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

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How governments and the electorate choose to structure judicial institutions has implications for the rule of law. In the state context, for example, judicial elections were instituted precisely because reformers expected elected judges to counter legislative action more vigorously through the power of judicial review. But when judges invalidate statutes more frequently, they reduce law's predictability and stability. The same can be said for decisions overruling precedent: frequent overrulings undermine the norm of stare decisis and destabilize the legal status quo. These behaviors may also be viewed by some observers as more "activist" than those that defer to legislative judgments or adhere to existing doctrine enunciated in case law.

For these reasons, the relative degree to which judges overrule precedents or invalidate statutes is important even in the face of the enhanced legitimacy some state court judges draw from their closer 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. 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 willing to challenge the legal status quo. 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 for a complete understanding of the ways in which judicial retention systems affect the rule of law.

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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 invalidated state restrictions on campaign speech for judicial candidates, (2) the politicization of judicial elections and the concomitant rise in costs and

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.*, CHRIS W. BONNEAU & MELINDA G. HALL, IN DEFENSE OF JUDICIAL ELECTIONS (2009) 41 (showing that *White* had no impact on challenges to incumbents, voter turnout, or campaign costs); Keith R. Eakins & Karen Swenson, *An Analysis of the States' Responses to* Republican Party of Minnesota v. White, 28 JUST. SYS. J. 371, 372-84 (2007); David Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 265-330 (2008) (noting recent "dramatic developments" in judicial elections, including changes wrought by the *White* case); Rebecca M. Solokar, *After* White: *An Insider's Thoughts on Judicial Campaign Speech*, 26 JUST. SYS. J. 149 (2005). The Court's later decision in *Citizens United v. Federal Election Commission*., 558 U.S. 310 (2010), caused further alarm to those concerned about the influence of corporate campaign contributions, as it imposed constitutional limitations on the government's ability to regulate campaign contribution 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*, 556 U.S. 868 (2009), that decision is not likely to have a substantial impact on the likelihood that judges will be disqualified. *See* Ronald D. Rotunda, *Constitutionalizing Judicial Ethics: Judicial Elections After* Republican Party of Minnesota v. White, Caperton, *and* Citizens United, 64 ARK. L. REV. 1, 52-54 (2011).

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]

The debate over judicial elections has been joined by those who defend elections as effective democratic institutions 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

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2. *See, e.g.*, RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS (Matthew J. Streb ed., 2009); *Judicial Elections, Unhinged*, N.Y. TIMES, Nov. 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).

3. To be sure, these criticisms are not new. In his 1906 presentation to the American Bar Association, for example, Professor Roscoe Pound lamented the introduction of politics into judicial selection, arguing that "[p]utting courts into politics and compelling judges to become politicians[] in many jurisdictions" threatened respect for judicial institutions. *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. Rep. 395, 410-11 (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 the best judges by electing them; (2) that the increasingly high costs of judicial campaigns leads to a perception (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 protection for corporate and union campaign expenditures will further undermine the concept of an impartial judiciary." Rotunda, *supra* note 1, at 4.

5. *See Press Release: Judicial Election TV Spending Sets New Record, Yet Voters Reject Campaigns to Politicize the Judiciary*, BRENNAN CTR. FOR JUST. (Nov. 7, 2012), https://www.brennancenter.org/press-release/judicial-election-tv-spending-sets-new-record-yet-voters-reject-campaigns-politicize.

6. At the time of this writing, lawmakers in a number of states are considering proposals to change their respective states' method of judicial selection, including eliminating elections and adopting merit selection plan (Pennsylvania, Illinois, and Minnesota) and eliminating judicial nominating commission in favor of Senatorial confirmation process (Kansas and Tennessee). Malia Reddick, *State Legislatures Take Up Judicial Selection Reform (Updated)*, INST. FOR ADVANCEMENT AM. LEGAL SYS. ONLINE (Feb. 4, 2013), http://online.iaals.du.edu/2013/02/04/state-legislatures-take-up-judicial-selection-reform.

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 hearing 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

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7. BONNEAU & HALL, *supra* note 1, at 98-101 tbl 4.10 (showing that voters differentiate among judicial candidates on the basis of types of judicial experience).

8. JAMES L. GIBSON, ELECTING JUDGES: THE SURPRISING EFFECTS OF CAMPAIGNING ON JUDICIAL LEGITIMACY 127-28 (2012); James L. Gibson, *Judges, Elections, and the American Mass Public: The Net Effects of Judicial Campaigns on the Legitimacy of Courts* 1, 3 (Law & Soc. Scis. Program of the Nat'l Sci. Found., Paper No. SES 0451207, 2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1881555.

9. Matthew J. Streb, *Judicial Elections and Public Perception of the Courts*, *in* THE POLITICS OF JUDICIAL INDEPENDENCE 147, 149 (Bruce Peabody ed., 2011). *But see* Sara C. Benesh, *Understanding Public Confidence in American Courts*, 68 J. POL. 697, 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* Stephen J. Choi, G. Mitu Gulati & Eric Posner, *Professionals and Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary*, 26 J.L. ECON. & ORG. 290, 291 (2008) ("The relative merits of appointment and selection systems are an empirical question . . . .").

11. For empirical evidence regarding the effect of campaign contributions on judicial decision-making, *see generally* Michael S. Kang & Joanna Shepherd, *Partisanship in State Supreme Courts: The Empirical Relationship Between Party Campaign Contributions and Judicial Decision Making*, 44 J. LEGAL STUD. S161 (2015); Michael S. Kang & Joanna Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69 (2011).

12. Andrew F. Hanssen, *Political Economy of Judicial Selection: Theory and Evidence*, 9 KAN. J.L. & PUB. POL'Y 413, 417 (2005) (finding that variations in judicial institutions affect judicial behavior by altering the costs and benefits associated with particular actions).

from the institutional choices they make regarding how to staff the state judiciary.

A. *Focus of this Study: Judicial Review and Stare Decisis*

This Paper enters the debate by addressing how methods of judicial retention affect two dimensions of judicial decision-making that have profound consequences for the rule of law. As explained in the succeeding parts, retention method matters because it is likely to shape judges' calculations regarding the professional consequences of their decisions and votes, especially regarding whether those decisions threaten the likelihood of remaining on the bench.[13] Judges' strategic expectations may therefore affect their willingness to engage in certain forms of decision-making if they believe their choices will antagonize or appeal to the reappointing authority (whether an elected branch or the electorate itself). In addition, where judges are retained by the electorate, they enjoy a more direct connection to the people and draw their institutional authority from majoritarian democracy. Such a direct electoral connection might offer judges greater freedom to shape policy outcomes relative to the legislative and executive branches.

Thus, this Paper first presents an empirical analysis of state courts' willingness to invalidate legislative enactments through the power of judicial review, with a special focus on whether retention method alters the likelihood that a court or judge will vote to invalidate legislation on constitutional grounds. 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 legislative 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

13. As Professors Hall and Brace explain, "the desire to continue in office is a primary goal for structuring judicial behavior in the United States," whether it manifests in an effort not to alienate the electorate or to win legislative or gubernatorial reappointment. Melinda G. Hall & Paul Brace, *State Supreme Courts and Their Environments: Avenues to General Theories of Judicial Choice*, *in* SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 281, 284 (Cornell W. Clayton & Howard Gillman eds., 1999).

should be of central concern to reformers. 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.[14]

Of course, invalidating statutes or overruling precedents are not 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 prescribed 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 appointed judges to destabilize the legal status quo (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.[15] 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.[16]

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14. Lon Fuller identified a list of rule of law virtues that includes: (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. LON FULLER, THE MORALITY OF LAW 65-91 (1964).

15. *See* Lars P. Feld & Stefan Voigt, *Economic Growth and Judicial Independence: Cross-Country Evidence Using a New Set of Indicators*, 19 EUR. J. POL. ECON. 497 (2003).

16. According to theories of case settlement, parties are more likely to settle before trial in "clear-cut" cases where the law favors one party over the other and where uncertainty about the case outcome is lowest. *See* Daniel P. Kessler, Thomas Meites & Geoffrey P. Miller, *Explaining Deviations from the Fifty Percent Rule: A Multimodal Approach to the Selection of Cases for Litigation*, 25 J. LEGAL STUD. 233 (1996) (explaining dominant theories of settlement associated with the fifty percent hypothesis). The "fifty percent hypothesis" posits that rational plaintiffs and defendants will settle rather than litigate where the law and evidence disproportionately favor one side. As the probability of winning approaches a coin toss, however, litigants are less likely to settle and outcomes at trial should

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.[17] 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.[18] 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 occur 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 of 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.[19] While judges may be compelled to invalidate legislation or overrule precedent based on valid constitutional arguments, nevertheless, increases in these decision-making outcomes tend to reflect a more activist orientation.

