

The Influence of Political Structures and Institutional Rules on State Supreme Courts

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Introduction

Law is a system of rules prescribed by a legitimate authority – the legislature by a statute, the citizens by a constitution, and a court by the ruling in a case, binding on those to whom it applies. As such, it is a government of extant rights. While this is a simplistic definition, there is an abundance of contradictory theories of law and judicial decision-making with little agreement on how it should be defined. Yet, many judicial researchers agree that while courts are constrained by the legal factors of a specific case, courts are also predisposed by the effects of their political environments, ideologies, and judicial elections (e.g., Brace and Hall, 1993, 1995; Emmert and Traut, 1994; George and Epstein, 1992; Hall, 1987; 2001; Songer and Haire, 1992).

Until more recent, political science research has typically concentrated a great deal of interest on the Supreme Court, a reasonable option considering the importance of the Court. Scholars of the new institutionalist model however, tend to focus more on lower federal courts since the judge's assignment to a particular case is deliberately unsystematic, which tends to support the causal inferences about the effect of judicial attributes on decision-making.¹ By redefining state court judicial decision-making in political terms, scholars who utilize the new institutionalist model enhance the research of judicial behavior while significantly adding to the body of knowledge of American and judicial politics. Still, much more remains to be studied; state supreme courts are a rich environment in

¹ Although limited in number, there are recent studies where researchers are also studying judges in state courts. See for example, Choi, Gulati, and Posner 2007, where they examine the decisions of the supreme courts in each state for a three-year period to measure the productivity, citation numbers, and independence of appointed and elected judges.

which to analyze judicial decision-making and the constraints of institutional arrangements, and little has been done to date.

Through the lens of a new institutionalist model, this paper evaluates state supreme court judicial review decisions.² Using state supreme court decisions in all fifty states between 1995 and 1998 in civil cases, I expand upon an earlier work to evaluate further the constraints of institutional, ideological, and interest group variables on a court's vote to strike or uphold statutes challenged before the state supreme courts.³

Judicial Review

One of the most important political powers that the courts have in the United States is the power of judicial review. At the state level, this is the power to declare the actions of other governmental actors such as the governor, the state legislature, or state law to be unconstitutional. For many reasons, but with their use of the power of judicial review clearly at the top of the list, American courts are probably the most powerful and the most activist in the world (Shapiro, 1995:44). As Tocqueville also wrote, "The judicial organization of the United States is the hardest thing there is for a foreigner to understand. ... The Americans have given their judges the right to base their decisions on the Constitution rather than on the laws. In other words, they allow them not to apply laws that they consider unconstitutional. ... So then, the Americans have given their courts immense political power" (Tocqueville, 1969:99-102).⁴

² The new institutionalist model emphasizes the institutional structure in which a court operates and the strategic opportunities that it provides for securing judicial policy preferences as central in understanding and explaining court decision-making. Formal dynamics such as the polity's separation of powers design and partisan political conflict are the key factors for analysis.

³ An earlier work, (2009). *Judicial Constraints: Challenges to the Constitutionality of State Statutes in Civil Cases* viewed these same civil court cases by individual judge vote. See State Judicial Database Coding Rules, State Supreme Court Data Project. Brace, Paul and Hall, Melinda Gann. 2001.

⁴ See also Bickel (1962) and *The Federalist No. 78*, at 485-86. "The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to

In a political sense, “The Court would stand as ‘an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority’” (Hamilton, Madison, and Jay, 1961:78). Quite simply, the framers were deliberate in the creation of the systems of checks and balances and separation of powers. Judicial review is perhaps the most powerful tool available to courts in our system of checks and balances. How members of the legislative branch perceive judicial behavior is even more critical given that state supreme courts resolve numerous issues that place them in a direct conflict with state legislatures.

However, there is a shared objective between the three branches of state government, which is to advance the public good (Abraham, 1999; Dahl, 1976; Miller and Barnes, 2004). If a statute produces a drastic or sweeping outcome, courts are compelled to act on the public’s behalf because it is likely that democratic process and reasoned justification were not fully adhered to in the enactment of the statute (Brace, Arceneaux, Johnson, and Ulbig, 2004; Greenawalt, 1975; Lovell, 2003). This has led to tension between the legislative and judicial branches across the states that have only intensified as the federal government devotes more responsibility to state governments and citizens turn to state courts to make policy (Tarr, 2003; Langer, 2002; National Center for State Courts, 1999). As a result, state courts increasingly resolve issues that have far-reaching implications for both policy and constitutionality. The issue is only further complicated by the variance of institutional rules in state political systems. Thus, as state supreme court judges are selected or retained in different ways, policymaking roles of state courts also vary.

them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. ...the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agent.”

A New Institutional Model: The Constrained Court Framework

The constrained court framework is a new institutionalist model based explanation of judicial decision-making that argues that the institutional framework in which judges find themselves determines their best strategies to pursue decisional outcomes (Langer et al, 2003). Constraint varies in political structures; the key to judicial behavior is to identify those conditions that constrain judicial action in which it renders it conditional on other actors' approval or assent (George and Epstein 1992). Rosenberg, who assessed the performance of the contemporary U.S. Supreme Court across a range of legal policy issues, concluded that "the constraints derived from the constrained court view best capture the capacity of courts to produce significant social reform . . . because courts depend on political support to produce such reform"(1991:336). Courts can effectively produce policy change, Rosenberg allowed, only in situations where the court's power stems from seconding the interests of other, more important domestic political agents (1991:33-35), rather than play a part in shaping those interests.

