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Judicial Independence on Unelected State Supreme Courts

William D. Blake, Ph.D.*
Assistant Professor of Political Science
University of Maryland, Baltimore County
wblake@umbc.edu

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Abstract: The state supreme court literature often overlooks the 12 states that use traditional appointment systems or fails to explore differences in their judicial designs. Eight states require justices to be reappointed at the end of a fixed term, while a different set of eight states currently use judicial commissions to limit the discretion of partisan elites to appoint judges. I develop a principal-agent theory of judicial independence to test how unelected judges under different institutional arrangements respond to elite preferences. An analysis of business cases from 1995-2010 indicates justices selected by judicial commissions are significantly less sensitive to elite ideology than justices nominated by partisan elites. The most responsive behavior occurs among justices subject to periodic reappointment who are chosen by partisan elites, while tenured judges chosen by judicial commissions behave independently of elite ideology. The data also provide evidence that state tort reforms significantly increase the probability of pro-business votes.

Keywords: judicial independence, judicial commissions, state selection systems

While scholars of state supreme courts have explored many empirical consequences of institutional design, the 12 states that do not elect their high court judges often end up on the proverbial cutting room floor (e.g., Bonneau, Cann, and Boyea 2012; Canes-Wrone, Clark, and Kelly 2014; Canes-Wrone, Clark, and Park 2012; M. G. Hall 2014b; but see Langer 2002; Shepherd 2009a).¹ Furthermore, many studies that include these states treat them monolithically (e.g., Bonneau and Hall 2009, 6; Canes-Wrone, Clark, and Kelly 2014; Curry and Hurwitz 2016a; Kritzer 2014), ignoring potentially meaningful differences in institutional context. Eight of these states provide renewable judicial terms while only four provide some form of tenure. A different set of eight states with traditional appointive systems have adopted merit selection, which utilizes judicial nominating commissions to evaluate potential judges on the grounds of professional, rather than partisan, qualifications.

In this paper, I analyze how the design of unelected state supreme courts affects judicial independence. Specifically, the analysis considers whether justices alter their behavior to conform to elite ideology in their state. Political elites possess specialized knowledge to screen judicial nominees before their appointment, monitor their behavior once on the bench, and create incentives to induce desirable behavior (Gray 2017). Institutional arrangements, however, structure the power of appointing principals. For example, delegating judicial selection to nominating commissions limits the extent to which political elites can screen nominees while judicial tenure weakens accountability incentives for judicial behavior, compared to the requirement for periodic reappointment. Judicial independence is a key feature of constitutional democracies, and while constitutional designers do not seek to maximize this principle, they seek to optimize it against competing values, such as democratic accountability.

Scholars of state supreme courts have written extensively on levels of judicial responsiveness to external democratic pressures, but this literature focuses on the accountability provided by judicial elections (e.g., Brace and Hall 1997). Canes-Wrone, Clark, and Kelly (2014, 27) have observed: “To the best of our knowledge, the literature on state courts does not theorize about how legislative or gubernatorial reappointment compares with other judicial selection systems.” One reason for this lack of theorizing is that so many studies of state supreme court responsiveness analyze death penalty cases (Blume and Eisenberg 1999; Brace and Boyea 2008; Canes-Wrone, Clark, and Kelly 2014; M. G. Hall 1987, 1992, 1995, 2014b; M. G. Hall and Brace 1994). Only four states with traditional appointment systems administer capital punishment.

Unlike capital punishment, this paper evaluates judicial behavior in business cases, a more comparable sample of salient state supreme court cases. Tort reform became a major political issue during the 1990s and 2000s at both the state and federal level. The infamous McDonald’s “hot coffee” case entered the American vernacular more prominently than most U.S. Supreme Court cases (Haltom and McCann 2009, 183–226). In addition to analyzing the how elite ideology affects judicial behavior, this paper also evaluates the degree to which state-enacted tort reform constrains decisionmaking in business cases.

In the next section, I define judicial independence along its two dimensions: the institutions designed to insulate judges from reprisals and the degree to which justices behave independently. I then evaluate the theory using a dataset of state supreme court business cases from 1995-2010. Multi-level mixed effects logistic regression models provide evidence justices chosen by partisan elites are more responsive to elite preferences than those selected by judicial commissions. The most responsive behavior occurs when justices operate under the weakest

conditions of institutional independence—selection by partisan elites with periodic reappointment. The results also suggest when nominating commissions are combined with tenure justices decide business cases independently of the preferences of their state governing coalition. I conclude by considering the broader empirical and normative implications of this study.