In contrast to the federal judiciary, state supreme courts offer intriguing twists on the typical theoretical treatments of judicial activism. Most criticisms of activism focus on the unelected federal courts and the challenge to democratic theory that emerges when those courts counter the will of the majority as expressed through legislation.[20] Similar concerns arise when the U.S. Supreme Court shifts the doctrinal landscape by overruling precedents, as

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approach a 50% win rate for plaintiffs. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 17-29 (1984).

17. *See* STEFANIE A. LINDQUIST & FRANK CROSS, MEASURING JUDICIAL ACTIVISM (2009).

18. *Id*. at 29-47.

19. *See* Karen Swenson, *School Finance Reform Litigation: Why Are Some State Supreme Courts Activist and Others Restrained?*, 63 ALB. L. REV. 1147, 1149-50 (2000) (noting that public school finance cases in state supreme courts represented a "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").

20. Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 218-28 (2002).

this move reflects the justices' decision to create new law and upset the status quo otherwise protected by the norm of stare decisis.[21] 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."[22] 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.[23] Where majoritarian pressures influence elected judges' decision-making, it may jeopardize the commitments of those judges' to constitutionalism and, in that respect, undermine the rule of law.[24]

State judicial selection and retention methods thus pose a theoretical puzzle in relation to traditional critiques of judicial activism. A phrase coined by Alexander Bickel, the "countermajoritarian difficulty" reflects scholarly anxiety when unelected judges render decisions that supplant the majority's policy preferences as expressed through the electoral process.[25] Bickel's concern centered on the U.S. Supreme Court's exercise of the power of judicial review, which enabled the Court's activism in the 1950s and 1960s.[26] But the key to the "countermajoritarian difficulty" is the tension between policymaking by the elected branches and judicial review by an *unelected* court. Where charges of activism stem from the "countermajoritarian difficulty," elected judges in state supreme courts may thus claim immunity. No countermajoritarian actions follow from their decisions to invalidate legislation, especially when the enacting legislative majority fails to reflect the current

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21. *See* Lee Epstein & Jack Knight, *The Norm of Stare Decisis*, 40 AM. J. POL. SCI. 1018, 1022 (1996) (noting that if precedent is regularly and systematically rejected, the Court's legitimacy is undermined).

22. ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1986).

23. Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. Chi. L. REV. 689, 757 (1995) (noting that central idea underlying the countermajoritarian difficulty—the fact that judges are not accountable to the democratic majorities—is missing in the case of elective judiciaries).

24. *Id*. at 788.

25. BICKEL, *supra* note 22. "[W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it." *Id*. at 16-17.

26. Although Bickel supported the outcome and opinion in *Brown v. Board of Education,* 347 U.S. 483 (1954), he became increasingly critical of the Warren Court's activism, as he expressed in his later book, ALEXANDER BICKEL, POLITICS AND THE WARREN COURT (1965).

electorate's preferences.[27] Nor should an elected court's lawmaking activities 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 primarily at the time of selection; thereafter, federal judges serve for life on good behavior.[28] Only three states—New Hampshire, Massachusetts, and Rhode Island—provide for life tenure (or life tenure until age seventy) following initial appointment by the governor or a merit selection committee.[29] Otherwise, appointed judges stand for retention elections before the electorate or are reappointed 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."[30] 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

27. 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." EVAN HAYNES, THE SELECTION AND TENURE OF JUDGES 96 (1944), *quoted in* CHARLES H. SHELDON & LINDA S. MAULE, CHOOSING JUSTICE: THE RECRUITMENT OF STATE AND FEDERAL JUDGES 4 (1997).

28. Impeachment also offers an avenue for political or electoral forces to shape personnel on the federal bench, and thus indirectly shape court policies. Impeachment should not be underestimated as a potent tool for political forces (as demonstrated by the impact of Justice Samuel Chase's impeachment on *Marbury v. Madison*), but it nevertheless represents an extremely rare event. *See* Jack Knight & Lee Epstein, *On the Struggle for Judicial Supremacy*, 30 L. & SOC'Y REV. 87, 99-100 (1996) (explaining how moderation in Court decision-making reduced the Senate's incentive to convict Justice Chase following articles of impeachment in House).

29. *See infra* Table 1.

30. Robert F. Williams, *Juristocracy in the American States?*, 65 MD. L. REV. 68, 78 (2006).

actions that counter the legislative will or overturn court doctrines.[31] Unlike legislatures, courts are passive institutions that must await cases on their dockets in order to effect policy change. 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 policymakers is limited relative to the legislative and executive branches.[32] 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 policymaking.[33] 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 it is about legislative or gubernatorial elections.[34] Comparatively speaking, judges' democratic "credentials" may not match those of legislators if legislators' accountability to the people reflects a

31. This observation does not, of course, address the question of 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. For a thorough discussion of the historical dynamics associated with the introduction of judicial elections, see Jed H. Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061 (2010).

32. Since state court precedents may be reversed by the legislature—especially in statutory cases—a court's choice to overturn a previous 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 supersede 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 have trumped (at least temporarily) legislative involvement in the field. *See* Williams, *supra* note 30, at 69 (noting that gay marriage decisions are "simply illustrative of how state courts in many jurisdictions have developed into major policymaking branches of state government").

33. *See generally* JESSE H. CHOPER, 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); DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY 17 (1977) (noting that the debate over the democratic character of judicial review raises issues not only of legitimacy but also of capacity, raising the question of whether courts can exercise this power competently); GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE (1991) (evaluating efficacy of Supreme Court in furthering social reforms, as compared to elected branches).

34. 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 the courts." Streb, *supra* note 9, at 148.

tighter electoral connection because the polity is more informed and activated over legislative policymaking.

For these reasons, the degree to which judges engage in activist decision-making is not unimportant even for state court judges that draw enhanced legitimacy from their closer ties to the electorate. The results of the empirical analysis described below indicate that judges subject to reelection through either nonpartisan or partisan ballots 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 more likely to engage in more activist decision-making. 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.

I. THE INFLUENCE OF INSTITUTIONAL DESIGN ON JUDICIAL BEHAVIOR

The preceding discussion highlights the importance of institutional design for 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 the King manipulating British judges led early framers of state governments to create judicial institutions that would ensure judges' independence from the executive branch.[35] Each of the original thirteen states had appointed judiciaries—either by the legislature or the

35. MARY VOLKANSEK & JACQUELINE L. LAFON, JUDICIAL SELECTION: THE CROSS-EVOLUTION OF FRENCH AND AMERICAN PRACTICES 19 (1988). 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." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

governor who, himself, was selected by the legislature and under its control.[36] Judges were appointed to serve "on good behavior," subject to removal by the legislature via impeachment.[37] 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.[38] Judicial elections provided state judges with an independent base of popular legitimacy to challenge the legislative will. As a result, every new state to enter the Union between 1846 and 1912 chose to institute judicial elections.[39] These changes were also consistent with the rise of Jacksonian democracy, with its emphasis on self-governance by the common man.[40]

However, this trend was not without controversy. In the post-Civil War Era, judicial elections came under attack, when observers became concerned that partisan politics was adversely affecting court legitimacy. To counter this influence, some states adopted a solution thought to enhance judicial independence from partisan politics: longer-term lengths.[41] Later reform movements at the turn of the twentieth century, motivated by concerns about party influence in government, led the Progressives to promote the adoption of nonpartisan elections. Ultimately, these reform movements culminated in the development of the Missouri Plan, which provided for the nomination of a judge by a commission of judges, lawyers, and laypeople; gubernatorial appointment of the 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 as illustrated in Table 1. The majority of state court judges are elected.[42] At the state supreme court level, thirty-eight states select judges through some type of judicial elections (partisan, nonpartisan, or retention), while the remaining twelve grant life

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36. CHARLES H. SHELDON & LINDA S. MAULE, CHOOSING JUSTICE: THE RECRUITMENT OF STATE AND FEDERAL JUDGES 2 (1997).

37. *Id*. at 3.

38. *See* John Dinan, *Independence and Accountability in State Judicial Selection*, 91 TEX. L. REV. 633, 635-36 (2013) (reviewing JED H. SHUGERMAN, THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA (2012)).

39. *Id*. at 636.

40. *See* SHELDON & MAULE, *supra* note 36, at 3.