"Constrained courts" are then presumed to behave differently than "unconstrained" courts that can veto the actions of other political actors within their political system (Bosworth, 2001:25). The framework is somewhat skeptical of the judges' decisional outcomes in whether policy preferences or legal values (or some mixture of the two) is more determinative. Its emphasis, rather, is on modeling court decision-making as a strategic game by goal-oriented actors who benefit from specific formal powers but are usually constrained by a number of formal limits. These actors also benefit from certain information about each other's political objectives and whether they wish to maximize their preferred policy goals (Maveety and Grosskopf, 2004). Operating in a separated powers system, the constrained court framework is concerned with policymaking and constitutional politics processes. It has been less focused on the individual judge as a decisional actor than the judicial institution as a governmental branch player. Works such as Stone Sweet's (2000) *Governing with Judges*, Epstein, Knight, and Shvetsova's (2001) article

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on constitutional courts, and Nagel's book (1996) on judicial power thus link courts' policy and institutional goals.

The explanatory value of the constrained court framework lies in its transportability as a model across political contexts and its potential predictive power (Vanberg, 1998). Once institutional constraints are precisely defined, judicial behavioral outcomes can be predicted with statistical confidence; moreover, state-to-state court decision-making can be compared along independent institutional structure variables that can be operationalized and reliably measured (Brace et al., 2004; Clemens and Cook, 1999). This is of particular interest to judicial scholars who study the comparative actions of state courts, legislation, and statutes.

Theory and Hypotheses

Institutional Constraints

Why are institutional environments important? Contemporary research has shown that the state's institutional arrangements are an important constraint in shaping the judiciary (Bonneau and Hall, 2003; Brace et al., 2004; Gillman, 2002). Institutional arrangement "shape not only the behavior of actors within an institution, but also the context in which these actors operate" (Bonneau, 2005:9).

One implication from an earlier discussion is that interbranch relations are influenced by method of judicial selection and retention. A fundamental component of intergovernmental relationships is the view that each branch has of one another's role in the decision-making process.⁵ It is an integral component for a government designed with a built-in system of checks and balances. However, the measures to explain the extent to which the institutional environment is related to judicial decision-making is not always clear. Recent studies provide compelling evidence in which factors in the political environment have an effect on judges, but that this effect is dependent on how the courts are connected to that environment

⁵ An earlier paper, *Judicial Constraints* (2009) discusses the interrelationship between state judiciaries and legislators and the effects of the constraints on judicial decision-making.

(Brace and Hall, 1995, 1997; Brace, Hall, and Langer, 2000; Langer, 2002; Traut and Emmert, 1998). Some scholars posit that judges who want to retain their judgeships will often sacrifice their own policy preferences to hold onto their positions on the bench (Brace and Hall, 1995; Brace et al., 2000; Epstein, Knight, and Shvetsova, 2002; Hall, 2001; Langer, 2002).

Judicial Selection and Retention

Political power in the United States is inevitably a function of constituency (Lowi, 1972). In a nation with a strong commitment to popular rule, majority support is often the central component in the struggle for political supremacy. The framers understood well the importance of constituency; the judiciary was thought to be “the least dangerous branch” expressly because of the limited capacity of the courts to develop and organize majority support (Bickel, 1962; McGuire and Stimson, 2004). The framers were confident that the judicial branch lacked both the political validity conferred by popular sovereignty and the institutional resources to develop strong and lasting bonds to important constituent groups (Converse, 1964; Dahl, 1976). In the grand design of the Constitution, they believed, the judiciary would play a secondary role in the development of the American state (Abraham, 1998; Tarr and Porter, 1988; Baum, 1990; Dahl, 1966, 2003).

Judicial selection and retention are ultimately about who will control political power. The judicial selection methods are also another mechanism of governmental oversight, which perpetuates the system of checks and balances. The main tenets of separation of powers are often not in dispute, yet the methods of judicial selection and retention remain very much at the forefront of political debate (Bonneau, 2005; Choi, Gulati, and Posner, 2007).

State judges are selected by a variety of methods. Many of these procedures favor the concept of judicial accountability, often through the mechanism of selecting or retaining state judges through some type of election process. These types include processes where state supreme court judges are either appointed by the governor,

retained by legislative vote, retention election, or elected by partisan and nonpartisan elections.⁶

In retention elections, the incumbent judge appears on the ballot unopposed and without party identification, and the public is simply asked to vote yes or no as to whether the judge should be retained for another term. If a majority of the voters vote yes, the judge serves another term; if a majority of the voters vote no, the judge is removed from office, and a vacancy is created on the bench that the governor and merit-selection commission must fill.⁷ Accordingly, this paper draws upon a prominent judicial research to contend that the institutional arrangements for the methods of judicial selection and retention have important implications for state politics and policy.

Judicial Retention Hypothesis: Courts are more likely to uphold state statutes when the judges are retained by either governor's appointment or by the state legislatures and more likely to overturn legislation when they are elected by other means.

Court Ideology

The Court is part of an institutional and political context that would be expected to influence, if not shape, its decisions (Gillman, 1999). Thus, it is possible that many of the state supreme court judges act on their sincere preferences, but the Court as an institution acts in a legal or strategic manner. The Court faces numerous constraints in its decision-making and in statutory decisions; the constraints appear to

⁶ The merit selection process, often referred to as the Missouri plan, is the most widely used system of initially selecting judges. A nominating commission for interim appointments and initial full terms first selects judges. At the first election, judges must face the voters in retention election. For the purpose of this research, courts that fall into the category of merit selection and/or retention elections are classified as retention elections.

