finally, it is not clear, even in an era of increasing salience for judicial elections, that the electorate is as well informed about judicial elections (or appointments) as they are about legislative or gubernatorial elections.[27] Comparatively speaking, judges' democratic "credentials" may not match those of legislators, since legislators' accountability to the people reflects a tighter electoral connection.

For these reasons, the relative degree to which judges engage in activist decision making is not unimportant even in the face of the enhanced legitimacy state court judges draw from their closer

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[25] Since state court precedents may be reversed by the legislature—especially in statutory cases—the choice to overturn a court decision has the potential to circumvent or replace legislative choices. In the case of constitutional interpretation as well, judicially-generated shifts in the doctrinal landscape supersedes the referendum process many states use to amend their constitutions. This effect might be seen most obviously in the recent history of state court decisions involving gay marriage, where state judiciaries' active choices to legalize gay marriage has trumped (at least temporarily) legislative involvement in the field. *See* Williams, Robert F., "Juristocracy in the American States?" 65 *Md. L.Rev.* 68-81 (2006), at 68 (gay marriage decisions are "simply illustrative of how state courts in many jurisdictions have developed into major policymaking branches of state government").

[26] Horowitz, Donald L., *The Courts and Social* Policy (1977), at 17 (debate over democratic character of judicial review raises issues not only of legitimacy but also of capacity—can courts exercise this power competently?); Choper, Jesse H., *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* (1980)(comparing the institutional capacity and accountability of the U.S. Supreme Court to the elected branches); Rosenberg, Gerald, *The Hollow Hope: Can Courts Bring About Social Change* (1991)(evaluating efficacy of Supreme Court in furthering social reforms, as compared to elected branches).

[27] Indeed, some observers may have preferred the state of affairs prior to the 1990s, when low salience judicial elections effectively severed the electoral connection between judges and the electorate. As Matthew Streb has observed, prior to the 1990s, "[j]udicial elections . . . were rarely contests and contested elections were rarely competitive. . . . To detractors of judicial elections, these traits were positive since they protected judicial independence and the integrity of courts." Streb, Matthew J., "Judicial Elections and Public Perception of the Courts," in Bruce Peabody, ed., *The Politics of Judicial Independence,* at 148 (2011).

connections to the electorate. The results of the empirical analysis described below indicate that judges subject to reelection through a nonpartisan or partisan ballot are more likely to invalidate legislative enactments and to overrule existing precedent than are judges retained via other reappointment methods. Some evidence exists even to demonstrate that judges subject to uncontested retention elections exercise the power of judicial review more often than judges retained by the legislature or governor. These results hold even after controlling for a host of court-, state- and judge-level characteristics. Judges who are answerable to the electorate and who are insulated from retention by the elected branches are, quite simply, more activist. This result may not surprise court observers. After all, elective systems were implemented in order to provide state court judges with an independent base of electoral support from which to challenge and rein in legislative activism. Nevertheless, for those interested in reforming judicial elections, this information is critical to a complete understanding of the ways in which judicial retention systems affect the rule of law.

II. Institutional Structures and Judicial Behavior

The preceding discussion highlights the importance of institutional design on judicial decision making, with a particular emphasis on the manner in which retention methods may impact judges' willingness to engage in activist decision making. But before analyzing the empirical evidence regarding judicial activism, it is useful to pause and consider (1) the extent to which state court institutional characteristics vary, and (2) what the existing empirical evidence tells us about the ways in which these varying institutional structures affect the quality, independence, and substance of judicial decisions in state courts.

A. Variation in State Court Structures

American colonists' experience with British judges manipulated by the king led early framers of state governments to create judicial institutions that would ensure that judges were independent from the executive branch.[28] Each of the original thirteen states had appointed judiciaries—either by the legislature or the governor who, himself, was selected by the legislature and under

[28] Volkansek, Mary and Jacqueline Lucienne Lafon, *Judicial Selection: The Cross-Evolution of French and American Practices* (1988), at 19. According to the Declaration of Independence, the King "has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."

its control.[29] Judges were appointed to serve "on good behavior," with removal by the legislature via impeachment.[30] States that entered the union between 1776 and 1930 adopted the same forms of selection and retention regimes. When state legislatures' improvident spending led to the Panics of 1837 and 1839, however, state constitutional conventions responded by creating new constraints on legislative activism, including empowering judiciaries to enforce them.[31] Judicial elections provided state judges with an independent base of popular legitimacy to challenge the legislative will. Every new state to enter the Union between 1846 and 1912 chose to institute judicial elections.[32] These changes were also consistent with the rise of Jacksonian democracy, with its emphasis on self-governance by the common man.[33]

Within decades after their initiation, however, judicial elections came under attack after the Civil War, when observers became concerned that partisan politics was adversely affecting judicial elections and court legitimacy. To counter this influence, some states adopted a solution thought to enhance judicial independence from partisan politics: longer term lengths. Later reform movements at the turn of the twentieth century, motivated by the Progressives, promoted the adoption of nonpartisan elections. Ultimately, these reform movements culminated in the development of the Missouri Plan, which provided for the nomination of judges by a commission of judges, lawyers, and laypeople, gubernatorial appointment of a nominated judge, and finally, after a period of probation, the judge's retention via an unopposed election. These reforms were intended to remove partisan politics from the judicial selection and retention processes.

The long history of shifting reforms at the state level has led to a widely varying set of practices across state judiciaries. The majority of state court judges are elected.[34] At the state supreme

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[29] Sheldon, Charles H. and Linda S. Maule, *Choosing Justice: The Recruitment of State and Federal Judges* (1997), at 2.

[30] *Id.* at 3.

[31] *See* Dinan, John, "Independence and Accountability in State Judicial Selection," 91 *Texas L.Rev.* 633-649, at 635 (2013)(reviewing Jed Handelsman Shugerman*, The People's Courts: Pursuing Judicial Independence in America* (2012)).

[32] *Id.* at 636.

[33] Sheldon and Maule, *supra* note ##, at 3.

[34] A salient qualification regarding judicial elections involves reliance on gubernatorial appointment to vacant seats between elections, a practice which is widely followed in states that elect their judges on a partisan or nonpartisan ballot. *See* Reddick, Malia, Michael J. Nelson, and Rachel Caufield, *Racial and Gender Diversity on State Courts:*

court level, thirty-eight states select judges through some type of judicial elections (partisan, nonpartisan or retention), while the remaining twelve grant life tenure or provide for gubernatorial/legislative reappointment.[35] State supreme courts also vary in the lengths of judicial terms. As noted above, only three states provide judges with life tenure, in two states until the age of 70. All other state supreme court justices' terms vary between six and fourteen years. These courts also vary in size, with many small states staffing their supreme courts with five justices, others with seven (the modal category), and several with nine. Two states split their supreme courts into two separate tribunals with jurisdiction over criminal or civil cases (Oklahoma and Texas). These remarkably varied institutional variations are set forth in Table 1.

An AJS Study, 48(3) *The Judges' Journal* (2008)(examining impact on state court diversity of governors' power to fill mid-term vacancies).

[35] For the two states with bifurcated state supreme courts (Oklahoma and Texas), the justices are selected and retained using the same methods of both courts.

Table 1: Institutional Characteristics, State Supreme Courts

State	Selec-tion	Reten-tion	Size	Term (Years)
Alabama	P	P	9	6
Alaska	M	R	5	10
Arizona	M	R	5	6
Arkansas	P	P	7	8
California	G	R	7	12
Colorado	M	R	7	10
Connecticut	LA	LA	7	8
Delaware	M	G	5	12
Florida	M	R	7	6
Georgia	N	N	7	6
Hawaii	M	J	5	10
Idaho	N	N	5	6
Illinois	P	R	7	10
Indiana	M	R	5	10
Iowa	M	R	7	8
Kansas	M	R	7	6
Kentucky	N	N	7	8
Louisiana	P	P	7	10
Maine	G	G	7	7
Maryland	M	M	7	10
Massachusetts	M	--	7	Age 70
Michigan	N	N	7	8
Minnesota	N	N	7	6
Mississippi	N	N	9	8
Missouri	M	M	7	12
Montana	N	N	7	8
Nebraska	M	R	7	6
Nevada	N	N	7	6
New Hampshire	G	--	5	Age 70
New Jersey	G	G	7	7
New Mexico	P	R	5	8
New York	M	G	7	14
North Carolina	P	P	7	8
North Dakota	N	N	5	10
Ohio	N	N	7	6
Oklahoma	M	R	9 (5)	6
Oregon	N	N	7	6
Pennsylvania	P	R	7	10
Rhode Island	M	--	5	Life

South Carolina	LE	LE	5	10
South Dakota	M	R	5	8
Tennessee	M	N	5	8
Texas	P	P	9 (9)	6
Utah	M	R	5	10
Vermont	M	LE	5	6
Virginia	LE	LE	7	6
Washington	N	N	9	12
West Virginia	P	P	5	6
Wisconsin	N	N	7	12
Wyoming	M	R	5	10

Source: American Judicature Society (http://www.judicialselection.us/). In Oklahoma, the Supreme Court (Civil) has nine judges, the Court of Criminal Appeals has five; In Texas, both civil and criminal supreme courts include nine judges. Term length includes term following retention election, if applicable. P=Partisan Election, N=Nonpartisan Election, G=Gubernatorial Appointment, M=Merit Selection, R=Retention Election, LA=Legislative Appointment, LE=Legislative Election, J=Reappointment by Judicial Nominating Commission.

The variables identified in Table 1 do not begin to canvas the full panoply of institutional characteristics that vary across state courts. Several of particular relevance to this study deserve specific mention. First, the composition of state supreme court dockets differ because of divergent rules regarding mandatory and discretionary jurisdiction on appeal. In the absence of an intermediate appellate court, mandatory appeals constitute a larger percentage of a court's docket.[36] Ten states, generally with smaller populations, do not have intermediate appellate courts.[37] In addition, state courts vary substantially with respect to their budgetary resources and institutionalization. Among the indicators of a court's professionalization are the justices' salaries, the number of law clerks, and a court's level of control over its docket.[38] Typical-

[36] Eisenberg, Theodore, and Geoffrey P. Miller, "Reversal, Dissent, and Variability in State Supreme Courts: The Centrality of Judicial Source," 89 *Boston Univ. L.Rev.* 1451-1504 (2009)(noting the influence of jurisdictional source (mandatory or discretionary jurisdiction) on state supreme court decisions to reverse or the likelihood of dissent).

[37] These states include Delaware, Maine, Montana, Nevada, New Hampshire, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming. *See also id.* at 1457 ("Over time . . . many SSCs achieved substantial control over their dockets, especially when intermediate courts of appeals were created to provide initial appellate review.").