41. JED H. SHUGERMAN, THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA 150 (2012).

42. A salient qualification regarding judicial elections involves reliance on gubernatorial appointments to vacant seats between elections, a practice which is widely followed in states that elect their judges on a partisan or nonpartisan ballot. *See* Malia Reddick, Michael J. Nelson & Rachel Caufield, *Racial and Gender Diversity on State Courts: An AJS Study*, 48 JUDGES' J. 28, 28-32 (2008) (examining impact on state court diversity of governors' power to fill mid-term vacancies).

tenure or provide for gubernatorial/legislative reappointment.[43] State supreme courts also vary in the lengths of judicial terms. As noted above, only three states provide judges with life tenure, and two others provide tenure until age seventy. All other state supreme court justices' terms vary between six and fourteen years. These courts also vary in size, with many states staffing their supreme courts with seven justices (the modal category), many small states having five justices and several with nine. Two states (Oklahoma and Texas) split their supreme courts into two separate tribunals with jurisdiction over criminal or civil cases.

TABLE 1: Institutional Characteristics, State Supreme Courts[44]

State	Selection	Retention	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

43. For the two states with bifurcated state supreme courts (Oklahoma and Texas), the justices are selected and retained using the same methods for both courts. For a complete explanation of state selection and retention methods, see *Judicial Selection in the States*, NAT'L CTR FOR STATE COURTS, http://www.judicialselection.us.

44. *Id*.

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	12
Washington	N	N	9	6
West Virginia	P	P	5	12
Wisconsin	N	N	7	10
Wyoming	M	R	5	8

Note: 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 differs 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.[45] Ten states, generally with smaller populations, do not have

45. Theodore Eisenberg & Geoffrey P. Miller, *Reversal, Dissent, and Variability in State Supreme Courts: The Centrality of Judicial Source*, 89 B.U. L. REV. 1451, 1451-1504

intermediate appellate courts.[46] In addition, state courts vary substantially with respect to their budgetary resources and professionalization. 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.[47] Typically, these measures of professionalization correlate with total state income, "which provides the resources to support more professionalized governmental institutions."[48]

B. *Consequences of Institutional Design for Judicial Independence*

The previous Subpart highlighted a number of institutional features that distinguish and vary across state supreme courts. This Subpart explores how those design features might affect or shape judges' decision-making behavior. More formalist or traditional accounts of judging would suggest that judges' institutional environments should exercise no influence on judicial decisions, which are determined only on the basis of the applicable law and the relevant facts.[49] Nevertheless, a burgeoning body of literature now supports the proposition 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 judges' choices.[50] Indeed, judicial selection and retention methods affect the extent to which judges are insulated from, and thus independent of, either the electorate or the elected branches, or both. As John Ferejohn has recognized, "Judicial independence . . . is a feature of the institutional setting within which judging takes place."[51]

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

(2009) (noting the influence of jurisdictional source (mandatory or discretionary jurisdiction) on state supreme court decisions on reversals or likelihood of dissents).

46. 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.").

47. Peverill Squire, *Measuring the Professionalization of U.S. Courts of Last Resort*, 8 ST. POL. & POL'Y Q. 223, 223-28 (2008).

48. *Id*. at 233.

49. *See* BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 69 (2010) (noting characteristics of formalist views but cautioning about overemphasizing the distinction between formalist and realist thought in American legal history).

50. *See, e.g*., LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998); SUPREME COURT DECISION MAKING: NEW INSTITUTIONALIST APPROACHES (Cornwell W. Clayton & Howard Gillman eds., 1999).

51. John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353, 353 (1999).

decisions "based solely on the individual facts and applicable law"[52] without bias toward either party. Institutional independence focuses on the separation of powers. Judges 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.[53]

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.[54] 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?"[55] Indeed, while judicial elections may enhance both decisional and institutional independence from the elected branches, they have the concomitant effect of increased judicial accountability to (and dependence on) the electorate. Thus, reform efforts to eliminate judicial elections, as noted above, have focused on the extent to which judges' decisional independence is compromised by the influence of campaign contributions.[56] Several recent empirical studies suggest that campaign contributions have the potential to, or do indeed, influence judicial voting behavior. For example, Professors Michael Kang and Joanna Shepherd studied the likelihood that a state supreme court justice would vote for a business

52. John Tunheim, *Judicial Independence*, 87 JUDICATURE 111 (2003-2004).

53. Joanna M. Shepherd, *Are Appointed Judges Strategic Too?*, 58 DUKE L.J. 1589 (2009).

54. Shugerman, *supra* note 31, at 1069 ("[J]udicial elections were designed to increase judicial checks on the other branches."); *see also* F. Andrew Hanssen, *Learning about Judicial Independence: Institutional Change in the State Courts*, 33 J. LEGAL STUD. 431, 446-48 (2004) (arguing that changes to state procedures to select judges driven by interest in sheltering state court judges from influence of incumbent officials in elected branches). *But cf*. F. Andrew Hanssen, *The Effect of Judicial Institutions on Uncertainty and the Rate of Litigation: The Election Versus Appointment of State Judges*, 28 J. LEGAL STUD. 205, 211 (1999) (asserting that appointment increases the political independence of state judges, including from the ruling majority).

55. Shugerman, *supra* note 31, at 1143.

56. Decisional independence may be measured beyond the influence of campaign contributions. *See* Choi et al., *supra* note 10 at 320-22 (showing no clear difference between appointed and elected judges in terms of judicial independence as measured by judges' willingness to vote against co-partisans on the bench).

interest as campaign contributions from those interests increased.[57] Kang and Shepherd found a statistically significant relationship between contributions from business interests and pro-business voting in state supreme courts elected on a partisan ballot.[58] Judicial elections involve a trade-off, then, between decision independence and institutional independence.

The extent to which judges operate independently of the electorate or the elected branches may also impact judicial workloads and litigants' choices as well. In a fascinating study of litigation and appeal rates in state courts, Andrew Hanssen finds that there are more appellate filings in appointed courts as compared to elected courts.[59] 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."[60] Of course, the predictability that stems from the partisan cues Hanssen identified does not stem from rule of law principles. *Ideological predictability* may be completely inconsistent, for example, with stare decisis if judges are willing to invalidate existing precedent in order to follow their own policy preferences. While we might assume that legal predictability is primarily driven by adherence to precedent or to judicial restraint, Hanssen's study suggests that, in elected courts, it may be driven more profoundly by partisanship or ideology as judges render decisions to conform to majoritarian preferences in the electorate. Predictability of this sort, stemming as it does from *dependence* on the electorate, may enhance settlement but undermine a court's legitimacy as neutral arbiters of disputes based on existing legal standards.

C. *Consequences of Institutional Design for Judicial Quality*

Not only do selection and retention mechanisms determine the scope of judicial independence, they also may determine the quality, diversity, character, or even personality of those who ascend to the state bench. According to conventional wisdom and much popular commentary, for example, elected judges are less qualified and less impartial than appointed judges.[61]

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57. Kang & Shepherd, *supra* note 11.

58. *Id*. at 112-13. 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. Damon M. Cann, *Justice for Sale?: Campaign Contributions and Judicial Decisionmaking*, 7 ST. POL. & POL'Y Q. 281 (2007) (using two-staged probit model to show that campaign contributions affect judicial decisions in the Supreme Court of Georgia).

59. Hanssen, *The Effect of Judicial Institutions*, *supra* note 54, at 227.

60. *Id*. at 232.

61. Editorial, *Judicial Elections and the Bottom Line*, N.Y. TIMES, Aug. 20, 2012, at A18 (arguing that decision-making by elected judges is "damaged by money-soaked elections"); Shugerman, *supra* note 31, at 1064 ("[M]odern perception is that judicial elections . . . weaken judges and the rule of law.").

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 elected judges.[62] In the most widely cited of these studies, Professors Choi, Gulati, and Posner evaluated the influence of state court selection mechanisms on judicial productivity, skill, and independence.[63] Their study found that (1) elected judges are more productive (as measured by the number of written opinions) than appointed judges while (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.[64] 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 noted, for example, that elected judges may write more opinions because they are more political by nature (with opinion writing perhaps serving as a form of constituency service), while appointed justices may be more concerned about their legacy as legal craftsmen.[65]

As for diversity on the bench, the weight of existing evidence similarly indicates no clear relationship between diversity and method of state court selection.[66] This finding holds even when interim appointments are considered

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62. *See, e.g.*, Henry R. Glick & Craig F. Emmert, *Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges*, 70 JUDICATURE 228 (1987) (finding no statistically significant differences on measures of quality between elected and appointed state supreme court justices); *see also* Diane M. Johnsen, *Building a Bench: A Close Look at State Appellate Courts Constructed by the Respective Methods of Judicial Selection*, 53 SAN DIEGO L. REV. (forthcoming Nov./Dec. 2016) ("[O]bjective characteristics of appellate judges in election states are significantly different in only a handful of respects from those of judges appointed through merit-selection and merit-confirmation.").