⁷ It is also worth noting that retention elections, like partisan and nonpartisan elections, also require judges to raise money to fund their campaigns, (see e.g., Reid 1999), which can open judges to charges that they are beholden to those who have given them financial support. Furthermore, there is evidence that despite the low probability of losing in retention elections (Hall 2001), judges' rulings can still be influenced by the desire to ward off defeat (Huber and Gordon, 2004).

be significant. The state supreme courts must react to the interpretation of the sitting legislature, which can overturn the decision, more than the legislature that passed the challenged state statute (Eskridge, 1991a; 1994). In theory, these constraints could then induce a court to move from its collective sincere preferences (Epstein and Knight, 1998).

In practical terms, however, such constraints are not always compelling. For much of the last fifty years, divided government (Fiorino, 1996; Peterson, 1990) has dominated American politics and this may free the court to a degree because the chances of a decision being overturned by subsequent legislation are minimized (Choi et al., 2007).

This paper analyzes state supreme court decision-making within the context of the new institutionalist model, which treats the courts as single actors. This perspective maintains that institutional rules structure the aggregation of individual preferences with a decision-making body. (Epstein, et al., 1998). Thus, decisions are not merely the collective expression of the individual preferences of its judges, but are a function of the interaction of the individual preferences and institutional structures and rules. Institutions thus shape the behavior of the actors in the legal system (Smith, 1988).

Court Ideology Hypothesis: Conservative courts are more likely to uphold challenged state statutes than liberal courts are.

State Ideology

The new institutionalist model recognizes internal and external constraints on state supreme courts. When courts make decisions, the constrained framework maintains that it collectively will consider the position of the political elites who will have to implement the decision and the state legislatures that can overturn any decision with which it disagrees (Eskridge, 1991; Spiller and Gely, 1992). On an individual level, judges may act strategically, taking into account their colleagues on the court (Murphy 1964; Maltzman, Spriggs, and Wahlbeck, 2000). Epstein and Knight (1998) argue that judges would like to make decisions based on their sincere policy values. However, state supreme courts faces important constraints, particularly in cases

involving statutory interpretation, and it must recognize those factors in making decisions (Fisher and Devins, 2006). State legislatures can overturn statutory decisions by a simple majority in most states; accordingly, the courts may have to adjust its preferred outcomes to get closer to a point the legislatures will find acceptable. Thus, even though they are constrained by other actors and institutions, courts' preferences should be relatively consistent with both elected elite and citizens in their home states.

Political Elite and Citizen Ideology Hypothesis: Courts are more likely to uphold state statutes when the state's citizens and political elite are more conservative in their ideology and more likely to overturn legislation when citizens and elite share a liberal ideology.

Interest Groups and Amicus Curiae

Amicus curiae, literally meaning, *friends of the court*, are briefs filed by outside interest groups where they serve to inform the court about the impact of a decision on a group that is not directly involved in the case. Amicus briefs can frame issues in a different context and suggest different alternatives for the court to consider (Caldeira and Wright, 1990). In effect, such briefs serve to organize specialized opinion, provide general and technical information, and provide an informal tally of public opinion for the court (Schlozman and Tierney, 1986:290-231).

Since the early 1950s, substantial gains in civil and political rights for women, racial minorities, and other underrepresented groups have been advanced by decisions made the courts. Moreover, many contentious and divisive political issues have been addressed by courts, including school prayer, flag burning, and gay marriage, with the judicial branch at the forefront of policy changes in all of these areas (Baum, 2004:88). Emboldened by the success of civil rights organizations such as the NAACP during the 1950s and 1960s, other political interests began to see the courts as viable alternatives to traditional mechanisms for bringing about policy changes (Glendon, 1991).

Berry echoed these sentiments noting, "Interest groups not only use the courts as an appeals process for adverse decisions by

other branches, but they also litigate when they feel that their lack of popular support makes it fruitless for them to lobby Congress or the executive branch”(1997:176). Thus, among the most important actors in the political arena today are interest groups, whereby amicus briefs have become the means to influence effectively the courts and indeed the judicial process and outcome.

Amicus Curiae Hypothesis: State supreme courts are more likely to uphold legislation when amicus briefs are presented to the court.

Research Design and Methodology

This analysis examines a portion of the state supreme courts plenary docket of state statutory civil cases as determined by the State Supreme Court Data Project. Centered on challenges to the constitutionality of state statutes in civil cases in fifty states during 1995-1998, I measure the impact of institutional, ideological, and interest group variables on courts’ votes to strike or uphold statutes challenged before the state supreme courts.

The data in this research is taken from Brace and Hall’s (2001) Supreme Court Data Project that includes information on state supreme court decisions in all fifty states from 1995 through 1998. This study is centered on whether state supreme court judge voted to overturn or uphold the legislation in the civil cases in question, which contains 99 court cases from this dataset.⁸

Dependent Variable

Court’s decision. In the analysis, I examine state supreme court judicial review decisions, which invalidate laws enacted by state legislation between 1995 and 1998.⁹ I created a single variable measuring whether the court upholds or overturns state legislation. Thus, the unit of analysis is court decision. This coding process

⁸ In my earlier work (2009), the unit of analysis was individual judges that centered on 569 individual judge votes.

⁹ Brace, Paul and Hall, Melinda Gann. 2001. “*The State Supreme Court Data Project (1995-1998)*.”

resulted in a dichotomous dependent variable, coded as 1 if the court voted to overturn the statute and 0 if the court voted to uphold the statute.