[38] Squire, Peverill, "Measuring the Professionalization of U.S. Courts of Last Resort," 8(3) *State Politics and Policy Quarterly* 223-228 (2008).

ly, these measures of professionalization correlate with total state income, "which provides the resources to support more professionalized governmental institutions."[39]

B. Institutional Constraints and Judicial Behavior

The previous section highlighted a number of institutional features that distinguish and vary across state supreme courts. But how do these variations in institutional design affect judicial decision making behavior, if at all? More formalist accounts of judging would suggest that judges' institutional environments should exercise no influence on the substance decisions of individual claims, which are determined only by the applicable law in light of the relevant facts.[40] Such a claim would, however, ignore the burgeoning body of literature supporting the notion that judges, like other political actors, respond to incentives and constraints stemming from institutional rules and structures; these incentives and constraints shape the nature and character of judicial decision making.[41] In this vein, the literature on state courts of last resort have focused primarily on systems of judicial selection and retention, in an effort to understand how variation in these systems affect the composition and quality of state courts, as well as the types of outcomes produced through their decision making.

First, selection mechanisms may shape the quality and diversity of those who ascend to the state bench. According to the conventional wisdom and much popular commentary, for example, elected judges are less qualified and less impartial than appointed judges.[42] Nevertheless, the empirical evidence is far from conclusive on that point. Indeed, systematic studies of judicial quality and performance discern little difference between appointed and

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[39] *Id.* at 233.

[40] *See* Tamanaha, Brian Z., *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (2010)(noting characteristics of formalist views but cautioning about overemphasizing the distinction between formalist and realist thought in American legal history).

[41] For examples, *see* Epstein, Lee, and Jack Knight, *The Choices Justices Make* (1998); Clayton, Cornell W., and Howard Gillman, eds., *Supreme Court Decision Making: New Institutionalist Approaches* (1999).

[42] Editorial, "Judicial Elections and the Bottom Line," *New York Times* (August 19, 2012), at A18 (decision making by elected judges is "damaged by money-soaked elections"); Shugerman, Jed Handelseman, "Economic Crisis and the Rise of Judicial Elections and Judicial Review, 123(5) *Harv. L.Rev.* 1061-1151, at 1063 (2010)("modern perception is that judicial elections . . . weaken judges and the rule of law.").

elected judges.[43] In the most widely cited of these studies, Professors Choi, Gulati and Posner evaluate the influence of state court selection mechanism on judicial productivity, skill, and independence.[44] Their study finds that (1) elected judges are more productive (write more opinions) than appointed judges, and (2) appointed judges write higher quality opinions (as measured by citation rates). No clear pattern emerged to suggest that the performance of appointed judges consistently exceeded that of elected judges.[45] Of course, these studies do not test the notion that elections cause judges with certain other characteristics to self-select into the profession. Choi, Gulati and Posner note, for example, that elected judges may write more opinions because they are more political by nature (with opinion writing serving as a form of constituency service perhaps), while appointed justices are more concerned about their legacy as legal craftsmen.[46]

As for diversity on the bench, the weight of existing evidence similarly indicates no relationship between diversity and method of state court selection.[47] This finding holds even when interim appointments are considered and when other contextual varia-

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[43] *See, e.g.,* Glick, Henry R. and Craig F. Emmert, "Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Jduges," 70 *Judicature* 228-235 (1987)(finding no statistically significant differences on measures of quality between elected and appointed state supreme court justices).

[44] Choi, Stephen J., G. Mitu Gulati, and Eric A. Posner, "Professionals and Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary," 26(2) *Journal of Law, Economics and Organization* 290-336 (2008).

[45] *But see* Berkowitz, Daniel, and Karen Clay, "The Effect of Judicial Independence on Courts: Evidence from the American States," Paper delivered at the American Law and Economics Association Annual Meeting (2005)(showing that electoral selection systems are negatively correlated with judicial quality as measured by Chamber of Commerce survey).

[46] *See* Pozen, supra note ##, at 277 ("It is natural to assume that the voting public will generally be inclined to select and reselect promajoritarian judges than will state appointing bodies and that relatively populist candidates will be more inclined to seek election."). Appointed and elected judges do differ on one characteristic: ideological diversity, which may have implications for other behaviors on the courts. *See* Boyea, Brent D., "Linking Judicial Selection to Consensus: An Analysis of Ideological Diversity," 35(5) *AmericanPolitics Research* 643-670 (2007).

[47] Hurwitz, Mark S. and Drew Noble Lanier, "Diversity in State and Federal Appellate Courts: Change and Continuity Across 20 Years," 29(1) *Justice System Journal* 47-70 (2008); Holmes, Lisa M. and Jolly A. Emrey, "Court Diversification: Staffing the State Courts of Last Resort Through Interim Appointments," 27(1) *Justice System Journal* 1-13 (2006); Bratton, Kathleen A. and Rorie L. Spill, "Existing Diversity and Judicial Selection: The Role of Appointment Method in Establishing Gender Diversity in State Supreme Courts," 83(2) *Soc. Sci. Q* 504-518 (2002).

bles—including social and political demographics—are taken into account.[48]

Second, selection and retention methods may affect judicial voting behavior in terms of substantive outcomes. In their extensive study of state supreme court justices' voting behavior in death penalty cases, Professors Melinda Gann Hall and Paul Brace have demonstrated the linkages between state justices' political environment and their willingness to uphold death sentences.[49] These linkages are mediated by certain institutional features, including methods of selection and retention. Hall and Brace show that state justices' predispositions regarding capital punishment are substantially moderated in the face of competitive elections. After controlling for the justices' attitudes, "justices in liberal, competitive states are less inclined to support death decrees, and those in conservative competitive states are more inclined to do so."[50] In the context of abortion rights, research by Professor Caldarone and his colleagues has shown that judges elected on a nonpartisan ballot are more likely than those elected on a partisan ballot to vote in accordance with popular preferences over reproductive rights.[51] An earlier study of sex discrimination appeals demonstrated that appointed state supreme court justices were more likely to find in favor of the plaintiff asserting discrimination.[52] These studies reflect the impact that selection systems may have on the outcomes of particular claims in elected and appointed courts.[53]

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[48] Reddick, Malia, Michael J. Nelson, and Rachel Paine Caufield, "Examining Diversity on State Courts: How Does the Judicial Selection Environment Advance—and Inhibit—Judicial Diversity?" *Judicature* (citation).

[49] *See, e.g.,* Brace, Paul R. and Melinda Gann Hall, "The Interplay of Preferences, Case Facts, Context, and Rules in the Politics of Judicial Choice," 59(4) *Journal of Politics* 1206-1231 (1997); Hall, Melinda Gann, "Electoral Politics and Strategic Voting in State Supreme Courts," 54 *Journal of Politics* 427-446 (1992); Hall, Melinda Gann, and Paul Brace, "Toward an Integrated Model of Judicial Voting Behavior," 20 *American Politics Quarterly* 147-168 (1992).

[50] Brace and Hall, supra note ##, at 1222.

[51] Caldarone, Richard P., Brandice Canes-Wrone, and Tom S. Clark, "Partisan Labels and Democratic Accountability: An Analysis of State Supreme Court Abortion Decisions," 71(2) *Journal of Politics* 560-573 (2009).

[52] Gryski, Gerard S., Eleanor C. Main, and William J. Dixon, "Models of State High Court Decision Making in Sex Discrimination Cases," 48(1) *Journal of Politics* 143-155 (1986).

[53] At the trial level, elected judges mete our harsher sentences than appointed judges as well, an effect that becomes more pronounced as the next election approaches. Gordon, Sanford C., and Gregory A. Huber, "The Effect of Electoral Competitiveness on Incumbent Behavior," 2(2) *Quarterly Journal of Political Science* 107-138 (2007; Huber,

Third, selection and retention methods may affect the level of consensual decision making on state supreme courts. In the area of death penalty appeals, earlier studies suggested that appointed justices were more likely to dissent than elected justices in death penalty appeals.[54] This finding in the unique death penalty context is not consistent with studies of dissent on state supreme courts in other cases. As early as 1970, Professors Brad Canon and Dean Jaros reported on their study of institutional structure and dissent in state supreme courts, in which they found that elective systems produce higher dissent rates.[55] They observed that "insofar as dissent is concerned, it is not so much who is recruited as how judges are retained that governs court outputs."[56] More recent research across multiple case categories confirms the connection between judicial selection methods and dissent rates, demonstrating a statistically significant connection between elected judges and increased rates of dissent.[57]

Fourth, selection and retention methods may enhance or undermine judicial independence. As John Ferejohn has recognized, "Judicial independence . . . is a feature of the institutional setting within which judging takes place."[58] Judicial independence is typically described in two dimensions: decisional independence and institutional independence. Decisional independence refers to a judge maintaining an impartial and unbiased posture toward the litigants in the case before her; when judges enjoy decisional independence, they render decisions "based solely on the individual facts and applicable law" without bias toward either party. Institutional independence focuses on the separation of powers. Judg-

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Gregory A., and Sanford C. Gordon, "Accountability and Coercion: Is Justice Blind when It Runs for office?" 48(2) *American Journal of Political Science* 247-263 (2004).

[54] Brace, Paul, and Melinda Gann Hall, "Neo-Institutionalism and Dissent in State Supreme Courts, 52(1) *Journal of Politics* 54-70 (1990)(showing negative relationship between elective systems and dissenting behavior); Hall, Melinda Gann, and Paul Brace, "Toward an Integrated Model of Judicial Voting Behavior," 20(2) *American Politics Research* 147-168 (1992)(same).

[55] Canon, Bradley C. and Dean Jaros, "External Variables, Institutional Structure and Dissent on State Supreme Courts," 3(2) *Polity* 175-200 (1970).

[56] *Id.* at 191.

[57] Leonard, Meghan E., and Joseph V. Ross, "Cooperation on State Supreme Courts," Paper prepared for delivery at the State Politics and Policy Conference, Houston Texas (2012); Arceneaux, Kevin, Chris W. Bonneau, and Paul Brace, "On Consensus in State Supreme Courts," Paper prepared for delivery at the Annual Meeting of the Midwest Political Science Association, Chicago Illinois (2007). *But see* Boyea, supra note ## (appointed courts display greater ideological diversity, which leads to reduced consensus).

[58] Ferejohn, John, "Independent Judges, Dependent Judiciary: Explaining Judicial Independence," 72 *Southern California L.Rev.* 353-384, at 353 (1999).

es who enjoy institutional independence are free from coercion or other improper influence by the elected branches. The two dimensions of judicial independence are plainly interconnected, of course. When a judge decides a case involving a state litigant such as an administrative agency, both decisional and institutional independence are implicated. Professor Joanna Shepherd's research has demonstrated that judges facing legislative reappointment are more likely to decide in favor of litigants from the executive, legislative and judicial branches, and that judges facing gubernatorial reappointment are more likely to vote in favor of litigants from the executive branch.[59]

These findings indicate that retention by the elected branches may hobble appointed judges' decisional independence from government litigants and imply that appointed judges lack institutional independence from the elected branches. In contrast, elected judges enjoy greater institutional independence from the legislature and executive, as intended by reformers who instituted judicial elections in the first place.[60] But in his impressive account of the rise of judicial elections, Professor Shugerman notes that judicial independence is a relative concept—any discussion about judicial independence involves the question, "independence from whom?"[61] Indeed, while judicial elections may enhance both decisional and institutional independence from the elected branches, they have the concomitant effect of increased judicial accountability (dependence) on the electorate. Thus reform efforts to eliminate judicial elections, as noted above, have focused on the extent to which judges' decision independence is compromised by the influence of campaign contributions.[62] Several recent empirical

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[59] Shepherd, Joanna M., "Are Appointed Judges Strategic Too?" 58 *Duke L.J.* 1589-1626 (2009).