63. Choi et al., *supra* note 10, at 309, 316.

64. *But see* Daniel Berkowitz & Karen Clay, *The Effect of Judicial Independence on Courts: Evidence from the American States* (Am. L. & Econ. Ass'n Ann. Meetings, Working Paper No. 32, 2005) (showing that electoral selection systems are negatively correlated with judicial quality as measured by a Chamber of Commerce survey). For an evaluation of whether retention and selection methods affect the likelihood that a state supreme court opinion will be reversed by the United States Supreme Court, see Ryan J. Owens et al., *Nominating Commissions, Judicial Retention, and Forward-Looking Behavior on State Supreme Courts: An Empirical Examination of Selection and Retention Methods*, 15 ST. POL. & POL'Y Q. 211 (2015) (showing no such relationship).

65. Choi et al., *supra* note 10, at 326-27; *see also* Pozen, *supra* note 1, at 277 ("It is natural to assume that the voting public will generally be more 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* Brent D. Boyea, *Linking Judicial Selection to Consensus: An Analysis of Ideological Diversity*, 35 AM. POL. RES. 643 (2007).

66. Mark S. Hurwitz & Drew N. Lanier, *Diversity in State and Federal Appellate Courts: Change and Continuity Across 20 Years*, 29 JUST. SYS. J. 47, 66 (2008); *see also* Kathleen A. Bratton & Rorie L. Spill, *Existing Diversity and Judicial Selection: The Role of the Appointment Method in Establishing Gender Diversity in State Supreme Courts*, 83 SOC. SCI. Q. 504, 508 (2002); Lisa M. Holmes & Jolly A. Emrey, *Court Diversification: Staffing*

and when other contextual variables—including social and political demographics—are taken into account.[67]

In addition, 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 Paul Brace and Melinda Gann Hall have demonstrated the linkages between state justices' political environments and their willingness to uphold death sentences.[68] 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, they find that "justices in liberal, competitive states are less inclined to support death decrees, and those in conservative[,] competitive states are more inclined to do so."[69] In the context of abortion rights, Professor Richard Caldarone and his colleagues have shown that state court justices 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.[70] 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.[71] These studies reflect the impact that selection systems may have on the outcomes of particular claims in elected and appointed courts.[72]

Third, selection and retention methods may affect the level of consensual decision-making on state supreme courts. As early as 1970, Professors Bradley Canon and Dean Jaros reported on their study of institutional structure and dissent in state supreme courts and found that elective systems produced higher

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the State Courts of Last Resort Through Interim Appointments, 27 JUST. SYS. J. 1, 3-4 (2006).

67. Reddick et al., *supra* note 42.

68. *See, e.g.*, Paul R. Brace & Melinda G. Hall, *The Interplay of Preferences, Case Facts, Context, and Rules in the Politics of Judicial Choice*, 59 J. POL. 1206 (1997) [hereinafter Brace & Hall, *The Interplay of Preferences*]; Melinda G. Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. POL. 427 (1992); Melinda G. Hall & Paul Brace, *Toward an Integrated Model of Judicial Voting Behavior*, 20 AM. POL. Q. 147 (1992) [hereinafter Hall & Brace, *Toward an Integrated Model*].

69. Brace & Hall, *The Interplay of Preferences*, *supra* note 68, at 1222.

70. Richard P. Caldarone et al., *Partisan Labels and Democratic Accountability: An Analysis of State Supreme Court Abortion Decisions*, 71 J. POL. 560, 568 (2009).

71. Gerard S. Gryski et al., *Models of State High Court Decision Making in Sex Discrimination Cases*, 48 J. POL. 143, 148 (1986).

72. At the trial level, elected judges mete out harsher sentences than appointed judges on average, with this difference becoming more pronounced as an election approaches. *See* Sanford C. Gordon & Gregory A. Huber, *The Effect of Electoral Competitiveness on Incumbent Behavior*, 2 Q.J. POL. SCI. 107, 133 (2007); Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247, 261 (2004).

dissent rates.[73] 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."[74] More recent research confirms the link between judicial selection methods and dissent rates, demonstrating a statistically significant connection between elected judges and increased rates of dissent.[75]

D. *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 nonconsensual decision-making, elected judges' behaviors diverge from appointed judges in significant ways. Of central importance to this study are those findings addressing the influence of judicial retention methods on judges' institutional independence and on the stability and predictability of legal standards. This Subpart 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 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's judges are *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'

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73. Bradley C. Canon & Dean Jaros, *External Variables, Institutional Structure and Dissent on State Supreme Courts*, 3 POLITY 175, 190 (1970).

74. *Id*. at 191.

75. *See* Paul Brace & Melinda G. Hall, *Neo-Institutionalism and Dissent in State Supreme Courts*, 52 J. POL. 54, 64 (1990) (showing a relationship between elective systems and dissenting behavior); Hall & Brace, *Toward an Integrated Model*, *supra* note 68 (reaching the same conclusion). *But see* Boyea, *supra* note 65, at 651 (noting that appointed courts display greater ideological diversity, which leads to reduced consensus).

likelihood of overturning statutes."[76] Drawing on data from the Brace and Hall Supreme Court Database for the years 1995 to 1998, Shepherd tested whether judges retained through the six primary methods (i.e., partisan and nonpartisan elections, retention elections, legislative and gubernatorial reappointment, and life tenure) show any differential likelihood of declaring a state law unconstitutional.[77] Her model incorporated 1,873 votes on the constitutionality of state statutes and identified no significant relationship 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 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.[78] 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.[79] 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 judges subject to merit retention election. In contrast, Professor Langer's comprehensive study of judicial review in four other substantive areas (i.e., election law, workers' compensation, unemployment compensation, and welfare benefits) found that the impact of judicial retention methods varied by issue area, with elected judges *more* likely to vote to strike state statutes in the areas of workers compensation and campaign and election law (as compared to judges retained by the legislature or governor).[80]

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76. Shepherd, *supra* note 53, at 1623. Professor Shepherd's findings obviously differ from those in this study. Although both studies rely on the same database, we culled the database to remove cases not involving a clear constitutional challenge to a statute and coded different variables, thus resulting in a different set of cases and different independent or control variables, likely contributing to the different result.

77. 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. *Id*. at 1612 n.110.

78. *Id*. at 1623.

79. Paul Brace et al., *Judicial Choice and the Politics of Abortion: Institutions, Context, and the Autonomy of Courts*, 62 ALB. L. REV. 1265, 1278 (1999).

80. LAURA LANGER, JUDICIAL REVIEW IN STATE SUPREME COURTS: A COMPARATIVE STUDY 89-122 (2002).

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.[81] After analyzing the proportion of cases involving a constitutional challenge in which the court struck the challenged statute between 1981 and 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.[82] In the context of school finance reform litigation, however, Karen Swenson identified no significant differences in propensity to invalidate public school financing systems between appointed and elected judges selected.[83]

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 our 1998 study of stare decisis in the supreme courts of four different states (Alabama, Florida, Pennsylvania, and New Jersey), Kevin Pybas and I found that the Alabama Supreme Court overruled precedents, particularly extremely "young" precedents, more often than the other three states while New Jersey overruled the least frequently.[84] The limited number of states included in the

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81. James P. Wenzel, Shaun Blower & David J. Lanoue, *Legislating from the State Bench*, 25 AM. POL. Q. 363 (1997). This study relied 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* Craig F. Emmert, *An Integrated Case-Related Model of Judicial Decision Making: Explaining State Supreme Court Decisions in Judicial Review Cases*, 54 J. POL. 543, 549 (1992).

82. 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 the nature of the excluded category in the model for purposes of comparison is somewhat opaque. 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." Wenzel et al., *supra* note 81, at 376.

83. Swenson, *supra* note 19, at 1174.

84. Stefanie A. Lindquist & Kevin Pybas, *State Supreme Court Decisions to Overrule Precedent, 1965-1996*, 20 JUST. SYS. J. 17 (1998).

study narrows the extent to 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, I found that partisan elected courts demonstrated the greatest propensity to invalidate prior precedents.[85] This study also 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 parts 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 is 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 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 limit or enhance 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.