Independent Variables

Method of Retention. The critical independent variables, methods of retention, test the assertion that judges on courts appointed by the governor or legislative vote are unlikely to overturn a state statute as unconstitutional. In order to measure whether the various types of retention methods influence the courts' decisions, I created two single dummy variables (Retpol and Retelec), which separates the methods into two distinct categories. For the court decision where the judges on the court were retained by governor appointment or legislative vote (Retpol), are coded as 1, otherwise 0. Court decisions where the judges on the court were retained by retention elections (Retelec) are coded as 1, otherwise 0. Because courts are constrained by the political environment and other institutional actors, I expect a negative relationship between the retention variables and the dependent variable.¹⁰

Court Ideology. I hypothesized that the courts' decision to strike or uphold a state statute will be influenced by its collective ideological tendencies. In order to measure judge's preferences, I use Brace, Langer, and Hall's (2000) party adjusted judge ideology scores (PAJID), a continuous variable which ranges from zero (most conservative) to 100 (most liberal). Because the courts that are more liberal in its ideology are more likely to challenge state legislation, I expect a positive relationship between court ideology and the dependent variable.

State Ideology. This variable was measured using the Berry et al. (1998) ideology scores. The ideology score is a continuous variable that falls between zero (most conservative) and 1 (most liberal). Because states that are more liberal achieve higher ideological scores

¹⁰ Although I do not include it in the analysis below, I did examine whether partisan and non-partisan elections had any independent effect on the decision to strike or uphold the legislation. The results were not statistically significant.

with this measure, I expect a positive relationship between the ideology measures and the dependent variable.

Amicus Curiae. I hypothesized that the court would be influenced by the presence of amicus briefs in the court case. This variable was determined by whether or not an amicus brief was presented to the court in each case in this study. This coding process resulted in a dichotomous dependent variable, coded as 1 if an amicus brief was filed and 0 if otherwise. Because it is beyond the scope of this study to determine which side (the plaintiff or the defendant), the brief supported, I do not claim a direction in the relationship between amicus and the dependent variable, only that it will prove to be a significant influence.

To summarize, Table 1 provides a complete list of all the variables and their exact measurement.

Table 1. Variable Descriptions for a Model of Constitutional Challenges to State Statutes

Variable	Variable Description
<i>Dependent Variable</i>	
Court decision	= 1 if the state statute declared unconstitutional = 0 otherwise
<i>Independent Variables</i>	
<i>Judicial Retention Variables</i>	
Political Retention	= 1 if retention of judge was by governor appointment or legislative vote = 0 otherwise
Retention election	= 1 if retention of judge was by retention election = 0 otherwise
<i>Ideology Variables</i>	
Elite (political) State Ideology	= Berry et al. (1998) elite ideology scores range from zero (most conservative) to 100 (most liberal)

Citizen State Ideology = Berry et al. (1998) citizen ideology scores
range from zero (most conservative) to
100 (most liberal)

Court Ideology = Brace, Langer, and Hall (2000) party
adjusted judge ideology score (PAJID)
range from zero (most conservative) to
100 (most liberal)

*Special Interest Group
Variables*

Amicus Curiae = 1 if amicus briefs were presented to court
= 0 otherwise

Source: Brace, Paul and Hall, Melinda Gann. 2001. “*The State Supreme Court Data Project (1995-1998)*.”

Statistical method

Since the dependent variable reflects the dichotomous court decision to reject or uphold a state statute, the logit model is the most appropriate. As previously noted, these specific cases were studied in earlier paper where the individual judge vote was the unit of analysis. Here, the focus is on the court in its entirety.

To convert the judge-level data into court-level data, using the statistical program, Stata, I employed the ‘collapse’ command, which effectively collapsed each variable by court case on its mean (Long and Freese, 2001). For example, in the original dataset, there were 569 individual measures of judge ideologies, ranging from zero to 100. When collapsed on their mean by court case, a single score was produced for the court ideology for each case. If there were five original judges, with ideology scores of 42, 45, 54, 56, and 68, the court ideology resulted in an ideology score of 53, which would be a moderate court. Table 2 provides descriptive statistics for the variables used in this analysis.

Table 2. Frequency Distributions for Court Vote to Overturn a Challenged State Statute.

Variable description	Frequency (Percent)
<i>Court Decision</i>	
State statute overturned	21 (21.2)
State statute upheld	78 (78.8)
Total	99 (100)
<i>Methods of Retention</i>	
Political Appointment	3,958 (16.9)
Retention Election	8,874 (37.8)
Total ¹	12,832 (100)
<i>Amicus Curiae Briefs</i>	
Amicus briefs filed in case	1,967 (7.70)
No Amicus briefs filed	23,610 (92.3)
Total	25,577 (100)

Source: Brace, Paul and Hall, Melinda Gann. 2001. “*The State Supreme Court Data Project (1995-1998)*.”

1. The total does not include partisan and nonpartisan elections.

Results and Discussion

Dependent Variable

The decisions in these court cases are the results from 35 states. Included in the analysis are all the civil cases that challenged a state statute. Kentucky had the greatest number of court cases that involved judicial review (8) followed closely by Georgia, Illinois, Louisiana, and Missouri (6). Overall, courts upheld state legislation 78.8 percent of the time, while striking state laws 21.2 percent of the time.¹¹ See Table 2 in Appendix A.