[60] Shugerman, Jed Handelseman, "Economic Crisis and the Rise of Judicial Elections and Judicial Review, 123(5) *Harv. L.Rev.* 1061-1151, at 1069 (2010)("judicial elections were designed to increase judicial checks on the other branches"); *see also* Hanssen, F. Andrew, "Learning about Judicial Independence: Institutional Change in the State Courts," 33 *J. Legal Studies* 431-473 (2004)(changes to state procedures to select judges driven by interest in sheltering state court judges from influence of incumbent officials in elected brances). *Cf.* Hanssen, F. Andrew, "The Effect of Judicial Institutions on Uncertainty and the Rate of Litigation: The Election versus Appointment of State Judges," 28(1) *Journal of Legal Studies* 205-232 (1999)(asserting that appointment increases the political independence of state judges, including from the ruling majority).

[61] *Id.* at 1143.

[62] *See* discussion of the influence of campaign contributions on judicial voting behavior in text accompanying notes ##-##, *supra.* Decisional independence may be measured beyond the influence of campaign contributions. *See* Choi et al., *supra* note ## (showing no clear difference existed between appointed and elected judges in terms of judi-

studies suggest that campaign contributions have the potential, or do indeed, influence judicial voting behavior. For example, Professors Michael Kang and Joanna Shepherd study the likelihood that a state supreme court justice will vote for a business interest as campaign contributions from those interests increase.[63] Kang and Shepherd find a statistically significant relationship between contributions from business interests and pro-business voting in state supreme courts elected on a partisan ballot.[64] Judicial elections involve a trade-off, then, between decision independence and institutional independence.

Fifth, selection and retention may affect the rule of law. In a fascinating study of litigation and appeal rates in state courts, Andrew Hanssen finds that there are more appellate filings in appointed state courts as compared to elected courts.[65] He interprets this conclusion as demonstrating that judicial elections provide litigants with better cues regarding the likely outcome of appeals—which in turn leads to a greater likelihood of settlement. Hanssen concludes that "increased uncertainty (and therefore more litigation) is a price we pay for protecting our judges from political influence."[66]

C. Activism, Independence and the Rule of Law

As described above, the existing research demonstrates that on some dimensions (productivity and diversity) elected state courts share similar characteristics with appointed courts. On others, such as voting behavior on issues salient to the electorate or non-consensual decision making, elected judges' behaviors diverge from appointed judges in significant ways. Of central importance to this study of activism in state courts are those findings addressing the influence of judicial retention methods on judges' institutional independence and on the stability and predictability of legal

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cial independence as measured by judges' willingness to vote against co-partisans on the bench).

[63] Kang, Michael S., and Joanna M. Shepherd, "The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions," 86 *N.Y.U. L.Rev.* 69-129 (2011).

[64] *Id.* at ##. This result is supported by other research that statistically controls for the endogeneity problem associated with studies of the influence of campaign contributions on political decision making. Cann, Damon M., "Justice for Sale? Campaign Contributions and Judicial Decisiomaking," 7(3) *State Politics and Policy Quarterly* 281-297 (2007)(using two staged probit model to show that campaign contributions affect judicial decisions in Georgia state supreme court).

[65] Hanssen, *supra* note ##.

[66] *Id.* at ##.

standards. This section reflects further on these relationships and the existing empirical evidence about the influence of retention methods on judicial review and the rule of law in state courts.

In the context of constitutional review, as noted above, judicial elections were instituted in the American states in order to insulate judges from the elected branches and thus provide them with the independent power and authority to overturn legislative judgments. In contrast, where judges are retained by the legislature or governor, they may feel more constrained—perhaps because more beholden—to those branches and thus less inclined to reverse legislation when its constitutionality is challenged in court. This dynamic stands in contrast to the conventional wisdom that judicial insulation from the electorate as reflected in the federal model enhances judicial independence and promotes innovation and activism in the judiciary. Conditioned by the U.S. Supreme Court as the model of an independent judiciary, observers who accept this conventional wisdom fail to account for the more varied *retention* methods used in state courts. Just because a court is *appointed* by the elected branches in some form that may be compared to the federal model does not mean that the method in which the judges are *retained* has no effect on judicial independence.

The evidence from empirical studies is nevertheless mixed on the question whether retention methods actually shape the exercise of judicial review in state courts. Most recently, Professor Joanna Shepherd found that "no statistically significant difference exists among retention methods in judges' likelihood of overturning statutes."[67] Her study, using data from the Brace and Hall Supreme Court database for the years 1995 to 1998, tested whether judges retained through the six primary methods (partisan and nonpartisan elections, retention elections, legislative and gubernatorial reappointment, and life tenure) show any differential likelihood of declaring a state law unconstitutional.[68] In her model incorporating 1873 votes on the constitutionality of state statutes, no significant relationship was identified between retention method and propensity to strike a state law. In a second model of judges' votes to strike statutes that incorporated a variable reflecting

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[67] Shepherd, Joanna M., "Are Appointed Judges Strategic Too?" 58 *Duke L.J.* 1589, 1616 (2009).

[68] Judges facing retention elections constituted the excluded reference category in Shepherd's study, on the hypothesis that unopposed retention elections provide judges with considerable independence because they are rarely defeated in such elections. See Shepherd, *Are Appointed Judges Strategic Too?*, supra note ##, at n.110 & accompanying text.

the time until the next retention event (election or reappointment), however, Shepherd found some evidence that judges facing gubernatorial reappointment became less likely to strike a statute as the reappointment event approached.[69] In light of these weak results, Shepherd suggested that selection effects may be the cause, on grounds that judges who are reluctant to overturn legislation rely on discretionary docket control to eliminate those cases from their dockets.

This latter supposition finds support in a study conducted by Professors Brace, Hall and Langer that assessed state court judges' willingness to overturn abortion statutes.[70] This innovative study included a two-staged model to account for the likelihood that a constitutional challenge appeared on state supreme court dockets. According to the results of the empirical tests, judges subject to reappointment by the legislature or executive were less likely *to hear* constitutional challenges to abortion statutes at the docketing stage, while judges facing reelection via partisan or nonpartisan elections were significantly less likely *to invalidate* abortion statutes than the excluded category (judges subject to merit retention election). In contrast, Laura Langer's comprehensive study of judicial review in four substantive areas (election law, workers' compensation, unemployment compensation, and welfare benefits) found that the impact of judicial retention methods varied across issue area, with elected judges *more* likely to vote to strike state statutes in three of the four areas examined (as compared to judges retained by the legislature or governor).[71]

A third study by James Wenzel, Shaun Bowler and David Lanque drew different conclusions regarding the impact of judicial selection systems on countermajoritarian behavior by state supreme courts.[72] After specifying a model of the proportion of cases involving a constitutional challenge in which the court struck the

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[69] *Id.* at 1623. This second model was specified with fewer than 1000 votes from the Brace and Hall database.

[70] Paul Brace, Melinda Gann Hall & Laura Langer, *Judicial Choice and the Politics of Abortion: Institutions, Context, and the Autonomy of Courts*, 62 ALB. L. REV. 1265, 1278 (1999).

[71] Langer, Laura, *Judicial Review in State Supreme Courts: A Comparative Study* (2002).

[72] Wenzel, James P., Shaun Bowler, and David J. Lanque, "Legislating from the State Bench," 25 *American Politics Quarterly* 363-379 (1997). Wenzel et al. rely on data from a study of judicial review conducted by Craig Emmert; however, Emmert did not test the impact of selection or retention methods on judicial review in state courts. *See* Emmert, Craig F., "An Integrated Case-Related Model of Judicial Decision Making: Explaining State Supreme Court Decisions in Judicial Review Cases." 54 *Journal of Politics* 543-552 (1992).

challenged statute between 1981 to 1985, Wenzel and his coauthors concluded that judges from states following the merit plan were less likely to invalidate state legislation than those selected via partisan or nonpartisan elections.[73] In the context of school finance reform litigation, however, Karen Swenson was able to identify no significant differences among judges selected via different methods regarding their propensity to strike down state financing systems for public schools.[74]

The results of empirical studies of judicial review in state supreme courts thus run the gamut, including findings that (1) selection or retention methods have no impact, (2) elected judges are less likely to strike down state statutes, or (3) elected judges are more likely to strike down state statutes. These varied findings could stem from several circumstances, including that the studies do not evaluate the same issue areas, test for the impact of selection method instead of retention method, or collapse certain retention methods into a single dummy variable (thus blurring distinctions between particular methods of retention or selection). At the very least, a quick canvas of the existing research reveals that the question remains open. In short, we still do not understand how judicial selection or retention mechanisms affect judges' willingness to engage in what is perhaps their most important systemic governmental function—checking the unconstitutional actions of the elected branches.

The same conclusion is even more easily reached with respect to state courts' propensity to respect the norm of stare decisis. Only two existing studies evaluate the likelihood that state courts will overrule precedent. In their early study of stare decisis in four state supreme courts (Alabama, Florida, Pennsylvania and New Jersey), Lindquist and Pybas found that the Alabama Supreme Court overruled precedent most frequently, and overruled extremely "young" precedents more often than the other three states, with New Jersey overruling the least frequently.[75] The limited number of states included in the study limits the extent to

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[73] Although this is the conclusion that is set forth in the authors' conclusions, it is difficult to discern this result from their statistical model because it is difficult to discern that nature of the excluded category in the model for purposes of comparison. Nevertheless, the authors conclude that "[s]ystematic features that tie judges closer to the electorate apparently lead to the selection of judges that are more willing to consider political as opposed to legal factors in the decision-making process." *Id*. at 376.

[74] Swenson, Karen, "School Finance Reform Litigation: Why Are Some State Supreme Courts Activist and Others Restrained?" 63 *Albany L.Rev.* 1147-1192 (2000).

[75] Lindquist, Stefanie, and Kevin Pybas, "State Supreme Court Decisions to Overrule Precedent, 1965-1996, 20(1) *Justice System Journal* 17-40 (1998).

which these results may be linked to selection or retention methods. In a later study of all state supreme courts over a 30 year period, Lindquist found that partisan elected courts demonstrated the greatest propensity to invalidate prior precedents.[76] This later study shed more light on the phenomenon of overruling but did not test for the impact of retention methods (as opposed to selection methods) on adherence to the norm of stare decisis.