Judicial Independence: The Nexus of Institutions and Behavior

As Geyh (2014, 2) has observed, the concept of judicial independence is so broad that it could explain either everything or nothing at all. This confusion in the literature exists, in part, because “[w]e need precise measures of judicial independence and research that then tests its causes and consequences” (Peretti 2002, 122). Judicial independence exists along two dimensions: institutional and decisional (cf. Geyh 2014), but it is the interaction between the two dimensions that makes this concept politically meaningful (Devins 2010). Over the course of American history, states have experimented with different institutional designs for their judiciaries in the hopes of stimulating an optimal level of decisional independence (Shugerman 2012; Tarr 2012).

Institutional Judicial Independence refers to rules, norms, and structures designed to insulate courts from certain types of external pressure. Written constitutions provide courts with several potential forms of institutional independence, which protect either individual judges or the judiciary as a whole from the rough-and-tumble of democratic politics (Ferejohn and Kramer 2002). These institutions include: salary protection, merit selection of judges, internal budgetary control, internal docket control, principled impeachment procedures, fixed jurisdiction, a fixed number of courts in a judicial system, a fixed number of judges on a court. Perhaps the most important institution to promote independence is length of tenure in office, whether for life, a

fixed single term, or renewable terms (Brinks and Blass 2011). Some constitutions utilize many of these institutions; others employ fewer of them. Unlike the U.S. Constitution, only the Constitution of Rhode Island provides its justices life tenure with no mandatory retirement age, and only 29 state constitutions protect judges' salaries from reduction (National Center for State Courts 2009).

Many of the states that have resisted the move to judicial elections were members of the original 13 colonies. Nonetheless, as Table 1 demonstrates, these 12 states are not perfect copies of the Article III design of the federal courts. Justices in eight states have fixed, renewable terms ranging in duration from 6 to 14 years.² Judges in New Jersey earn tenure when reappointed after their freshman term. Finally, eight of these states currently utilize judicial nominating commissions, which are instructed to consider potential nominees without regard to their political affiliation (American Judicature Society 2011). Typically, these commissions present a short list of candidates to the governor, who selects one. The nominee must then receive some form of legislative confirmation. If these justices have fixed terms, they are re-nominated by the judicial selection commission, the governor reappoints, and one or both chambers of the state legislature reconfirm.³ While governors and state legislators play a role in the appointment of judges in a merit selection system, judicial commissions effectively control the selection process because of their first-mover advantage.

[Insert Table 1 about here.]

Decisional Judicial Independence is the degree to which a judge's vote reflects her sincere evaluation of a case. Threats to sincere decisionmaking originate from both external and internal sources. One concern is judges will suppress their views to reflect the contrary views of outside actors, like governors, state legislators, or the public. Opponents of competitive judicial

elections also fear campaign contributions undermine the rule of law in this way. Furthermore, the rule of law presumes that earlier cases decided by courts restrain the choices available to future courts. If a court changes its outlook on the law because of some external political change, such as a critical election, decisional independence suffers.

Optimizing Decisional Independence Through Signaling and Incentives

The goals of predictability and stability underlying the rule of law may seem too rigid or unrealistic for democracy, but judicial independence is a concept that constitutional designers hope to optimize, not maximize (Geyh 2008, 2013). Every judicial system not only allows but relies on some types of outside influence. Outside influence occurs when third parties send signals to a court (Rubin 2002). These signals range from legal and ethical options like newspaper editorials to questionable tactics, such as making undue threats of impeachment, or even illegal conduct like offering bribes. No one would say, for instance, that amicus briefs undermine judicial independence in a meaningful fashion. If signals from third parties are ever present, it might seem like the only way to maximize judicial independence would be to lock judges in a dungeon.⁴

A judge begins this signaling game during the judicial selection process. The appointment of judges represents a principal-agent problem (Nemacheck 2008). In the context of American state courts, there are often multiple principals: campaign contributors, political parties, legislators, governors, judicial commissions, and the public itself. Principals are concerned about the possibility of shirking on the part of the agent, which can arise when there is a divergence of preferences. Principals have three tools with which to accomplish these goals: the initial screening process by which agents are selected, on-the-job monitoring, and incentives to induce compliance. Studies of state supreme court behavior find not all principals are equally

powerful in constraining agent judges. Gubernatorial preferences exert no influence on judicial behavior in states where the legislature alone controls judicial retention (Gray 2017). Justices in Missouri plan states base strategic retirement decisions on the ideological congruence of the governor—not the electorate—because the governor enjoys a first-mover advantage in the process to appoint their successor (Curry and Hurwitz 2016b).