The states that had the greatest number overall of legislation overturned were Montana and Illinois (3), and Kentucky and Wisconsin (2). Although Colorado, Minnesota, Nebraska, and West Virginia ruled in a lower number of judicial review cases, when they did, they overturned state statutes 100 percent of the time where these civil cases came before its courts.¹² Interestingly, Mississippi, while addressing the third highest group of state statute rulings, never overturned state legislation even though they are retained by partisan election. However, the reluctance to overturn legislation might be best explained by the very conservative citizen ideology (mean ideology score of 23 out of a possible 100). That is, the court seems to consider the citizens preferences, which supports my hypothesis that institutional and political constraints influence a court's vote.

It is important to be aware that this model and its variables cannot fully predict the expected outcomes in any given case because in reality, case facts and sound legal principle often do override institutional arrangements and preferences. For example, Table 3 displays that while Maryland is moderately liberal (mean citizen ideology score is 65) and retains its judges by partisan election, its

¹¹ In all of these states, judges were retained by citizen vote. Illinois and Missouri were by retention election; Kentucky and Georgia were by partisan election; and Louisiana was by nonpartisan election.

¹² Here, Colorado, Minnesota, Nebraska, and West Virginia are all retained by citizen vote (retention election, partisan and nonpartisan elections). This too indirectly supports my hypothesis that courts are more likely to overturn state statutes when its judges are not beholden to the political elites for retention to the bench.

state supreme courts have never overturned a state statute with respect to civil cases in this study.

Table 3. Court Voting to Overturn a Challenged State Statute by State

State	Uphold	Overturn	Total Cases	Overturn Percent
CO	0	1	1	100.0
MN	0	1	1	100.0
NE	0	1	1	100.0
WV	0	1	1	100.0
MT	1	3	4	75.0
WI	1	2	3	66.7
FL	1	1	2	50.0
IL	3	3	6	50.0
OK	1	1	2	50.0
SD	1	1	2	50.0
VT ²	1	1	2	50.0
TX	2	1	3	33.3
KY	6	2	8	25.0
AR	4	1	5	20.0
MO	5	1	6	16.7
AK	4	0	4	0.0
AL	3	0	3	0.0
AZ	1	0	1	0.0
CA	1	0	1	0.0
CT ²	5	0	5	0.0
DE ¹	2	0	2	0.0
GA	6	0	6	0.0
IA	3	0	3	0.0
KS	4	0	4	0.0
LA	6	0	6	0.0
MD	2	0	2	0.0
ME ¹	1	0	1	0.0
MI	1	0	1	0.0

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MS	5	0	5	0.0
NJ ¹	1	0	1	0.0
PA	1	0	1	0.0
SC ²	1	0	1	0.0
UT	1	0	1	0.0
WA	1	0	1	0.0
WY	3	0	3	0.0
Total	78	21	99	

Source: Brace, Paul and Hall, Melinda Gann. 2001. "The State Supreme Court Data Project (1995-1998)."

¹ New Jersey, Delaware, and Maine retain state supreme court judges by governor appointment.

² Vermont, Connecticut, and South Carolina's judges are retained by legislative vote.

On the other hand, Montana is a relatively conservative state (mean citizen ideology is 36) and also retains its judges by partisan election, but it ranks as one of the highest states with respect to the number of challenged state statutes during 1995 to 1998. In total, Montana supreme courts overturned state legislation in 75 percent in all of its civil cases.

Yet, in states where citizen ideology is conservative, there is still a reasonable chance that a judge will vote to overturn the legislation; this is even more evident when judges are retained by retention elections than by political retention methods. For example, Oklahoma is the most conservative state, as measured by the Berry et al. citizen ideology scale. However, their state supreme courts voted to overturn challenged legislation in 50 percent of the civil cases.¹³

¹³ For discussion of why some of these cases are statistical outliers, see Diagnostics in Appendix B.

The Determinants of State Supreme Courts to Strike State Laws

Overall, the model performs well, correctly predicting 80.8 percent of the cases.¹⁴ As hypothesized, retention by either governor appointment or legislative vote (political retention method) is a statistically significant predictor that courts are less likely to vote to strike state statutes than when judges on their courts are retained by other means. Citizen ideology is also a statistically significant indicator that influences a courts' vote to uphold or overturn a challenged state statute.

Table 4. Logit Estimation of Court's Votes Overturn a Challenged State Statute State Supreme Courts, 1995-1998 (with hypothesized Direction of Coefficient)

Independent Variables	Coefficient/Standard Error
Retention of judges are by Political Appointment (-)	-3.144 (1.138)*
Retention of judge was by Retention Election	-0.509 (0.611)
Court's Ideology score (+)	0.023 (0.029)
Citizen state ideology (+)	0.080 (0.036)*
Elite state ideology (+)	-0.017 (0.011)
Were Amicus briefs presented in case?	-0.283 (0.209)
Constant	-4.531 (1.266)***
N	99
Percent Correctly Predicted	80.8
Pseudo-R ²	.130
Log-Likelihood	-44.49

Source: Brace, Paul and Hall, Melinda Gann. 2001. "The State Supreme Court Data Project (1995-1998)." *p≤ .05; ** p≤ .001

¹⁴ This is an improvement over the individual judge level results, which correctly predicted 76.3 percent of the cases.

Retention elections, court ideology, and amicus briefs were not statistically significant predictors of the dependent variable. The results from the regression analysis are presented in Table 4. Several diagnostic tests demonstrate that the model has meaningful predictors and is properly specified.