II. EMPIRICAL SPECIFICATION AND ESTIMATION

A. *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 Brace and Hall State Supreme Court Database.[86] That database, incorporating data on all state supreme court decisions rendered from 1995 to 1998, includes several variables that denote cases raising constitutional

85. Stefanie A. Lindquist, *Stare Decisis as Reciprocity Norm*, *in* WHAT'S LAW GOT TO DO WITH IT? 173, 185 (Charles G. Geyh ed., 2011).

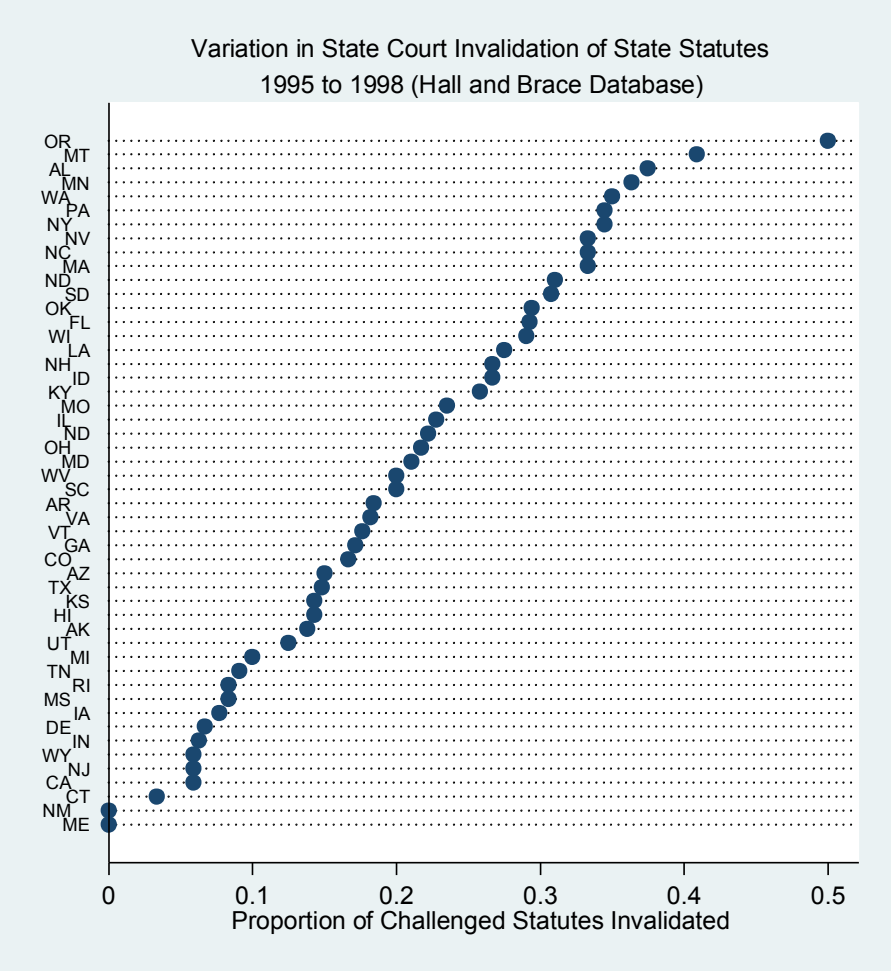
86. *State Supreme Court Database*, RICE U. (Jan. 2001), http://www.ruf.rice.edu/~pbrace/statecourt (Project Managers: Paul Brace & Melinda G. Hall).

challenges to state statutes.[87] 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 re-classifications, ultimately resulting in 1,203 cases for analysis, as well as 7,174 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.

87. Cases involving constitutional challenges to federal statutes happen very rarely and were eliminated from this 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, reflecting a challenge under the U.S. Constitution (USC) or under the state constitution (STC) to the case type variable names, which indicate that the case involved a challenge to a statute on the basis of the federal or state constitutions (or both).

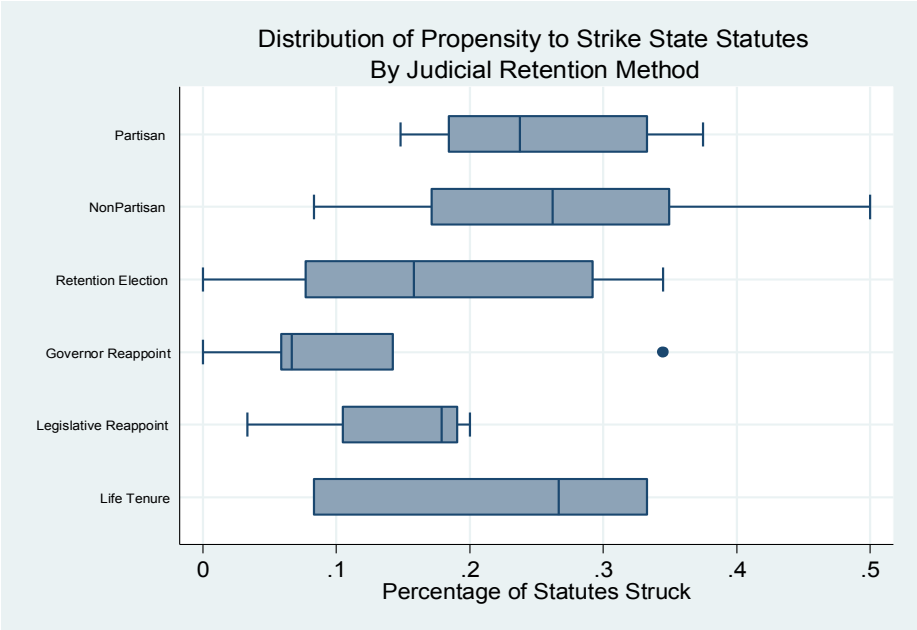
FIGURE 1: Variation in State Court Invalidation of State Statutes
1995 to 1998 (Hall and Brace Database)



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 by 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 on the continuity of the elected branches are less likely to invalidate statutes enacted by 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.[88]

FIGURE 2: Distribution of Propensity to Strike State Statutes by Judicial Retention Method



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 using (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.

88. *See* Shugerman, *supra* note 31, at 1115-16.

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.[89] Perhaps more important, however, is the length of time that judges have actually served on the bench, since it may shape their expectations regarding their continuation 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, reelection may remain assured or highly probable even when the mandated term length is fairly short. Measures that reflect the actual length of time judges serve 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.[90] 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.[91] 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.[92]

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

89. 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* Mark S. Hurwitz, *The Relative Concept of Independence*, 91 TEX. L. REV. 651, 657 (2013) (reviewing JED H. SHUGERMAN, THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA (2012)).

90. Term length was also tested in the models presented herein; it had no significant effect.

91. *See* LINDQUIST & CROSS, *supra* note 17, at 47-64.

92. PAJID scores were created by Brace et al. (2000) based on elite (i.e., governor and parties in each legislative chamber) and citizen ideology in the judges' respective states 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. Paul Brace et al., *Measuring the Preferences of State Supreme Court Justices*, 62 J. POL. 387, 398 (2000).

associate justices, which was included in the model to control for this level of assistance and as a proxy for professionalization. Increased 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 time to craft opinions that change the legal status quo. Furthermore, as inexperienced attorneys who have only a short-lived connection with the institution, clerks may be less sensitive to the institutional consequences of judicial decisions vis-à-vis the elected branches.[93] 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 if more professional courts are less inclined to disrupt the legal status quo.[94] The expected direction of this variable is thus unclear.

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 intermediate appellate courts, the number of cases on the docket may impact courts' 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.[95] 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

93. I thank Judge Lee Rosenthal for this insight.

94. *Cf*. Jeffrey Yates, Holley Tankersley & Paul Brace, *Assessing the Impact of State Judicial Structures on Citizen Litigiousness*, 63 POL. RES. Q. 796, 806 (2010) (showing empirical results suggesting that professionalism of state supreme courts promotes greater predictability in their decision making).

95. 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".

engage in more activist or innovative policymaking that produces more court challenges.

According to existing studies, for example, legislative professionalism is associated with a greater willingness to reform government personnel practices[96] and to adopt more complex and technical policies.[97] Because they are more active, professional legislatures may also propose and enact more bills, which could also lead to more frequent court challenges on constitutional grounds.[98] 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.[99]

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.[100] 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 amicus curiae briefs, 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 was constructed that reflected the

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96. J. Edward Kellough & Sally C. Selden, *The Reinvention of Public Personnel Administration: An Analysis of the Diffusion of Personnel Management Reforms in the States*, 63 PUB. ADMIN. REV. 165, 171 (2003).