I assume state supreme court justices prefer acting sincerely to insincerely, *ceteris paribus*, but that they are also rational actors who wish to keep their jobs and maintain judicial power. One consequence of this desire to preserve judicial authority is that judges must anticipate the reaction of the other branches of government. Even with life tenure, justices on the U.S. Supreme Court, as Walter Murphy notes (1964, 171), consider whether “a certain decision or the announcement of a policy in an opinion would stir a political reaction which would gravely threaten that policy and probably judicial power itself.” Because political elites directly control the selection and retention processes in these states, the rigor of on-the-job monitoring is likely much higher than in states with judicial elections. Voters, who lack the specialized knowledge of the judicial system possessed by elites, rely on partisan heuristics (Bonneau and Cann 2013; Schaffner and Streb 2002) and signals sent through the media (Schaffner and Diascro 2009) or in strongly contested judicial campaigns (M. G. Hall 2014a).

Elites can create several incentives to induce compliance from their agent judges (Rosenberg 1992). These sanctions include: legislative override (Bergara, Richman, and Spiller 2003; Harvey and Friedman 2006), constitutional amendment (Segal, Westerland, and Lindquist 2011), refusal to increase judicial salaries (Yoon 2006), non-enforcement of judicial decisions (Baum 2003; M. E. K. Hall 2014), threats of impeachment (Bushnell 1992), jurisdiction stripping (Clark 2010), and court-packing (Caldeira 1987). Life tenure does not allow justices to escape

these constraints. Additionally, all of these reprisals, save for impeachment, are institutionally-focused, that is, they weaken the power of the entire judiciary, regardless of an individual justice's vote. Requiring judges to be reappointed periodically creates a more personalized and potentially more potent threat to decisional independence.⁵

Hypotheses

When predicting behavior on unelected state high courts, Canes-Wrone, Clark, and Kelly (2014) cite literature on the responsiveness of other appointed officials to public opinion (Deno and Mehay 1987; Vlaicu and Whalley 2012), but the literature suggests elite ideology is a more important consideration for these justices. Justices in South Carolina, Vermont, and Virginia—where state legislatures control judicial retention—tend to vote consistently with legislative preferences when seeking reappointment (Gray 2017). Amicus briefs submitted to state supreme courts with legislative appointment systems are more likely to contain information about elite preferences, not public preferences (Comparato 2003). Appointed state supreme court justices are more likely to side with government litigants than elected justices, and this effect increases when they approach their reappointment date (Shepherd 2009a). Justices in traditional appointive systems are also significantly less willing to strike down state laws than elected judges (Langer 2002), a finding that is consistent with analyses from the 19th century (Shugerman 2010a). In states with periodic reappointment, justices should conform their behavior to elite expectations to increase their chances of being reappointment. When reappointment is not an issue, this pressure should abate. Consequently, I predict:

Reappointment Uncertainty Hypothesis: State supreme court justices subject to periodic reappointment will be more responsive to elite ideology than tenured supreme court justices.

Furthermore, the influence of the selection process in a principal-agent game depends on the expectations of the appointing principals. At the federal level, executive branch staff screen potential nominees thoroughly so that presidents are unlikely to be disappointed by their future performance (Nemacheck 2008). Baum and Devins (2010), using a social-psychology theory of judicial behavior, find U.S. Supreme Court justices anticipate elite reactions to their decisions. Governors, presumably, engage in a similar screening process when given the discretion to do so, and the judges they appoint will behave correspondingly. Governor Chris Christie recently ended a four-year stalemate with Democrats in the legislature over an appointment to the New Jersey Supreme Court. Said Christie (as cited in King 2016), “There’s no secret that I would have preferred to nominate a Republican, but then you have to get down to what’s going to work.”