Judicial Retention Methods

The results support the judicial retention hypothesis; the retention methods by which judges are retained should affect the decision to strike or uphold legislation because the method of retention should have a greater effect on judicial voting than method of initial selection (Brace and Hall, 1995; Epstein, Knight and Shvetsova, 2002). All else being equal, when appointed by a governor or retained by legislative vote, state supreme courts the court’s judges are more likely to uphold state statutes.

Table 5. Odds Ratio. Percentage Change in Court Voting to Overturn a Challenged State Statute.

Variable	b	P> z	%StdX	%
Political Retention	-3.14394	0.019	-64.3	-95.7
Citizen ideology	0.07957	0.025	165.8	12.3

Source: Brace, Paul and Hall, Melinda Gann. 2001. “*The State Supreme Court Data Project (1995-1998)*.” The dependent variable is Court’s vote to overturn a challenged state statute. In the graph below, I used the last column, percentage, for the dichotomous variable, Political Retention, because I can interpret the odds ratio directly. Because I am interested in the odds ratio of a 1-standard-deviation change in Citizen Ideology, the third column is used. N=99.

The methods of judicial selection and retention have an effect to the extent to which courts are accountable and to whom they are accountable. The odds of a court voting to overturn a challenged state statute is 95.7 percent lower for courts when its judges are

appointed by governors or retained by legislative vote than when judges are retained by other means.

Table 6. Significant Variables in Relationship to Court Decision

Variable description	Upholds (Percent)	Strikes (Percent)	Total (Percent)
<i>Retention by Political Appointment or Vote</i>			
Yes	11 (91.7)	1 (8.3)	12 (100)
No	67 (77.0)	20 (23.0)	87 (100)
<i>Citizen Ideology</i>			
Conservative ¹	6 (85.7)	1 (14.3)	7 (100)
Moderately Conservative	58 (81.7)	13 (18.3)	71 (100)
Moderately Liberal	14 (70.0)	6 (30.0)	20 (100)
Liberal	0 (0.0)	1 (100)	1 (100)

Source: Brace, Paul and Hall, Melinda Gann. 2001. "The State Supreme Court Data Project (1995-1998)."

¹ Using Berry's Citizen Ideology measure, where zero=Conservative and 100=Liberal, the mean ideology scores were divided into quartiles to provide four evenly divided tiers of ideology, Conservative, Moderately Conservative, Moderately Liberal, and Liberal. N=99.

Table 6 presents a set of simple tables of the relationships between the two significant variables and the court decision to either

strike or uphold state statutes. Although this one-dimensional analysis does not control for any of the other variables, it does provide a more comprehensive overview of the context between the models significant predictors in relationship to a court's vote on a challenged state statute.

Table 6 demonstrates that courts whose judges are retained by governor appointment and by legislative vote to uphold state legislation 91.7 percent of the time.¹⁵ On the other hand, courts do appear willing at times to reject state legislation, voting to strike state laws 8.3 percent of the time. Thus, they do not appear to be unreserved agents of political appointment or vote. Accordingly, these institutional and political constraints are statistically significant on state supreme court decision-making. Below, I will consider the relative strength of these constraints by looking at a series of predicted probabilities that better explains the substantive importance of judicial retention methods.

Citizen Ideology

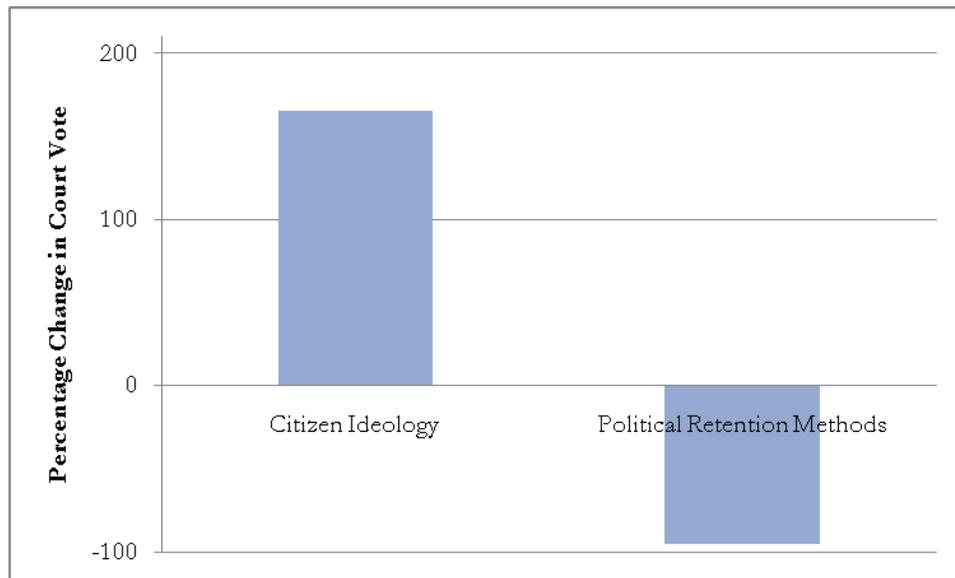
As expected, the citizen ideology measure is statistically significant and has a positive effect on the probability that the state supreme court will strike state legislation. I expected a positive relationship between the ideology measures and the dependent variable. The results are supportive of my hypothesis that when states have a more liberal electorate, the more likely courts are willing to overturn state statutes.