A review of the empirical literature thus reveals that our knowledge of how the institutional design of state supreme courts affects or shapes the rule of law is extremely limited. At best, the studies' results are in conflict, especially in the case of judicial review. This state of affairs is particularly problematic in light of reform efforts to change the manner in which state judges are selected and retained, since those choices may have far reaching consequences for the predictability and stability of legal rules governing citizens' affairs. To provide further information and analysis of these phenomena, the following sections report on empirical tests of state supreme court justices' exercise of the power of judicial review, and on their decisions to overrule precedent.

In the models presented herein, the focus centers on the methods states use to retain justices on the bench. Although judicial selection is surely relevant to judicial behavior at some level, retention methods are likely more germane simply because they are likely to shape judges' expectations and incentives regarding the consequences of their decisions once they have ascended to the bench. At that point, of course, the circumstances that shaped their initial selection are simply a matter of history. This study therefore evaluates whether judicial retention methods alter judges' decisional calculus or otherwise create incentives that limits or enhances their propensity to invalidate legislation or to overrule precedent. It begins with the empirical analysis of state supreme court decisions evaluating the constitutionality of state legislation.

D. Judicial Review

Dependent Variable. To test for the influence of institutional structures on the exercise of judicial review in state supreme courts, this study relies on data from the Hall and Brace State Supreme Court Database.[77] That database, incorporating data on

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[76] Lindquist, Stefanie A., "Stare Decisis as Reciprocity Norm," in Charles Geyh, ed., *What's Law Got to Do with It?* (Stanford University Press, 2011).

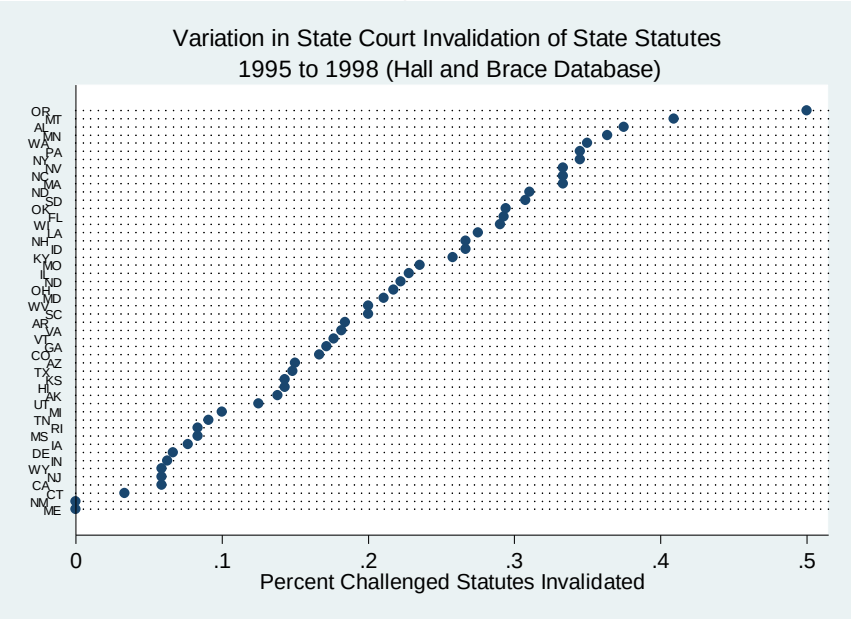
[77] The database is available at http://www.ruf.rice.edu/~pbrace/statecourt/.

all state supreme court decisions rendered from 1995 to 1998, includes several variables that denote cases raising constitutional challenges to state statutes.[78] Each such case was then reviewed to determine whether the coding accurately reflected a constitutional challenge to a state enactment, as opposed to a proposed law (frequent in the case of proposals to add initiatives to the ballot), or to some form of executive action by an administrative agency or the governor. Each dissenting or concurring vote was also evaluated to ensure that the separate opinion reflected the dissenting or concurring judge's evaluation of the statute's constitutionality. This culling process eliminated a large number of cases from the database and resulted in a number of vote reclassifications, ultimately resulting in 1203 cases for analysis, as well as 7043 individual justice votes to strike or uphold a state statute.

The data revealed substantial variation across the state courts in terms of their propensity to invalidate a state statute challenged under either the federal or state constitutions (or both). Figure 1 presents a dot plot of the proportion of constitutional challenges that were successful in each state over the period covered (1995 to 1998). Although the figure does not provide information about the number of opportunities available to state courts to consider constitutional challenges, it does reveal that, of those challenges presented, some state courts refused to invalidate any challenged statutes, while others struck up to 50% of those challenged before them. The figure thus presents preliminary evidence of considerable variation across the states in terms of their exercise of the power of judicial review.

[78] Very rarely, the cases involve constitutional challenges to federal statutes. Those cases were eliminated from the analysis to ensure comparability. Only cases involving constitutional challenges to state statutes were included in the analysis. The constitutional cases are identified on the basis of a USC or STC suffix to the casetype variable names, which indicate that the case involved a challenge to a statute on the basis of the federal or state constitutions (or both).

Figure 1



To illustrate the bivariate relationship between retention methods and judicial invalidation of state statutes, Figure 2 presents a series of box plots that reveal the distribution of the data in Figure 1 according to judicial retention method. With the exception of one outlier reflected in the dot outside the whisker of the gubernatorial reappointment box plot, the figure indicates that courts subject to retention via partisan and nonpartisan elections, as well as those that enjoy life tenure, are the most likely to invalidate state statutes. In contrast, the figure reveals that judges subject to gubernatorial and legislative retention are far less likely to invalidate legislative enactments. At least preliminarily, these findings are consistent with the notion that judges whose jobs depend for continuation on the elected branches are less likely to invalidate statutes enacted by the those institutions. Where the continuation of judges' positions depends instead on the electorate (or on no other entity as in the case of judge with life tenure), judges appear more willing to exercise the power of judicial review. This initial finding is consistent with Jed Shugerman's analysis of the advent of judicial elections, which produced a surge in statutory invalidations by state courts in the 1800s.[79]

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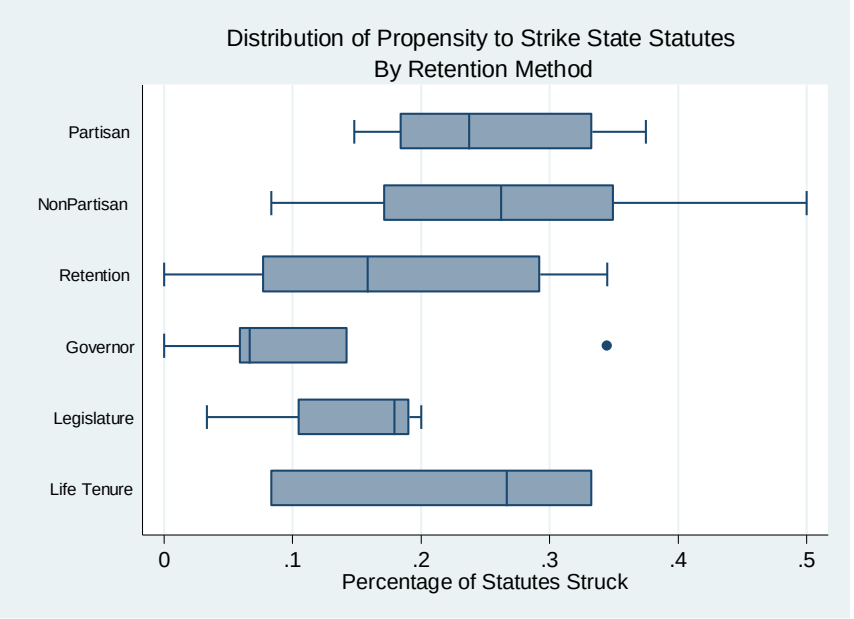
[79] Cite Shugerman's empirical analysis.

Figure 2



Nevertheless, other variables could explain this bivariate relationship, which thus could constitute a spurious result. Those alternative influences must be controlled. To test for other potential explanations for the variation among states reflected in Figures 1 and 2, a multivariate model was specified of (1) the decision whether to invalidate a state statute at the court level, and (2) the vote to invalidate a state statute at the judge level.

Independent Variables—Court Level Model. At the court level, a number of state, court and case characteristics may explain why certain cases are more likely to lead to statutory invalidation. First, term length has been identified as a potential source of judicial independence.[80] Perhaps more important, however, is the length of time that judges have actually remained on the bench, since it may shape their expectations regarding their continuation

[80] According to Shugerman, lengthening terms did not have the intended effect of freeing judges from partisanship and electoral influence, a conclusion he reaches through analysis of case studies. *See* Hurwitz, Mark S., "The Relative Concept of Independence," Reviewing Jed Hanselman Shugerman, *The People's Courts: Pursuing Judicial Independence in America*, 91 *Texas L.Rev.* 651-663, at 657 (2013).

in their positions. Term length—as a statutory specification—may not reflect the security of a seat on the bench. In states with little electoral competition, re-election may remain assured or highly probable even when the mandated term length is fairly short. Measures that reflect the actual length of time judges remain on the bench, therefore, may provide a better test of judicial independence to the extent judges are able to win reelection (or reappointment) time and again. For that reason, the court-level multivariate models incorporate a variable reflecting the *average tenure length* of judges sitting on the bench at the time of the decision.[81] Where judges on the bench vary substantially in the length of their tenure, the variation may also affect judges' expectations about the likelihood that they will continue on the court. The models therefore incorporate the *standard deviation of tenure length* for judges then serving on the reviewing panel.

Judicial ideology may also influence state supreme court justices' responsiveness to constitutional challenges. Although ideally a model would control for the ideological direction of the statute as compared to the judges' policy preferences, many state constitutional challenges defy easy ideological categorization. Nevertheless, most accounts of judicial activism indicate that judges with more liberal policy preferences are more likely to engage in activist decision making, especially if the challenges raise issues related to civil liberties.[82] The model thus controls for the median court ideology as measured by the party-adjusted judge ideology scores developed by Professors Brace, Hall and Langer.[83]

Judges' choices to invalidate precedent may also depend upon the level of court professionalization and the degree to which judges have assistance from clerks. State supreme courts vary in the number of law clerks available to associate justices, which was included in the model to control for this level of assistance and as a proxy for professionalization. Increasing assistance by law clerks may cut both ways. First, these newly minted lawyers may press their justices to innovate or provide justices with the necessary leisure time to craft opinions that change the legal status quo. Furthermore, as inexperienced attorneys who have only a

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[81] Term length was tested in the models presented herein; it had no significant effect.

[82] See Lindquist and Cross, supra note ##, seriatim.

[83] PAJID scores were created by Paul Brace, Melinda Hall and Laura Langer (2000) based on elite and citizen ideology in the judges' state at the time of appointment or election, adjusted for party identification. The scores range from 0 to 100, with larger values associated with increased liberalism. Brace, Paul, Laura Langer and Melinda Gann Hall, "Measuring the Preferences of State Supreme Court Justices." 62 *Journal of Politics* 387-413 (2000).

short-lived connection with the institution, clerks may be less sensitive to the institutional consequences of judicial decisions vis a vis the elected branches.[84] On the other hand, to the extent that the number of law clerks reflects a court's level of professionalization, it may mitigate in favor of more restrained decision making. Thus it is unclear as to the expected direction of this variable.