Judicial nominating commissions, on the other hand, seek “to minimize the effect of overt political considerations in judicial appointment processes and thereby, to better guarantee the effective and fair application of law for state citizens” (Caufield 2010, 767). In these states, governors surrender significant discretion to another principal, judicial commissions, which utilize a very different screening process. While the presence of a short list of candidates does provide governors with some discretion, it pales in comparison to the power enjoyed by other governors (or presidents). In a sense, merit selection is a misleading term in that it connotes the appointment of “better” or “more deserving” judges. The history of merit selection, however, reveals “the impetus for reform was not a concern about the quality of judges, but a concern with the ability of political and party elites to control judicial selection and, in so doing, to manipulate judicial decision-making based on overtly political goals” (Caufield 2010, 771).

States with appointed judiciaries that have adopted merit selection have justified this change on judicial independence grounds. Connecticut adopted a nominating commission in 1986 following complaints that legislative leaders wielded too much power in determining which judges should be reappointed (Madden 1986). In 1994, a broad coalition of Rhode Island interest groups proposed creating a nominating commission as a solution to a rash of scandals on the state bench. Of particular concern was a slush fund managed by Chief Justice Thomas Fay and his court administrator who was a former speaker of the Rhode Island House of Representatives (Yelnosky 1996).

At the same time, the literature on judicial commissions suggests that this institution is not wholly apolitical. Judicial commission members tend to be politically active (Henschen, Moog, and Davis 1990), and political factors influence the selection of commissioners (Watson and Downing 1969). However, the literature also suggests commissions are not ideologically-captured institutions. Of the eight states in this analysis that use nominating commissions, four (Connecticut, Delaware, New York, and Vermont) are constitutionally required to have a partisan balance in their membership (National Center for State Courts 2017b). Survey data indicates most judicial commissioners believe that political considerations only infrequently influenced commission decisions (as cited in Caufield 2007, 177–78). The use of judicial nominating commissions significantly increases the probability of a governor appointing a justice from the opposite party (McLeod 2012). If a governor from one political party nominates a justice from the opposite party, it stands to reason that such a justice will feel significantly less pressure to factor the preferences of a state’s governing coalition into her decisions.

Proponents of competitive judicial elections (Bonneau and Hall 2009) have argued that the goals are naïve, as merit selection does not adequately anticipate the attitudinal and strategic

dimensions of judicial decisionmaking. The veracity of this critique, however, is limited because most studies of state supreme court behavior evaluate the Missouri Plan, not merit selection in isolation (Brace and Hall 1995; Canes-Wrone, Clark, and Kelly 2014; Choi, Gulati, and Posner 2010; Fitzpatrick 2009; Gyski, Main, and Dixon 1986; Hanssen 1999; O'Callaghan 1991; but see Owens et al. 2015).⁶ Retention elections, the second component of the Missouri Plan, provide relatively high levels of job security (M. G. Hall 2001, 318) stemming from low-information election contests (Canes-Wrone, Clark, and Park 2012; Curry and Hurwitz 2016a). In other words, retention elections create behavioral incentives that are distinct from those produced by merit selection alone. Thus, the stated goal of merit selection, depoliticizing judicial behavior, forms the second hypothesis:

Agent Screening Hypothesis: Justices appointed by partisan elites will be more responsive to elite ideology than justices appointed by judicial commissions.

Like the U.S. Constitution's dual commitments to life tenure and salary protection, judicial independence at the state level depends on the combined effect of judicial selection and retention methods. As Table 1 indicates, the sample includes justices operating under all four selection and reappointment combinations. Elite ideology should be the most influential to a justice operating under the lowest levels of institutional independence and vice versa. When judges chosen by nominating commissions are tenured, these conditions interact creating greater discretion to behave sincerely. Similarly, when a partisan selection process interacts with a requirement for periodic reappointment, the incentives to respond to elite ideology increase. Combining selection and retention effects allows for the final hypotheses:

Diminished Responsiveness Hypothesis: Tenured justices appointed by judicial commissions will exhibit the lowest level of responsiveness to elite ideology.

Heightened Responsiveness Hypothesis: Justices chosen by partisan elites who are subject to periodic reappointment will exhibit the highest level of responsiveness to elite ideology.