As the relationship between state ideology and court decisions in Table 4 demonstrate, the preferences of the electorate do matter to court when making decisions with respect to state legislation. As highlighted by Table 5 and Figure 1, as the state's ideology moves from conservative to liberal, having a 1-standard-

¹⁵ Although the variable retention election was not significant, it is important to recognize that when judges are not appointed or voted by legislature to retain their seat on the bench, courts strike state law as unconstitutional 76.9 percent of the time, which is a significant contrast to the 8.3 percent for political retentions methods.

deviation-higher percentage in citizen's ideology increases a court's odds of overturning a challenged state statute by 165.8 percent.

Figure 1. Odds Ratio. Percentage Change in Court Voting to Overturn a Challenged State Statute.



Source: Brace, Paul and Hall, Melinda Gann. 2001. "The State Supreme Court Data Project (1995-1998)." N=99.

The odds of a court voting to overturn a challenged state statute are 95.7 percent lower for the judges on the court appointed by governors and legislative vote. Moving from conservative to liberal, having a 1-standard-deviation-higher percentage in citizen's ideology increases a court's odds of overturning a challenged state statute by 165.8 percent.

Relative to the court's vote, conservative states strike state statutes 14.3 percent of the time, while states that are more liberal

strike legislation 30 percent of the time.¹⁶ The more liberal the state, the more liberated courts might feel to vote their own preferences and overturn state laws. Thus, all else equal, courts who decide civil cases in more liberal states are more likely to overturn state legislation than courts in more conservative states are.

Table 7. Predicted Probabilities of Court Vote to Overturn a Challenged State Statute

Variable description	Overturn Legislation
<i>Method of Retention</i>	
Political Retention	.020
Retention Election	.233
<i>Citizen Ideology</i>	
Conservative ¹	.048
Moderately Conservative	.195
Moderately Liberal	.541
Liberal	.851

Source: Brace, Paul and Hall, Melinda Gann. 2001. “*The State Supreme Court Data Project (1995-1998)*.”

¹ Using Berry’s Citizen Ideology measure, where zero=Conservative and 100=Liberal, the court scores (derived from the judge scores by case, centered on the mean) were divided into quartiles to provide four evenly divided tiers of ideology, Conservative, Moderately Conservative, Moderately Liberal, and Liberal. N=99.

¹⁶ This is in reference to Table 6 in Appendix A.

Predicted Probabilities

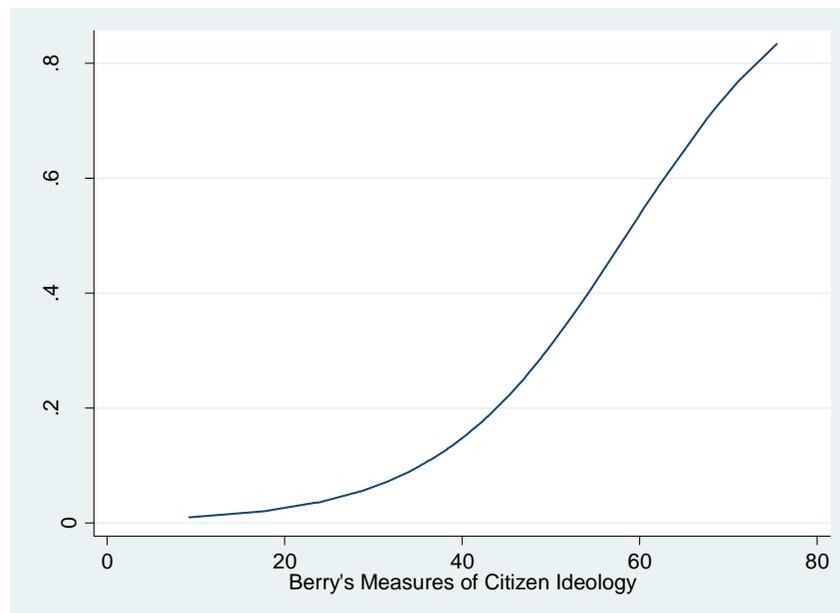
Table 7 presents the predicted probabilities and offers substantive interpretation of the results. This table presents the predicted probability that a state supreme court will strike legislation when the judges on the court are retained by political means (appointed by the governor or retained by legislative vote) and for Citizen Ideology when all of the other variables are held constant.

Overall, the probability for a judge to overturn a challenged state statute is 2 percent when a governor appoints them or retained by legislative vote.¹⁷ This offers further support for my hypothesis that courts are more reluctant to strike state law when political elites determine whether a judge will be retained when his or her term ends. The predicted probabilities for citizen ideology also support my hypothesis that when states are more liberal, courts are more likely to overturn state legislation. The probability ranges from 4.8 percent in a conservative state to overturn state legislation to 8.15 percent a liberal state. This clearly suggests that citizen ideology is important to courts when they consider state laws.

Figure 2 illustrates the predicted probabilities with respect to citizen ideology. This graph represents the effect of judicial support (or opposition) for the legislation among state courts by increasing measures of conservative-liberal citizen ideology. In this graph, it is clear that the probability of overturning the legislation increases among states with tendencies that are more liberal and thus, more likely to support more socially advanced or liberal policies. At the same time, conservative preferences of the electorate clearly lower the probability that the state supreme court will strike state legislation.

¹⁷ Although Retention elections were not statistically significant, it is worthy to note that for retention elections, a court has a 23.3 percent probability to overturn state legislation, which is significantly higher than by political appointments.

Figure 2. Predicted Probability. Court Voting to Overturn a Challenged State Statute based on Berry et al. Citizen Ideology Measure with other variables set at their means.¹



Source: Brace, Paul and Hall, Melinda Gann. 2001. "The State Supreme Court Data Project (1995-1998)." N=99.
Figure utilizes postgr3 by Michael Mitchell and spostado by Scott Long in Stata.