97. Sangjoon Ka & Paul Teske, *Ideology and Professionalism—Electricity Regulation and Deregulation over Time in the American States*, 30 AM. POL. RES. 323, 338 (2002).

98. Alan Rosenthal, *State Legislative Development: Observations from Three Perspectives*, 21 LEGIS. STUD. Q. 169, 171-72 (1996).

99. Peverill Squire, *Measuring State Legislative Professionalism: The Squire Index Revisited*, 7 ST. POL. & POL'Y Q. 211, 212 (2007). *But see* Peverill Squire, *Membership Turnover and the Efficient Processing of Legislation*, 23 LEGIS. STUD. Q. 23, 29 (1998) (finding that legislative professionalism decreases legislative productivity).

100. In two states, Nebraska and North Dakota, the law requires a supermajority before the court may invalidate a state statute. Evan H. Caminker, *Thayerian Deference to Congress and Supreme Court Supermajority Rule: Lessons from the Past*, 78 IND. L.J. 73, 91-92 (2003). 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.

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

In addition to amici, the Attorney General (AG) 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.[101]

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.[102]

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 by the [U.S.] Supreme Court."[103] 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 (a) solely on state

101. In the cases used in our database, the AGs entered the case to argue in favor of the statute's constitutionality.

102. 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.

103. Emmert, *supra* note 81, at 547; *see also* Susan P. Fino, *Judicial Federalism and Equality Guarantees in State Supreme Courts*, 17 PUBLIUS 51, 64 (1987) (arguing that equal protection decisions based on state grounds alone were more than twice as likely to produce outcomes declaring state policy unconstitutional).

constitutional grounds versus (b) 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.[104] 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.[105] 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 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.

104. *See* Paul Brace & Melinda G. Hall, *"Haves" Versus "Have Nots" in State Supreme Courts: Allocating Docket Space and Wins in Power Asymmetric Cases*, 35 LAW & SOC'Y REV. 393 (2001); Marc Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1975); Robert A. Kagan et al., *The Business of State Supreme Courts, 1870-1970*, 30 STAN. L. REV. 121 (1977).

105. I thank Joanna Shepherd for her generosity in providing these data.

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

Variable	*Coefficient (Robust SE)*	*P-value (2-Tailed)*
Retention Method		
Partisan Election	.796 (.483)	.100
NonPartisan Election	.798 (.392)	.042
Retention Election	.552 (.412)	.181
Governor Reappoint	-.149 (.575)	.794
Legislative Reappoint	(Reference)	
Permanent Appointment	.679 (.565)	.230
Judge/Court		
Tenure (Median)	.074 (.048)	.127
Tenure (SD)	-.145 (.058)	.013
PAJID (Median)	.006 (.004)	.145
Law Clerks	-.175 (.143)	.222
Court Size	.092 (.095)	.335
IAC	-.565 (.285)	.048
Legal Environment		
Decision Docket	-.0003 (.001)	.827
Legislative Professionalism	1.09 (1.06)	.304
Case Characteristics		
Lower Court Strike	1.21 (.173)	.000
Amicus Differential	-.239 (.106)	.025
AG Involvement	-.337 (.184)	.067
Advisory Opinion	1.21 (.543)	.025
Initiative or Referendum	.225 (.541)	.677
State Const'l Challenge	.443 (.131)	.001
Business Challenger	.359 (.240)	.134
Government Challenger	.243 (.197)	.217
Organization Challenger	.883 (.304)	.003
Individual Challenger	(Reference)	
Year Counter	.152 (.080)	.057
Regional Dummies	(Included)	
Constant	-2.89 (.798)	.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	*Coefficient (Robust SE)*	*P-value (2-Tailed)*
Retention Method		
Partisan Election	.778 (.311)	.012
NonPartisan Election	.620 (.280)	.027
Retention Election	.544 (.276)	.049
Governor Reappoint	-.108 (.351)	.758
Legislative Reappoint	(Reference)	
Permanent Appointment	.467 (.415)	.260
Judge/Court		
Tenure	.006 (.020)	.737
Chief Judge	-.071 (.051)	.162
PAJID	.003 (.001)	.057
Law Clerks	-.250 (.101)	.014
Court Size	.078 (.066)	.239
IAC	-.345 (.232)	.137
Legal Environment		
Decision Docket	-.0007 (.0009)	.425
Legislative Professionalism	1.30 (.703)	.064
Case Characteristics		
Lower Court Strike	.955 (.137)	.000
Amicus Differential	-.151 (.071)	.033
AG Involvement	-.288 (.125)	.022
Advisory Opinion	.858 (.555)	.122
Initiative or Referendum	.233 (.433)	.589
State Const'l Challenge	.274 (.123)	.026
Business Challenger	.162 (.193)	.401
Government Challenger	.149 (.168)	.376
Organization Challenger	.721 (.224)	.001
Individual Challenger	(Reference)	
Year Counter	.099 (.057)	.086
Regional Dummies	(Included)	
Constant	-2.23 (.557)	.000

Note: N=7174. 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	.118	.134
NonPartisan Election	.118	.107
Retention Election	ns	.094
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	-.043
Court Size	ns	ns
IAC	-.083	ns
Legal Environment		
Decision Docket	ns	ns
Legislative Professionalism	ns	.225
Case Characteristics		
Lower Court Strike	.179	.165
Amicus Differential	-.035	-.026
AG Involvement	-.049	-.049
Advisory Opinion	.180	ns
Initiative or Referendum	ns	ns
State Const'l Challenge	.065	.047
Business Challenger	ns	ns
Government Challenger	ns	ns
Organization Challenger	.132	.124
Individual Challenger	(Reference)	(Reference)
Year Counter	ns	ns
N	1203	7174

The results presented in these tables confirm the bivariate relationship explored in Figure 2. As seen in Table 4, decisions at both the court and judge levels 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 an approximated 10 to 13% 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 9% more likely to vote to strike a state statute than judges subject to legislative reappointment.

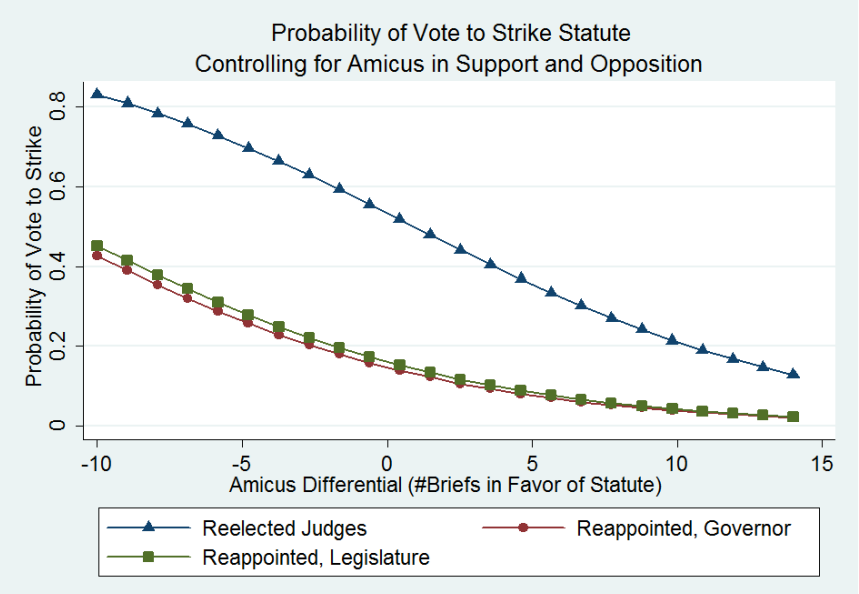
Several other coefficients are worthy of note because of their substantive impact on the dependent variables. First, legislative professionalism is positively related to a judge's vote to strike. Since this variable theoretically ranges from 0 to 1, the marginal effect indicates that a shift from the least professional to the most professional legislature creates about a 22% 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.

Looking at the case characteristics, the dummy variable measuring whether the statute was invalidated by the lower court is statistically significant and substantively important. A lower court invalidation increases the likelihood that the court or judge will agree that the statute is unconstitutional by about 18% (court model) and about 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 probability 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 will do the same is less than 20%.

FIGURE 3: Probability of Vote to Strike Statute Controlling for Amicus in Support and Opposition



The Attorney General's (AG) 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.[106] Whether because the AG selects promising cases in which to defend state legislation or

106. William P. Marshall, *Break up the Presidency?: Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2456 (2006) (arguing that the primary obligation of state attorneys general is to the public's interest rather than to the state government's interest, thus allowing them to exercise independence in litigation decisions).