Data, Variables, and Methods

I test these hypotheses using Matthew Hall and Jason Windett's state supreme court dataset, which used automated textual analysis to collect every state supreme court ruling from 1995 through 2010. When compared with the State Supreme Court Data Project, created by Melinda Gann Hall and Paul Brace using hand-coding procedures, Hall and Windett (2013) produced reliable measures of state supreme court decisionmaking. This analysis examines business cases decided in state supreme courts. Scholars commonly use business cases in studies of state court decisionmaking (Choi, Gulati, and Posner 2010; Kang and Shepherd 2011; McCall 2008; Shepherd 2009a, 2009b, 2013; Waltenburg and Lopeman 2000), the empirical implications of institutional design (Brace and Hall 2001; Brace, Yates, and Boyea 2012; Shugerman 2010) and law-and-economics studies (Helland and Tabarrok 2002; Tabarrok and Helland 1999). Business cases provide a large sample of cases compared to other salient legal issues such as capital punishment, which is not practiced in most of these states, or abortion cases, which are difficult to identify given the structure of the Hall and Windett dataset.⁷

Consistent with other state supreme court votes in business cases, I identify cases with one business interest and one non-business interest. I identified a business litigant by searching the litigant name and procedural posture fields for abbreviations commonly associated with business organizations, such as "Inc." These search protocols identify cases come from several different Lexis legal area headings, mostly civil procedure.⁸ To check the accuracy of this sample selection method, I randomly selected 25 cases from each state and found 99.3% of these cases met the criteria for having one business litigant and one non-business litigant, and 96.7%

met the criteria that a vote for the business litigant constituted an ideologically conservative vote. The unit of analysis is the judge-vote, and the dependent variable is whether a justice cast a liberal vote, defined as a vote against the business litigant. Further details about creating the sample and the legal issues within it are available in the Appendix.

The NOMINATE version of the Berry elite ideology scores serves as the independent variable of interest. Berry et al. (2010) have suggested that substituting NOMINATE scores (Poole and Rosenthal 1985) for state party ideology improves the convergent validity over their previous estimation method, based on ADA/COPE scores (Berry et al. 1998). Berry elite ideology scores represent a weighted average of the relative partisan control in both chambers of each state legislature and the control of the governorship with higher values corresponding to more Democratic Party control. The Berry score employed in the analysis includes a one-year lag. For example, the model assumes that when a justice decides a case in 1995, she is reacting to the elite ideology in 1994.

This measure is ideal because, as noted earlier, justices in each of these 12 states must receive the support of the governor and/or the state legislature to receive their initial appointment. A composite measure of the preferences of a governor and state legislature is appropriate even in states like South Carolina and Virginia, where the legislature alone controls judicial appointments. In those states, governors are empowered to fill vacancies on their state supreme courts, which frequently makes them an appointing principal (Nolan 2015). Furthermore, a more granular measure of the preferences of the relevant appointing principals in each state simply is not feasible. While Shor and McCarty (2011) offer a more direct approach to measuring state legislative ideology by analyzing roll call records, unfortunately, the amount

of missing data renders it unhelpful. Berry et al. (2013) also note that their composite measure of elite preferences performs basically as well as those of Shor and McCarty.

As Table 1 noted, changes to judicial selection methods in Connecticut, New Hampshire, Rhode Island, and South Carolina create a sample in which some justices in those four states were appointed by partisan elites while others were chosen by judicial commissions. Judicial selection method is coded for each justice in each year.⁹ To approximate a justice's policy preferences, I use the dynamic ideal points for state supreme court justices developed by Windett, Harden, and Hall (2015). This measure of ideology combines CFScores (Bonica and Woodruff 2015) with item response estimate of judicial voting behavior. Higher values of this dynamic, scaled measure correspond to judicial conservatism.

The analysis also takes strategic factors into account. Prior studies (Cann 2002, 2007; Shepherd 2009a) have demonstrated government litigants enjoy a high success rate in arguing cases before their state supreme court. Government litigants most frequently appear under the issue headings of administrative law, constitutional law, civil procedure, and governments.¹⁰ Because the government would be the non-business litigant in these cases, the presence of a government litigant should increase the likelihood of a liberal vote.¹¹ Three states (Connecticut, New Hampshire, and Virginia) have complete discretion over the acceptance of appeals in civil cases (Flango and Rottman 1998), and the analysis includes a dichotomous control for this institutional difference.