Other institutional variables may affect courts' propensity to invalidate legislation as well. As noted above, docket control may shape the nature of the cases considered by a court. Court dockets differ in terms of the mixture of cases on their agenda and their caseloads. To control for these differences, a dummy variable was added to the model reflecting the presence or absence of an intermediate appellate court. Where an intermediate court exists, supreme court justices typically exercise greater discretion to choose the cases on their dockets. This discretionary docket may lead to a greater propensity to overrule statutes controlling for other factors, as justices in states with intermediate appellate courts may exercise their certiorari jurisdiction to identify cases as vehicles for legal change. Alternatively, they may rely on this measure of docket control to avoid cases that would require them to evaluate the legality of legislation adopted by the coordinate branches.

In addition to the level of docket control provided by the presence of an intermediate appellate court, the number of cases on the docket may impact court's decisions in cases involving judicial review. To control for this effect, a variable was constructed that measures the number of decisions rendered by the court each year and that resulted in an opinion of any length.[85] This variable may measure either *opportunity* to engage in the exercise of judicial review, or it may control for *judicial workload,* either of which may shape the legal environment in which judges consider whether to strike a state statute. Furthermore, where the state legislature is highly professionalized, it may engage in more activist or innovative policy making that produces more court challenges. According to existing studies, for example, legislative professionalism is associated with a greater willingness to reform government

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[84] I thank Judge Lee Rosenthal for this insight.

[85] Comparable caseload data on state supreme courts is difficult to find because states report their courts' caseloads using different methods. For this study, therefore, the caseload variable was constructed on the basis of a Westlaw search aimed at culling from the data any decisions on administrative matters, motions or petitions. The search employed the headnote field to identify only those decisions accompanied by an opinion with at least one headnote: "co(high) and da([year]) and headnote".

personnel practices[86] and to adopt more complex and technical policies.[87] More professional legislatures also propose and enact more bills, which could also lead to more frequent court challenges on constitutional grounds.[88] On the other hand, legislative professionalism could cause lawmakers to craft legislation that hews the line more closely on matters of constitutional law. For that reason, the model controls for legislative professionalism in each state based on a measure developed by Peverill Squire that accounts for legislator pay, number of days in session, and staff per legislator.[89]

The number of justices staffing the court may also affect judicial behavior, especially at the court level. Where justices sit on larger courts, it may be more difficult to construct a majority of judges willing to take the dramatic step of invalidating state legislation.[90] Thus a variable measuring the size of the supreme court was included.

Certain characteristics associated with the individual cases may also influence courts' reactions to constitutional challenges brought before them. When the lower court has ruled that the statute is unconstitutional, it indicates that at least one judge has identified constitutional flaws in the statutory scheme. The models thus include a variable reflecting whether the court below (either at the trial or intermediate appellate level) struck the challenged law. Courts may also respond to interest group pressure in the form of briefs amicus curiae, and those briefs may provide important information and cues regarding the statute's constitutionality and its policy consequences. Each case was examined to identify the number of briefs filed in support or in opposition to the statute's constitutionality, and a measure constructed that re-

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[86] Kellough, J. E., and S. C. Selden, "The Reinvention of Public Personnel Administration: An Analysis of the Diffusion of Personnel Management Reforms in the States." 63 *Public Administration Review* 165–76 (2003).

[87] Ka, Sangjoon, and Paul Teske, "Ideology and Professionalism—Electricity Regulation and Deregulation over Time in the American States." 30 *American Politics Research* 323–43 (2002).

[88] Squire, Peverill, "Membership Turnover and the Efficient Processing of Legislation." 23 *Legislative Studies Quarterly* 23–32 (1998).

[89] Squire, Peverill, "Measuring State Legislative Professionalism: The Squire Index Revisited," 7(2) *State Politics & Policy Quarterly* 211-227 (2007).

[90] In two states, Nebraska and North Dakota, the law requires a supermajority before the court may invalidate a state statute. Including this variable in the model produced a counterintuitive result: in states with supermajority requirements, the courts exhibited a greater likelihood of overruling challenged enactment.

flected the difference between the number of briefs in support and the number of briefs in opposition.

In addition to amici, the Attorney General may argue in favor of the statute's constitutionality in some cases. A control variable was therefore included to test for the AG's presence as counsel for the state. Because in many states the Attorney General is elected rather than appointed (AGs are popularly elected in 43 states), the variable's impact may not necessarily measure the influence of the executive branch. Rather, court responsiveness to the AG's arguments in favor of a statute's constitutionality may provide state court judges with an important cue regarding the preferences of the electorate.[91]

Some states provide for abstract review of state statutes prior to their implementation. In cases involving an advisory opinion, the legislature has requested that the court pass on the constitutionality of the statute prior to its application in concrete cases. It is possible that these requests come to the court when doubt exists regarding the constitutionality of an enactment, and thus a variable was included in the model to reflect whether the decision involved a request for such an advisory opinion regarding a statute's validity. Furthermore, courts may be particularly disinclined to overturn statutes enacted via the initiative or referendum procedure, as those statutes indicate that the electorate has been directly involved and has specifically endorsed the statute on the ballot. The models therefore include a variable indicating whether a challenged statute passed through the initiative or referendum process.[92]

Prior research has indicated that the source of the constitutional challenge matters in state courts' exercise of the power of judicial review. In his study of judicial review cases decided in the early 1980s, Professor Emmert found that when a statute was challenged on state constitutional grounds alone, as opposed to on federal grounds only or on state and federal grounds, the statute was more likely to be invalidated. Emmert speculated that, when state constitutional grounds form the sole basis for a court challenge, "state courts may be more willing to engage in judicial activism [because] they know that their rulings cannot be reversed

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[91] In the cases in our database, the AGs entered the case to argue in favor of the state statute's constitutionality.

[92] Note that this variable does not reflect challenges to the form or structure of ballot initiatives *before* they are passed; only statutes that were actually enacted were included in the database.

by the [U.S.] Supreme Court."[93] In addition, however, state constitutions often include numerous specific provisions regarding the form and scope of particular governmental powers. Thus they may also impose constraints on governmental action that exceed the general limitations provided in the U.S. Constitution's bill of rights. To test for these effects, a variable was created to measure whether a law was challenged solely on state constitutional grounds, in comparison to those challenged solely on federal grounds or on a combination of state and federal grounds.

Finally, party capability theory has a long and honored history in the study of appellate court decision making, including in studies of state supreme courts.[94] To control for differences in party capability—including resources and expertise—a set of dummy variables was created to reflect whether the challenge was brought by a government, business, organization, or individual litigant. Regional dummy variables were also included to account for possible geographic trends or patterns in the data, as well as a year counter to account for the effects of time over the five year period.

Independent Variables—Judge Vote Model. To specify a model at the level of the judicial vote, several variables were added or altered to measure factors that might influence a vote at the judge level. In particular, a measure of tenure length for each judge was incorporated, indicating the number of years that judge had served on the court at the time of the case decision.[95] The PAJID score in this model reflects the individual justice's ideology score, rather than the court median. And a variable was incorporated to account for a vote by the chief justice. Chief justices may be particularly sensitive to institutional concerns and thus more reluctant to vote to invalidate a legislative enactment.

Table 2 provides the results of a logit model of the court-level decision to strike or uphold a state statute, with standard errors clustered on the state to address dependence among observations

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[93] Emmert, supra note ##, at 547; *see also* Fino, Susan, "Judicial Federalism and Equality Guarantees in State Supreme Courts," 17 *Publius* 51-67 (1987)(equal protection decisions based on state grounds alone were more than twice as likely to produce outcomes declaring state policy unconstitutional).

[94] *See* Brace, Paul, and Melinda Gann Hall, "Haves" versus "Have Nots" in State Supreme Courts: Allocating Docket Space and Wins in Power Asymmetric Cases," 35(2) *Law and Society Review* 393-417 (2001); Kagen, Robert, Bliss Cartwright, Lawrence M. Friedman & Stanton Wheeler , "The Business of State Supreme Courts, 1870-1970," 30 *Stanford Law Review* 121-56 (1977); Galanter, Marc, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," 9 *Law & Society Rev*. 95-160 (1975).

[95] I thank Joanna Shepherd for her generosity in providing these data.

at the state level. Table 3 sets forth the results of the judge-level logit model, with standard errors clustered on state and case to account for dependence among the observations within states and within individual cases. To provide additional information about the substantive impact of the significant variables, Table 4 provides the average marginal effects for each.

Table 2: Logit Model of Court Decision to Strike State Statute

Variable	*Coef. (Robust SE)*	*P-value (2-Tailed)*
Retention Method		
Partisan Election	.817 (.474)	.085
NonPartisan Election	.809 (.378)	.032
Retention Election	.539 (.400)	.178
Governor Reappoint	-.148 (.563)	.793
Legislative Reappoint	(Reference)	
Permanent Appointment	.673 (.564)	.232
Judge/Court		
Tenure (Median)	.073 (.049)	.138
Tenure (SD)	-.144 (.059)	.015
PAJID (Median)	.006 (.004)	.142
Law Clerks	-.171 (.143)	.231
Court Size	.052 (.093)	.572
IAC	-.518 (.288)	.073
Legal Environment		
Decision Docket	-.0003 (.001)	.820
Legislative Professionalism	1.14 (1.05)	.280
Case Characteristics		
Lower Court Strike	1.21 (.173)	.000
Amicus Differential	-.239 (.106)	.025
AG Involvement	-.346 (.185)	.062
Advisory Opinion	1.22 (.544)	.024
Initiative or Referendum	.258 (.542)	.633
State Const'l Challenge	.448 (.131)	.001
Business Challenger	.362 (.240)	.131
Government Challenger	.244 (.197)	.217
Organization Challenger	.883 (.301)	.003
Individual Challenger	(Reference)	
Year Counter	.150 (.080)	.060
Regional Dummies	(Included)	
Constant	-2.67 (.752)	.000

Note: N=1203. Coefficients for regional dummies omitted. Model specified with errors clustered on state.

Table 3: Logit Model of Judge Vote to Strike State Statute

Variable	*Coef. (Robust SE)*	*P-value (2-Tailed)*
Retention Method		
Partisan Election	.803 (.308)	.009
NonPartisan Election	.596 (.276)	.031
Retention Election	.478 (.271)	.079
Governor Reappoint	-.093 (.348)	.789
Legislative Reappoint	(Reference)	
Permanent Appointment	.449 (.410)	.275
Judge/Court		
Tenure	.0005 (.004)	.907
Chief Judge	-.072 (.056)	.197
PAJID	.003 (.001)	.066
Law Clerks	-.229 (.098)	.020
Court Size	.070 (.062)	.257
IAC	-.355 (.230)	.122
Legal Environment		
Decision Docket	-.0009 (.0009)	.306
Legislative Professionalism	1.35 (.693)	.050
Case Characteristics		
Lower Court Strike	.917 (.136)	.000
Amicus Differential	-.146 (.069)	.036
AG Involvement	-.307 (.125)	.014
Advisory Opinion	.802 (.558)	.151
Initiative or Referendum	.235 (.435)	.589
State Const'l Challenge	.259 (.123)	.035
Business Challenger	.127 (.192)	.510
Government Challenger	.139 (.168)	.407
Organization Challenger	.686 (.225)	.002
Individual Challenger	(Reference)	
Year Counter	.085 (.057)	.139
Regional Dummies	(Included)	
Constant	-2.11 (.514)	.000

Note: N=7043. Coefficients for regional dummies omitted. Model specified with errors clustered on case citation and state.