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.[107] 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 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.

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 briefs. 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 40% depending on the value of the amicus variable.

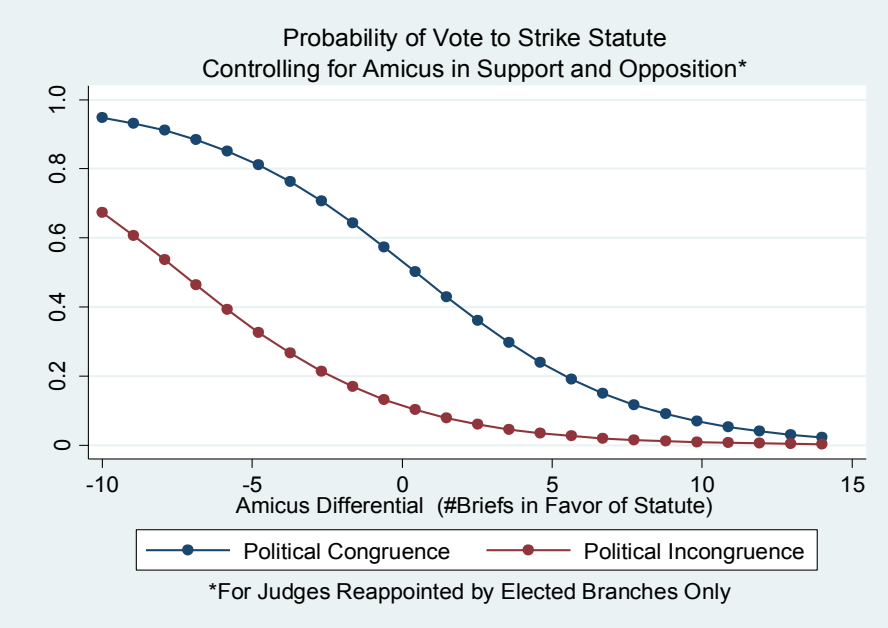
107. In the model of judicial votes, the Advisory Opinion variable did not achieve statistical significance at the conventional level in a two-tailed test, but it approaches significance at the .10 level and achieves significance at the 1.0 level in a one-tailed test.

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

Variable	*Coefficient (Robust SE)*	*P-value (2-Tailed)*
Political Congruence		
Judge/Leg/Gov Congruence	1.849 (.631)	.003
Judge/Court		
Tenure	.094 (.150)	.527
Chief Judge	-.097 (.146)	.505
PAJID	-.001 (.003)	.668
Law Clerks	-1.331 (.479)	.005
Court Size	-1.227 (.587)	.037
IAC	2.376 (.922)	.010
Legal Environment		
Decision Docket	.007 (.005)	.157
Legislative Professionalism	3.451 (1.717)	.044
Case Characteristics		
Lower Court Strike	1.117 (.449)	.013
Amicus Differential	-.271 (.118)	.022
AG Involvement	.729 (.398)	.067
State Const'l Challenge	.697 (.421)	.098
Business Challenger	.366 (.510)	.473
Government Challenger	-.313 (.536)	.559
Organization Challenger	.812 (.576)	.159
Individual Challenger	(Reference)	
Year Counter	.439 (.191)	.022
Regional Dummies	(Included)	
Constant	.698 (1.848)	.705

Note: N=958. Coefficients for regional dummies omitted. Model specified with errors clustered on case citation and state.

FIGURE 4: Probability of Vote to Strike Statute Controlling for Amicus in Support and Opposition



Note: For judges reappointed by elected branches only.

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 regarding the subset of the judiciary that relies on the legislature or governor for reappointment. 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.

Finally, we turn to the matter of selection effects. 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 invalidated by the court.[108] Regardless of the cause, therefore, state legislatures with elected judges are more likely to see their legislation invalidated, all else being equal.[109]

B. *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 Subpart, I consider factors that influence judicial activism in the context of stare decisis. The analysis below addresses the question of whether judicial retention methods affect courts' 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.[110] The data includes only decisions that reflect violations of intertemporal stare decisis; actions by the U.S. Supreme Court or state legislatures to overrule precedent (e.g., superseding by statute) are excluded. The dependent variable is constructed in the form of a *frequency* or *count* of the number of decisions rendered each year in which a state supreme court overruled an existing precedent. The distribution of the mean and median count

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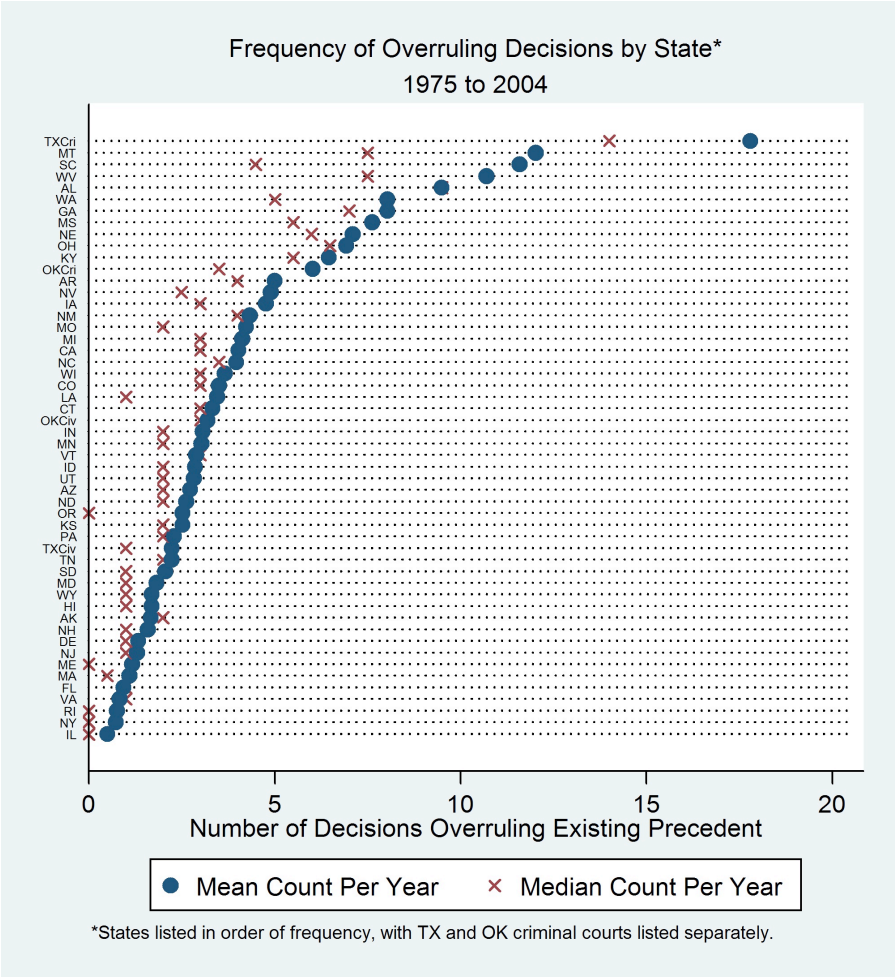
108. It is possible, of course, that a supreme court might avoid reviewing the constitutionality of a state statute that was invalidated in the court below, but this scenario seems remote. Articles that show that judges act strategically in setting their dockets do not speculate on what happens to those 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 are not explored, but rather only the incidence of abortion cases on the courts' dockets. *See* Brace et al., *supra* note 79, at 1280.

109. 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.

110. This data was collected from Westlaw by (1) downloading all citations (in excess of two million cites) to decisions rendered by the 52 state supreme courts (including the two supreme courts each in Texas and Oklahoma) over the entire course of their histories; (2) reformatting those citations using Perl programming language 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 cases 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.

of overrulings each year, by state, is presented in the dot plot provided in Figure 5.