A second table of predicted probabilities is presented in Table 8. The first section of the table presents predicted values when Citizen Ideology are conservative states (where the range in the Berry measure is in the first quartile, zero to 25). Moving from conservative to liberal along the four citizen ideology sections of the table are the predicted probabilities of political retention methods (governor appointment and legislative vote) that a judge will overturn state

legislation. Although Retention elections were not statistically significant, substantively, it is important to highlight the differences in probabilities in comparison to courts where political elites (i.e., governor appointment or legislative vote) retain its judges.

Table 8. Predicted Probabilities of Court Vote to Overturn a Challenged State Statute

	Overturn Legislation
<u>Conservative State¹</u>	
Political Retention	.003
Retention election ²	.036
<u>Moderately Conservative State</u>	
Political Retention	.012
Retention election	.152
<u>Moderately Liberal State</u>	
Political Retention	.055
Retention election	.465
<u>Liberal State</u>	
Political Retention	.222
Retention election	.808

Source: Brace, Paul and Hall, Melinda Gann. 2001. “*The State Supreme Court Data Project (1995-1998)*.”

¹ Using Berry’s Citizen Ideology measure, where zero=Conservative and 100=Liberal, the court scores (derived from the total judge mean scores) were divided into quartiles to provide four evenly divided tiers of ideology, Conservative, Moderately Conservative, Moderately Liberal, and Liberal. N=99.

² Retention elections were not statistically significant. However, substantively, it is important to compare the probabilities against the political appointment or vote.

The values in this table show that the court is more likely to uphold the challenged state statute especially when the state ideology is also relatively high. For example, in ultra conservative states, such as Oklahoma, a court with political retention methods has a .30 percent probability to overturn legislation while courts using retention elections have a 3.6 percent probability to strike legislation. That is to say, it is highly unlikely that Oklahoma courts will overturn state laws.¹⁸

On the other hand, in moderately liberal/liberal states where judges are retained by political appointment or vote, such as Vermont, a court has a 22.2 percent probability to overturn legislation, which is a significant increase from that of conservative states. Moreover, while a state, such as Illinois, that is also a moderately liberal/liberal state, but employs retention elections as its judicial retention method, has an 80.8 percent probability to overturn legislation. That is to say, all else equal, the more liberal the citizen's ideology the more likely courts will rule to overturn a challenged state statute. Overall, when states utilize retention elections to retain their state supreme court judges, they are consistently more likely to overturn state legislation than courts that retain their judges by political means.

The results of the predicted probabilities illustrate two critical points. First, retention methods are important. Previous research supports the argument that the specific ways we determine who is selected and retained on state supreme courts is an important consideration when it comes to the way in which courts decide whether to overturn or to uphold state legislation. This study demonstrates that courts feel constrained by the methods of retention when deciding the constitutionality of state law. This point confirms the need to incorporate some measure of how retention methods affect not only the courts but also state legislation and laws as we

¹⁸ There are instances however, that judges on the Oklahoma Supreme Court will vote to overturn a state statute. See Appendix B in the explanation for outliers in *Landrum v. National Union Ins. Co.*, 912 P.2d 324, 329 (Okla. 1996).

consider the implication of the judicial decisions over time and among the various states.

Second, retention methods are important but only where the courts are attentive to citizen's beliefs as well as mindful of the constraints of the political environment. As evidence in this study suggests, the more liberal the state's ideology, so too does the probability that the court will overturn state legislation. This finding is consistent with the findings of earlier work at the individual judge level, as well as other work on state court decision-making (Aspin, 2006; Brace and Hall, 1995; Brace, Hall, and Langer, 2000; Choi et al, 2007). However, most research is limited to specific content areas. This study, however takes into account civil litigation that affects both private businesses and organizations and everyday citizens. At the same time, the outcomes of many of these cases have far-reaching implications for future court rulings and state legislation.

Conclusion

The findings of this study supports much of the literature that at least on the retention methods of judges on state supreme courts and citizen ideology, courts are responsive to what they perceive to be their institutional constraints.¹⁹ Given the incentive that retention methods create for judicial candidates to gain favor with the public and with political elites, the existence of evidence that judges' decisions can be influenced by institutional and electoral considerations is not surprising.

This paper, using the approach of a constrained framework within a new institutional model, should help better the understanding of the contemporary debates on judicial decisions surrounding the courts in addressing the inexhaustible question of what factors influence how courts' vote. Studies of retention methods, civil trials, and the influencing effects of citizen ideology remain quite incomplete because all too often they are limited in the

¹⁹ Similar arguments were presented in my earlier paper, *Judicial Constraints* (2009). The fact that the argument holds when the data is aggregated as it is here in this court-level study, demonstrates that the findings are consistent and substantively important.

relatively small areas of research, such as sex discrimination cases or criminal law, or simply viewed through the lens of a more simplistic model, such as the attitudinal approach or social background theory. Indeed, future work would do well to continue exploring how the decision-making process, coupled with the institutional constraints of the other branches and political actors, combine to influence judicial decisions in our courts.

However, what has not yet been identified is the question, if a court bends its preferences to reflect those of the elected branches, is it because it is responsive to the pressures that can be brought by the elected branches, or is it a matter of agreement between the state supreme court and the governor or legislature? More in-depth analysis of the court cases, the political environment, and institutional constraints upon the court will provide a much greater analysis of why judges and courts decide the way they do.

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