Table 4: Average Marginal Effects for Significant Variables
Models of Statutory Invalidation

Variable	*Court Model*	*Judge Model*
Retention Method		
Partisan Election	.121	.140
NonPartisan Election	.120	.104
Retention Election	ns	.083
Governor Reappoint	ns	ns
Legislative Reappoint	(Reference)	(Reference)
Permanent Appointment	ns	ns
Judge/Court		
Tenure	ns	ns
Tenure (SD)	-.021	--
Chief Judge	--	ns
PAJID	ns	.0005
Law Clerks	ns	-.040
Court Size	ns	ns
IAC	-.076	ns
Legal Environment		
Decision Docket	ns	ns
Legislative Professionalism	ns	.237
Case Characteristics		
Lower Court Strike	.180	.160
Amicus Differential	-.035	-.025
AG Involvement	-.051	-.053
Advisory Opinion	.181	ns
Initiative or Referendum	ns	ns
State Const'l Challenge	.066	.045
Business Challenger	ns	ns
Government Challenger	ns	ns
Organization Challenger	.131	.120
Individual Challenger	(Reference)	(Reference)
Year Counter	ns	ns
N	1203	7043

The results presented in these tables confirm the bivariate relationship explored in Figure 2. At both the court and judge levels, decisions to invalidate state statutes are more likely to occur in courts reelected on a partisan or nonpartisan ballot. The average marginal effects indicate that these dummy variables account for a 10 to 14% increase in the likelihood of a choice to invalidate state legislation over the reference category (courts that are reappointed by the legislature). In the judge-vote model, retention elections also appear to have an effect on the dependent variable, with judges retained via unopposed retention elections 8% more likely to vote to strike a state statute than judges subject to legislative reappointment.

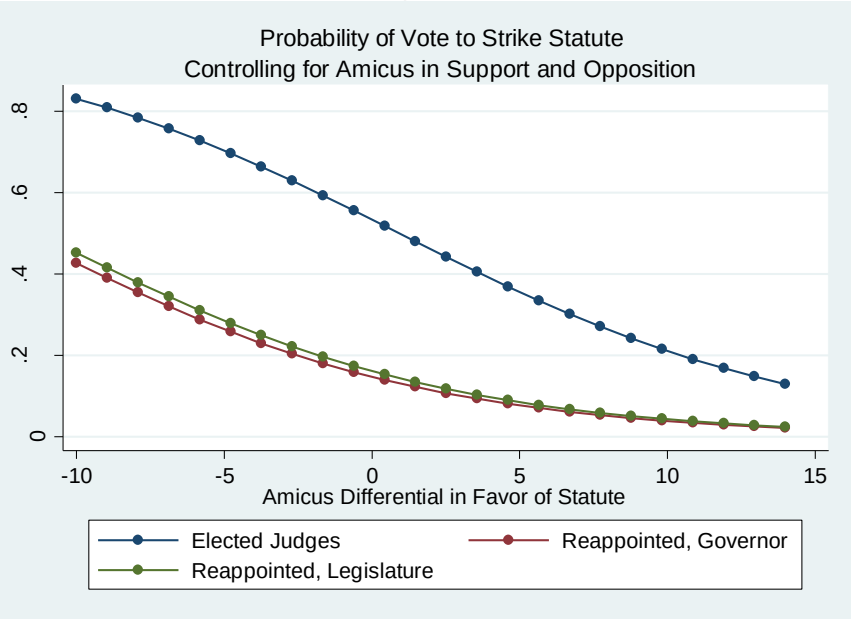
Several other coefficients are worthy of note because of their substantive impact on the dependent variables. First, legislative professionalism is positively related to a judges' vote to strike. Since this variable theoretically ranges from 0 to 1, the marginal effect indicates that a shift from the least professional to the most professional legislature creates about a 24% increase in the likelihood that a judge will vote to invalidate a challenged enactment. Professional legislatures may, indeed, enact more innovative policies that are more likely to contain a constitutional defect. The positive coefficient in both models is inconsistent with the notion that professional legislatures are more cautious or careful about ensuring that enacted legislation conforms to constitutional requirements.

At the case level, the dummy variable measuring whether the statute was invalidated by the lower court is statistically significant and is substantively important. A lower court invalidation increases the likelihood that the court or judge will agree that the statute is unconstitutional by 18% (court model) and 16% (judge model). Amicus curiae also influence courts and judges in cases involving judicial review. For every brief filed in support of the statute in excess of the number of briefs opposing it, the probability of a decision or vote to strike decreases by about 3%. The differential between briefs in support and opposition may therefore have a substantial impact on the likelihood of statutory invalidation.

Figure 3 provides a graphical representation of the likelihood that judges subject to different retention methods will vote to invalidate the challenged enactment, based upon probabilities generated from the logit model. For ease of interpretation, judges retained via any form of election are collapsed into a single category on the graph. The vertical space between the curves reflects the difference between reelected and reappointed judges in the proba-

bility that they vote to strike a statute (the y-axis). The x-axis indicates the numerical difference between briefs in support and opposition to a challenged law; the values cover the range of values found in the database. Positive values indicate that more briefs were filed in support of the statute than were filed in opposition to it. The figure highlights the substantial relationship between amicus filings and judge rulings. Indeed, the likelihood of a vote to strike approaches zero for all courts when the number of positive briefs compared to negative briefs approaches the maximum value in the dataset (15). Also worth noting is the probability that judges will vote when the amicus variable equals zero. At that point, the probability that an elected judge will vote to invalidate hovers around 50%, whereas the probability that a judge subject to reappointment is less than 20%.

Figure 3



The Attorney General's involvement as counsel in support of the challenged statute also decreases the likelihood of a court decision or judicial vote to strike a statute by about 5%. This result may stem from the AG's expertise, but it could also reflect the idea that, as an independently elected official in most states, the AG's choice to participate in an individual case indirectly measures the impact of the electorate's policy preferences. In many states, the Attorney General has authority independent of

the Governor to pursue or participate in litigation; the AG's primary responsibility is to protect the public interest rather than the government's prerogatives.[96] Whether because the AG selects promising cases in which to defend state legislation or because the AG's participation provides an important cue to state judges regarding the public's view on the legislation at issue, the AG's involvement in the litigation has an important substantive impact on the judicial choice to uphold or invalidate state laws.

Other case characteristics associated with the type of law challenged or the nature of the challenge influence decisional outcomes. Requests for advisory opinions are more likely to result in a court judgment that the recently enacted statute is unconstitutional.[97] Moreover, when litigants challenge state statutes solely under the state constitution, they are more likely to achieve success, either in terms of case outcomes or judicial votes in favor of their position. Finally, organizations are more likely to succeed on their claims than individuals; business and government challengers show no statistically significant difference from individual litigants.

These findings support the conclusion that electoral retention methods may shape judges' incentives to counter the legislative will through the exercise of judicial review. As a further test of the impact of the preferences of the elected branches on the voting behavior of judges reappointed by the legislature and governor, a variable was created to measure "congruence" between the party of the voting judge, the governor, and state legislative majority. Although this state of affairs occurred in a small percentage of cases (16% in all cases, and 4% in cases involving reappointed courts), it presents a unique context to test for the impact of the preferences of the elected branches on judicial behavior. Where judges *share* the preferences of the other branches, their decisions to invalidate statutes are (1) more likely to be consistent ideologically with the preferences of the elected branches, and (2) less likely to generate an adverse reaction from the legislature or governor since the decision was rendered by members of the same political party. Party congruence thus may provide judges with a form of political insulation.

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[96] Marshall, William P., "Break up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive," 115(9) *The Yale Law Journal* 2446-2479 (2006)(state attorneys general's primary obligation is to public interest rather than to government; exercise independence in litigation decisions).

[97] In the model of judicial votes, the Advisory Opinion variable did not achieve statistical significance at the conventional level in a two-tailed test, but it approaches significance at the .10 level and achieves significance at the 1.0 level in a one-tailed test.

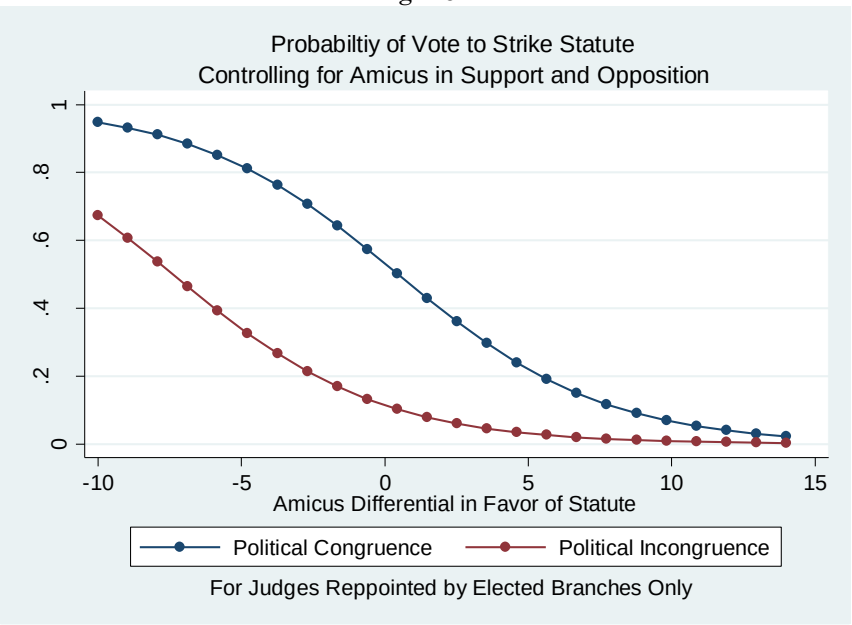
Although the variable had no significant effect in the voting model for all judges in the database, Table 5 provides the result of a logit model of voting behavior by judges who are subject to reappointment by the legislature or governor. The model reveals that appointed judges are far more likely to vote to invalidate a statute when their party affiliation shields them from legislative criticism. Figure 4 provides a graphical representation of the impact of political congruence on the probability that these appointed judges will vote to invalidate a state statute, controlling for the influence of amicus curiae. For judges who are ideologically congruent with a unified legislature and executive, the likelihood of a vote to invalidate a challenged statute increases by more than forty percentage points depending on the value of the amicus variable.