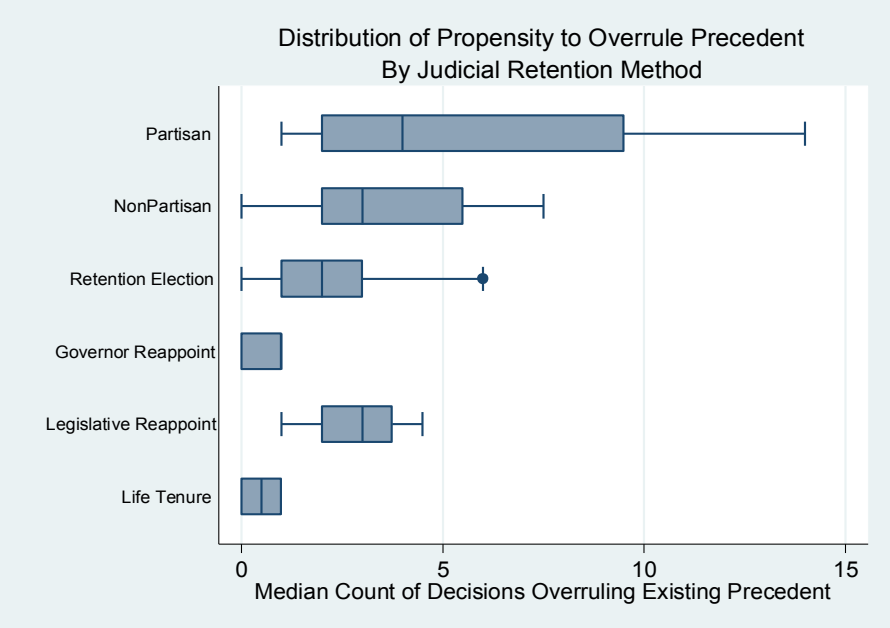
FIGURE 5: Frequency of Overruling Decisions by State, 1975 to 2004



From a descriptive standpoint, the data presented in Figure 5 reveals considerable variation across state supreme courts in terms of their respective propensities to overrule precedent. Some state courts (e.g., Illinois) overrule precedent very infrequently while others (e.g., Texas Court of Criminal Appeals) overrule existing case law 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: Distribution of Propensity to Overrule Precedent by Judicial Retention Method



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. Many 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. On the one hand, 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 loath 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 life tenure of justices. 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.[111] 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 precedent-setting court with the ideology of the court considering whether to overrule the decision.[112] The data for this study does 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 (i.e., 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.[113]

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 (while 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

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111. *See* Lindquist, *supra* note 85, at 177 (arguing that larger courts create free riders that undermine the consensual norm of stare decisis). This hypothesis is based upon Judge Richard Posner's observation that consensus norms like stare decisis are stronger in small groups and thus likely to be stronger in smaller courts because, the smaller the court, the more each judge might worry about "the impact of their own behavior toward precedent on the survival of the practice of decision according to precedent in their jurisdiction." RICHARD A. POSNER, OVERCOMING LAW 122, 122 n.27 (1995). Free riding judges allow their colleagues to adhere to (and maintain) the norm while they (the free riders) decide cases in ways that advance their own personal policy preferences.

112. For an example of this methodology, see THOMAS G. HANSFORD & JAMES F. SPRIGGS, II, THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT (2008).

113. *See* LINDQUIST & CROSS, *supra* note 17 (showing that liberal justices were more likely to engage in activist decision making, including the overruling of precedent).

with it an increased concern for institutional legitimacy. As a proxy for professionalization, 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 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. 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.[114]

Furthermore, state supreme court justices' responsiveness to precedent may be affected by the political environments in their respective states. Where a state legislature is highly professional and active, for example, obsolete judicial decisions may be superseded 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.[115] 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.

114. *See* PAUL BAIROCH, CITIES AND ECONOMIC DEVELOPMENT: FROM THE DAWN OF HISTORY TO THE PRESENT (Christopher Braider trans., Univ. of Chi. Press 1988) (describing the relationship between the rise of cities and economic and social change).

115. Peverill Squire, *Measuring State Legislative Professionalism: The Squire Index Revisited*, 7 ST. POL. & POL'Y Q. 211 (2007).

TABLE 6: Regression Model of Count of Overruling Decisions

Variable	*Coefficient (Robust SE)*	*P-value (2-Tailed)*	*Average Marginal 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	

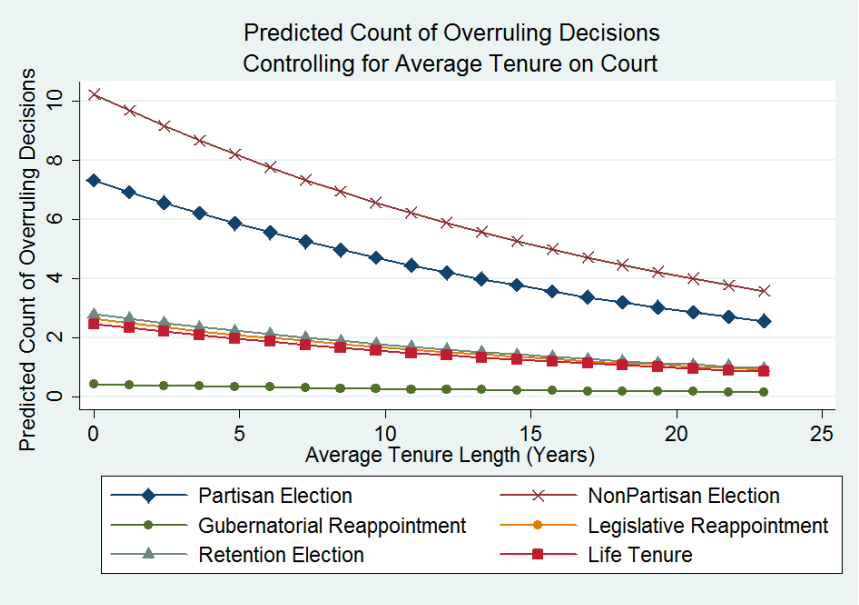
Note: N=1,483. Twenty-five outliers omitted from model; negative binomial regression of count data with dispersion around mean. Model includes year and state fixed effects, as well as dummy variables reflecting region.

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. Judges retained pursuant to partisan and nonpartisan elections overrule their own courts' decisions more often. The impact of this variable is substantial. As the average marginal effects reveal, partisan elected courts overrule almost four more precedents and nonpartisan elected courts overrule almost five more precedents each year compared to legislatively reappointed courts. Yet the latter are not the most restrained—once other variables are controlled, courts retained via gubernatorial reappointment demonstrate a far greater reluctance to

overturn precedent as they overrule, on average, more than six fewer decisions than do courts reappointed by the legislature.

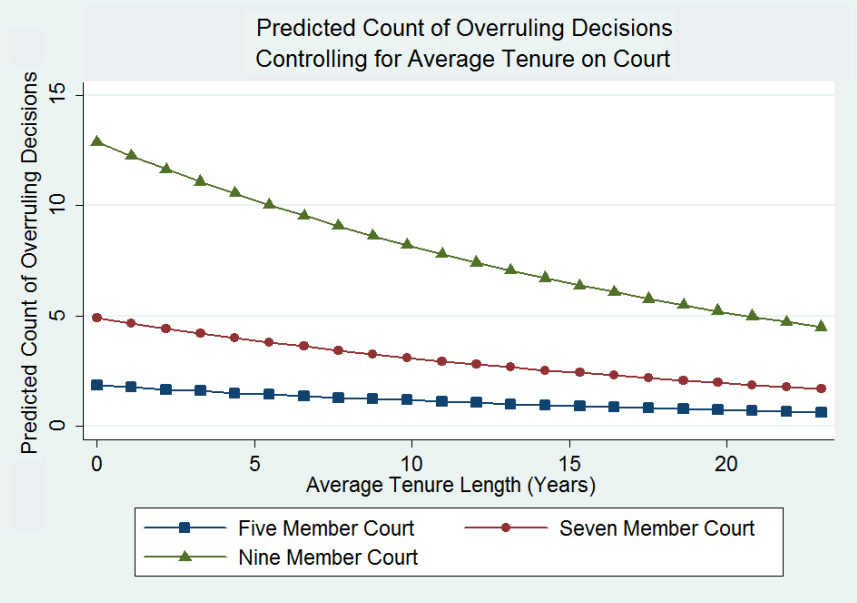
As expected, tenure length also influences the justices' decisions to overturn precedent, with judges serving for longer periods being *less* likely to disrupt the legal status quo. As noted, this result could stem from those judges' reluctance to defect from a norm that protects the longevity of their 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: Predicted Count of Overruling Decisions Controlling for Average Tenure on Court



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

FIGURE 8: Predicted Count of Overruling Decisions Controlling for Average Tenure on Court



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 significantly and positively associated with overruling decisions, as expected. 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 overturn 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 charges that they have no proper role in policy-making much less persuasive. 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 be used to evaluate the *impact* of these differences in activism to promote citizen 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 regarding whether to pursue litigation or settle disputes out of court? Answers to these questions remain critical for a complete assessment of the consequences of the results reported here.