Table 5: Logit Model of Judge Vote, Reappointed Courts Only

Variable	*Coef. (Robust SE)*	*P-value (2-Tailed)*
Political Congruence		
Judge/Leg/Gov Congruence	2.350 (.772)	.002
Judge/Court		
Tenure	.0005 (.004)	.907
Chief Judge	-.035 (.188)	.851
PAJID	-.001 (.003)	.588
Law Clerks	-1.315 (.521)	.021
Court Size	-.898 (.325)	.006
IAC	1.930 (.837)	.021
Legal Environment		
Decision Docket	.003 (.003)	.901
Legislative Professionalism	3.956 (1.707)	.020
Case Characteristics		
Lower Court Strike	1.078 (.440)	.014
Amicus Differential	-.251 (.116)	.030
AG Involvement	.746 (.390)	.056
State Const'l Challenge	.669 (.393)	.089
Business Challenger	-.115 (.539)	.830
Government Challenger	-.512 (.580)	.377
Organization Challenger	.271 (.604)	.653
Individual Challenger	(Reference)	
Year Counter	.305 (.184)	.098
Regional Dummies	(Included)	
Constant	1.487 (1.762)	.399

Note: N=964. Coefficients for regional dummies omitted. Model specified with errors clustered on case citation and state.

Figure 4



Given the small percentage of cases involving ideological congruence between the judiciary, legislature and governor, these findings must be interpreted with caution. Nevertheless, they provide some additional information about the inter-branch dynamics that may shape judicial behavior in the context of an appointed judiciary that relies for reappointment on the legislature or governor. In comparison to judges who are accountable only to the electorate (or who enjoy life tenure), appointed judges' votes are much less activist. Or, phrased in another way, electorally-accountable judges are more activist than other judges in constitutional cases challenging the validity of state legislation. As intended by those who instituted judicial elections, elected judges are more likely to rein in the legislature through the power of judicial review.

The matter of selection effects remains, of course. As noted by previous researchers, the reduced propensity of appointed judges to invalidate state legislation may occur because they are able to control the cases that arise on their dockets. These judges might thus *avoid* confrontations with the elected branches at the docketing stage. Indeed, it may well be true that some judges avoid confrontation by declining to hear cases requiring constitutional review. But by avoiding the cases, their actions very likely result in the continuing validity of statutes that otherwise might be invali-

dated by the court.[98] Regardless of the cause, therefore, state legislatures with elected judges are more likely to see their legislation invalidated, all else being equal.[99]

E. Stare Decisis

The analysis presented above pertains to judicial activism manifested through the exercise of judicial review. The statistical results support the hypothesis that elected judges are more likely to invalidate state legislation on constitutional grounds, even after controlling for a number of state, court, and judge-level factors. In this section, I consider factors that influence judicial activism in the context of *stare decisis.* The analysis below addresses the question whether judicial retention methods affect court's willingness or propensity to overrule existing precedents.

Dependent Variable. To test for the relationship between retention methods and overruling behavior, data was gathered to measure the frequency of state supreme court decisions that overrule existing precedent in each year over the period 1975 to 2004.[100] The data include only those decisions that reflect violations of intertemporal *stare decisis;* overruling actions by the state legislature (i.e. superceding by statute) or by the U.S. Supreme Court are excluded. The dependent variable is constructed in the form of a *frequency* or *count* of the number of decisions rendered

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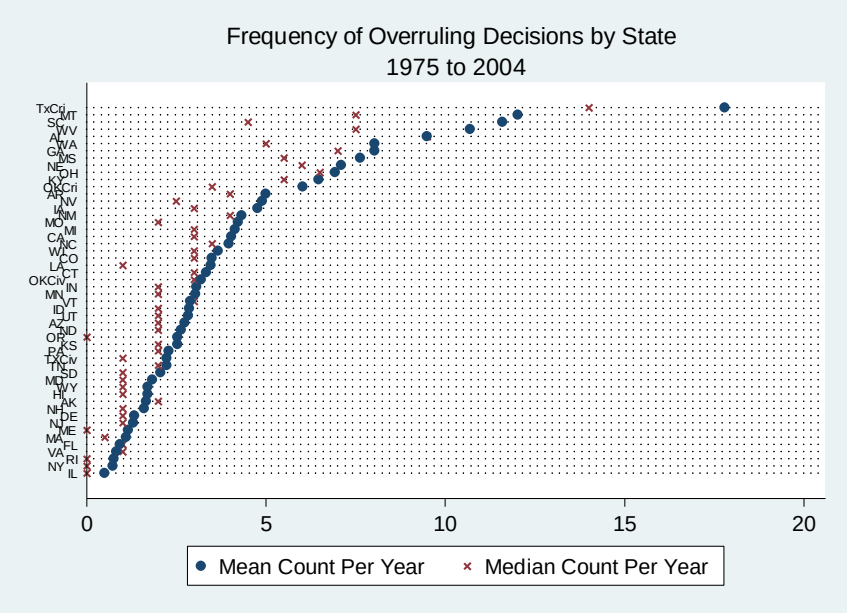
[98] It is possible, of course, that a supreme court might avoid reviewing the constitutionality of a state statute that was invalidated in the court below, but this scenario seems remote. Articles that show that judges act strategically in setting their dockets do not speculate on what happens to those cases that are filed in the lower courts and appealed to the supreme court—especially when the lower court has invalidated the challenged enactment. Thus the mechanics of case avoidance is not explored, but rather only the incidence of (abortion) cases on the courts' dockets. *See* Brace, Hall, and Langer, supra note ##, at 1280.

[99] An alternative explanation focuses on legislative *inaction*: perhaps in the states with reappointed judges, legislators are more cautious when enacting statutes such that any challenges that do arise are less likely to result in statutory invalidations. Presumably the variable measuring legislative professionalism may control for this effect to some degree, but otherwise this explanation presents a hypothesis that is extremely difficult to test.

[100] These data were collected from Westlaw by (1) downloading all citations (in excess of two million cites) to decisions rendered by the (52) state supreme courts over the entire course of their histories, (2) reformatting those citations using Perl programming language[100] to create efficient input files for Westcheck, (3) submitting the files to Westcheck, (4) parsing the Westcheck output to identify all red flagged cases and the decisions overruling those case in whole or in part, and (5) generating a comprehensive database of all overruled and overruling decisions for all states across all years. I am grateful to Charles Keckler for the prototype of the programs that enabled this data collection process.

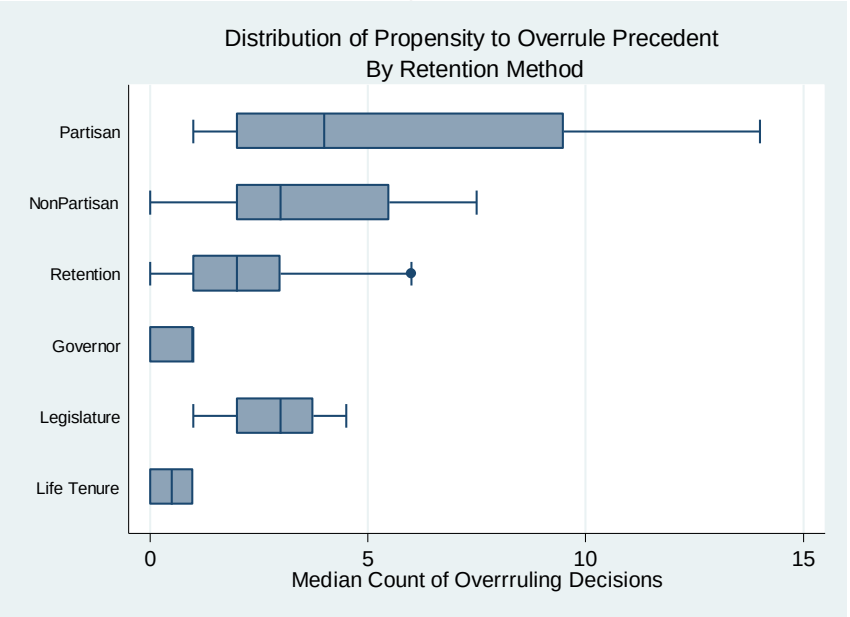
each year in which a state court overruled an existing precedent. The distribution of the mean and median count of overrulings each year, by state, is presented in the dot plot provided in Figure 5.

Figure 5



From a descriptive standpoint, the data presented in Figure 5 reveal considerable variation across the state courts in terms of their propensity to overrule precedent. Some states overrule precedent very infrequently, while others (particularly the Texas Court of Criminal Appeals) overrule existing caselaw at a fairly dramatic rate. How do these frequencies vary by retention method? The box plot in Figure 6 presents the bivariate relationship between retention method and the median count of overrulings per year across the state supreme courts.

Figure 6



The box plots reveal a clear pattern: partisan elected courts overrule precedent far more frequently than do courts retained via other methods. Courts subject to retention through nonpartisan elections also demonstrate an enhanced propensity to overrule precedent, although the differences between nonpartisan elected courts and those subject to other retention methods are not as profound.

This bivariate relationship, though suggestive, must be subjected to a multivariate model to control for other possible influences on adherence to stare decisis in state courts. A number of independent control variables were therefore identified for inclusion in the multivariate model, many of which mirror those included in the models of judicial review.

Independent Variables. First, tenure length may be related to overruling behavior for several reasons. From one perspective, judges who have served for longer periods have written more opinions; for that reason they may (1) encounter fewer existing decisions with which they disagree, or (2) be more loathe to undermine the norm of *stare decisis* in a way that would render their own rulings vulnerable to future disruption. On the other hand, lengthy tenure and secure seats may produce a more independent and perhaps more activist bench. Indeed, activism at the U.S. Supreme Court is typically explained through reference to the justic-

es' life tenure. To control for the possible effect of tenure on the court, therefore, the model of overruling behavior includes a measure of the average number of years served by sitting justices on each supreme court per year, as well as a measure reflecting the variability (standard deviation) of tenure length for those justices on the court in each year.

Court size may also affect adherence to the norm of *stare decisis*. First, larger courts may have difficulty mustering a majority of justices to overrule precedent. But alternatively, larger courts may suffer from free rider problems in terms of individual judges' adherence to the consensual norm of *stare decisis*.[101] To control for these possible effects, the model includes a measure of court size in terms of the number of authorized seats on each court per year.

Judicial ideology is also likely to affect judges' propensity to overrule a precedent. An ideal test would compare the ideology of the "enacting" court with the ideology of the court considering whether to overrule the existing decision.[102] The data for this study do not allow such a fine-grained measure to reflect the impact of judicial ideology on decisions to overrule an individual case. Thus the model includes a measure of judicial ideology (PAJID score) to control for the simplified hypothesis that more liberal justices may be more likely to overrule precedent to conform doctrine to changing social circumstances.[103]

Further variables must also be controlled. First, court dockets differ in terms of the mixture of cases on their agenda and their caseloads. To control for these differences, a dummy variable was added to the model reflecting the presence or absence of an intermediate appellate court. Where an intermediate court exists, supreme court justices typically exercise greater discretion to choose the cases on their dockets. This discretionary docket may lead to increased overruling behavior controlling for other factors, as justices in states with intermediate appellate courts may exercise their certiorari jurisdiction to identify cases as vehicles for legal change. Professionalization of the judiciary may also affect overruling behavior if professionalization carries with it an increased concern for institutional legitimacy. As a proxy for professionali-

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[101] *See* Lindquist, supra note ##, at ## (arguing that larger courts create free riders that undermine the consensual norm of *stare decisis*).

[102] For an example of this methodology, see Hansford, Tom, and James Spriggs, II, *The Politics of Precedent on the U.S. Supreme Court* (2008).

[103] *See* Lindquist and Cross, *supra* note ## (showing that liberal justices were more likely to engage in activist decision making, including the overruling of precedent).

zation, therefore, the model includes a measure of the number of law clerks assigned to each associate justice. Increasing assistance by law clerks may influence justices to adhere to *stare decisis*, since clerks may have internalized more formalist principles associated with precedent in law school. On the other hand, these newly minted lawyers may press their justices to innovate or provide justices with the necessary leisure time to craft opinions that change the legal status quo.

As for caseload itself, judges may only overrule precedent to the extent they have opportunities to do so. To account for the level of opportunity to overrule, the model includes a count of the number of decisions rendered each year that resulted in an opinion of any length. To further account for differences in the number of precedents available for review and invalidation, a measure reflecting the age of the state was incorporated into the model as well. Caseload mix may also be affected by the demographic characteristics of the states; a variable was therefore included in the model to reflect the level of urbanization in each state. Urbanization may produce the types of social or economic changes that render existing precedent obsolete.

Furthermore, state supreme court justices' responsiveness to precedent may be affected by the state's political environment. Where the state legislature is highly professional and active, for example, obsolete judicial decisions may be superceded by statute, obviating the need for the court to overrule its own decisions. For that reason, the model controls for legislative professionalism in each state based on a measure developed by Squire. Regional dummies were also included to control for any geographic variation in judicial behavior.

In the model of overruled decisions per year, the dependent variable constitutes a count of the number of such decisions truncated at zero; as such, it conforms to a poisson distribution. Given overdispersion in the data, the model was fitted using negative binomial regression, with fixed effects for each state and year. The results of the model are presented in Table 6 below. The table also includes the average marginal effects for each independent variable that achieved conventional levels of statistical significance.

Table 6: Regression Model of Count of Overruling Decisions

Variable	*Coef. (RobustSE)*	*P-value (2-Tailed)*	*Ave. Marg. Effect*
Retention Method			
Partisan Election	1.02 (.491)	.038	3.66
NonPartisan Election	1.35 (.442)	.002	4.86
Retention Election	.057 (.266)	.830	ns
Governor Reappoint	-1.82 (.961)	.058	-6.54
Legislative Reappoint	(Reference)		
Permanent Appointment	-.067 (.877)	.938	ns
Judge/Court			
Tenure (Median)	-.045 (.014)	.001	-.163
Tenure (SD)	.022 (.018)	.227	ns
PAJID (Median)	-.002 (.002)	.173	ns
Law Clerks	-.325 (.150)	.030	-1.67
Court Size	.483 (.095)	.000	1.73
IAC	.581 (.126)	.000	2.08
Legal Environment			
Decision Docket	-.003 (.0004)	.000	.013
Legislative Professionalism	-1.18 (.807)	.142	ns
Urbanization	-.017 (.014)	.241	ns
State Age	-.013 (.008)	.101	-.050
Year Dummies	(Included)		
State Dummies	(Included)		
Regional Dummies	(Included)		
Constant	-.524 (1.72)	.760	

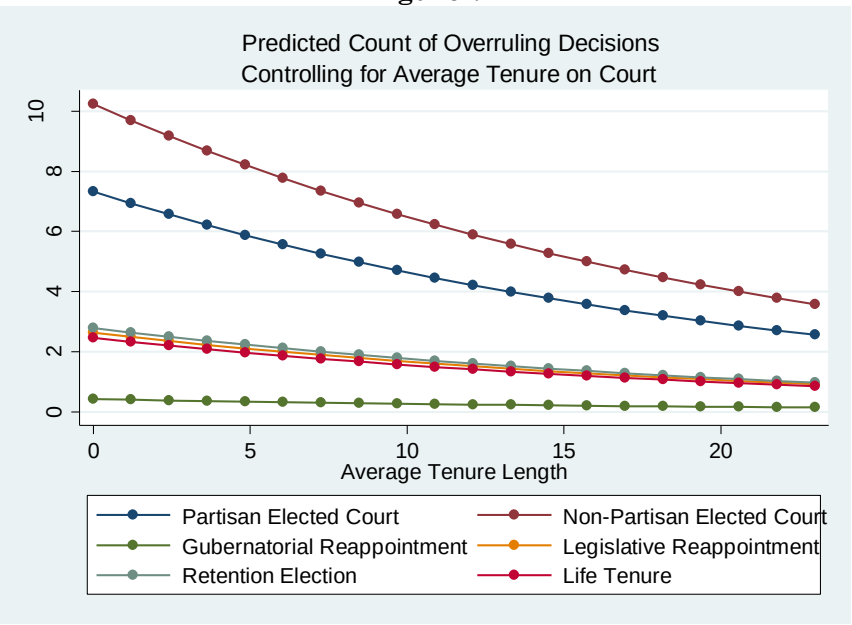
Note: N=1483. Twenty-five outliers omitted from model; negative binomial regression of count data with dispersion around mean. Model includes year and state fixed effects, as well as dummy variables reflecting region.

The model results reported in Table 6 demonstrate several significant and substantively important independent variables. First, retention method is significantly related to the frequency with which courts overturn precedents. Courts retained pursuant to partisan and nonpartisan elections overrule their own courts' decisions more often. The impact of this variable is substantial. As the marginal effects reveal, partisan elected courts overrule almost four more precedents each year compared to legislatively retained courts, and nonpartisan elected courts overrule almost five more precedents each year compared to the same reference category. Yet legislatively elected courts are not the most restrained—once other variables are controlled, courts retained via gubernatorial reappointment demonstrate a far greater reluctance

to overturn precedent even than courts reappointed by the legislature.

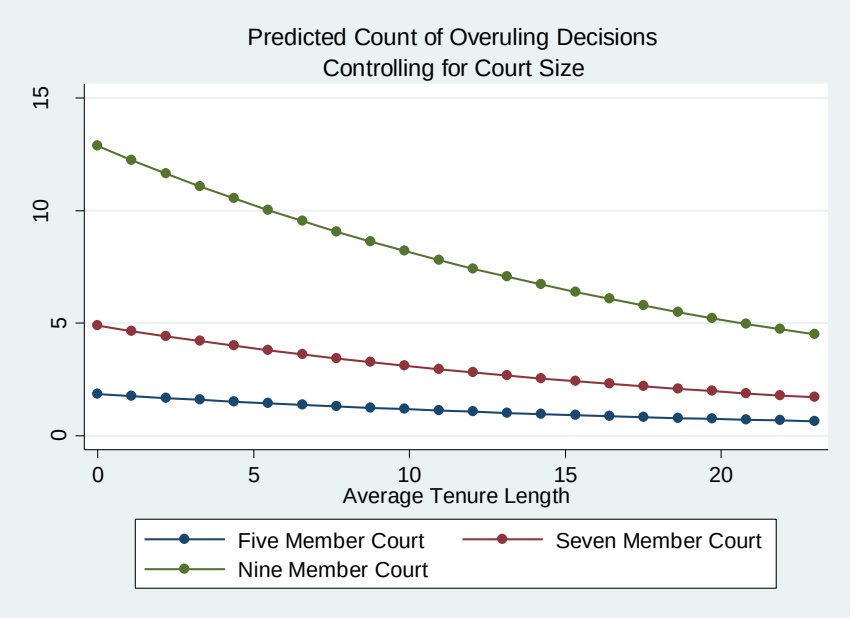
As expected, tenure length also influences the justices' decisions to overturn precedent, with judges serving for longer periods *less* likely to disrupt the legal status quo. As noted, this result could stem from those judges' reluctance to defect from a norm that protects the longevity of their own doctrinal pronouncements in previous cases. Simply stated, increased tenure length enhances the consensual norm of *stare decisis*. Figure 7 illustrates the impact of the retention and tenure length variables on the predicted count of overruling decisions. As tenure length increases over the actual range of the variable, the predicted count of overruling decisions decreases markedly, especially for elected courts. The figure also clearly demonstrates the impact of retention method on overruling behavior. Nonpartisan and partisan elected courts are more activist than courts subject to retention elections, reappointed by the elected branches, or serving for life.

Figure 7



The variable measuring court size also demonstrated a significant impact on courts' overruling behavior. Figure 8 provides a graphical representation of that influence of courts size, again controlling for tenure length. Larger courts are less inclined to respect existing precedent, perhaps because of free rider effects.

Figure 8



Finally, several other variables achieved conventional levels of statistical significance and are worthy of note. The number of cases for decision, a variable that measures a court's opportunity to reconsider existing precedent, is significant in the expected direction. Furthermore, court professionalization, as measured indirectly through the number of judicial clerks assigned to each associate justice, *decreases* the likelihood of overruling behavior. In contrast, the degree of docket control supreme courts may exercise in the presence of an intermediate appellate court *increases* the likelihood of activism in the form of overruling precedents.

As with the model of judicial review, the findings seem clear: elected courts destabilize precedent more frequently and thus may be deemed more activist. Like statutory invalidations, overruling precedent constitutes a form of judicial policy making. Although it does not directly interfere with the prerogatives of the elected branches, it does signal the court's willingness to generate and change court doctrines in light of changing circumstances.

III. Judicial Institutions and Legal Stability

The empirical results presented in this paper contribute to the existing literature highlighting the influence of judicial retention methods on judicial behavior. The evidence indicates that retention via partisan or nonpartisan elections increases levels of judicial activism, whether measured in terms of courts' propensity to invalidate statutory enactments or overrule precedent. In both circumstances, elected judges involve themselves more prominently in state policy making.

These results thus have substantial implications for reformers interested in altering the manner in which judges are selected and (especially) retained. Judicial elections provide judges with closer ties to the electorate, rendering less persuasive charges that they have no proper role in policy making. But at the same time, they raise concerns for the rule of law. Frequent destabilization of statutory rules or case law is worrisome even if the judges responsible are accountable to the electorate.

A complete understanding of these patterns and trends in judicial decision making must therefore evaluate the *impact* of these differences in activism for citizens' wellbeing and court legitimacy. How, for example, do frequent overrulings or statutory invalidations affect perceptions of courts' competency and legitimacy? How do they shape the legal environment to promote or undermine economic growth? How do they influence litigants' choices whether to pursue litigation or settle disputes out of court? Answers to these remain critical for a complete assessment of the consequences of the results reported here.