The analysis also considers differences in state tort laws, which should constrain judges from reaching liberal votes. To test this, I created a new measure of the strength of tort reforms in place in a given state-year. The 5th Edition of the Database of State Tort Reforms (Avraham 2014) tracks the annual enactment and repeal of the most prevalent types of tort reform in all 50

states between 1980 and 2012. The presence or absence of each reform loaded on one factor, using a principal components analysis. A Cronbach's alpha-derived score was created using all eleven categories of reform to account for the shared variance ($\alpha = 0.706$) to form a tort reform index with higher values corresponding to more rigorous tort reform.¹² The Appendix contains a table ranking the 12 states on this index. Table 2 contains additional information about the variables used in the analysis.

[Insert Table 2 about here.]

The dichotomous nature of the dependent variable lends itself to logistic regression analysis, but observations in the dataset are grouped, violating the assumption of independence of errors. For example, a justice's votes across cases are unlikely to be independent of each other, even after controlling for justice-specific factors (Gelman and Hill 2007). To account for the hierarchical nature of the dataset, I estimate a multilevel, mixed-effects logistic regression models with a random intercept for each state and judge. The models also contain a random slope for judicial selection method to account for within-state variation of appointed judges in Connecticut, New Hampshire, Rhode Island, and South Carolina. By allowing within-group and across-group variation, multilevel modeling creates unbiased coefficients appropriate for causal inference. Given the panel nature of the dataset, I include a time trend. The key results of the analysis are unaffected by substituting year dummy variables or a crossed-effect random intercept as alternative specifications.

Results and Discussion

Table 3 displays the results of three models of judicial behavior. The Likelihood-Ratio χ^2 tests for each model reject the null hypothesis that the random-effects parameters are zero, which suggests multilevel modeling represents an improvement over traditional logistic regression.

Model 1 includes an interaction term between reappointment method and elite ideology while Model 2 examines the effect of elite ideology across selection systems. Model 3 includes a triple interaction of elite ideology across retention and selection methods. As a robustness check, the Appendix contains the same three models with an additional control for voter preferences, using Berry state citizen ideology scores from the year before the case in question was decided. In none of those models did voter preferences exert a statistically significant influence on judicial decisionmaking, and including this additional control did not affect any of the key findings regarding the influence of elite ideology, which I will now describe.

[Insert Table 3 about here.]

Drawing substantively meaningful conclusions about multiplicative interaction models can be difficult (Brambor, Clark, and Golder 2006). The three figures display marginal effects of the interaction terms from each model. Responsive judicial behavior occurs when the marginal effect of elite ideology is significant and positive, and independent behavior occurs when the marginal effect is not statistically different from zero. Each hypothesis predicts behavior across institutional environments, which requires a comparison of marginal effect sizes for hypothesis testing. The differences in marginal effect sizes and their corresponding *p*-values were estimated using the *mlincom* feature of the *SPost13* software package in Stata (Long and Friesen 2014). Each figure holds control variables at their means. All reported predicted probabilities include the population-level intercept, but neither group-level intercept.

Figure 1 visualizes how justices subject to reappointment and those with tenure respond to elite preferences. The marginal effect of elite ideology is statistically significant and positive for justices in both categories. A change of one standard deviation from the mean value of elite ideology increases the predicted probability of a liberal vote by 0.053 amongst justices with

fixed terms and 0.048 amongst tenured justices. These results indicate justices respond to the preferences of their state governing coalition, regardless of their retention method. While the effect size is somewhat larger amongst justices subject to periodic reappointment, the difference in marginal effects is not statistically significant ($p = 0.788$). Thus, the data do not provide support for the *Reappointment Uncertainty Hypothesis*. Legislatures and governors have the expertise and incentives to be rigorous monitors of the behavior of their agent judges. They also possess tools to induce compliance even when judges have tenure. This non-finding suggests that reappointment uncertainty does not significantly constrain judicial behavior above the baseline set by threats of legislative override, impeachment, jurisdiction stripping, etc. that affects all judges.

[Insert Figure 1 about here.]

Figure 2 illustrates the effect of elite ideology across judicial selection methods obtained by the second model displayed in Table 3. Like the retention effects described above, the marginal effect of ideology for justices from both selection methods is positive and statistically significant. A change of one standard deviation from the mean value of elite ideology increases the predicted probability of a liberal vote by 0.068 and 0.032 for judges chosen by partisan elites and commissions, respectively. These findings indicate unelected state supreme court justices respond to the preferences of the governing coalition, regardless of who controls the judicial appointment process. The difference between the marginal effects, however, is statistically significant ($p = 0.024$), which provides support for the *Agent Screening Hypothesis*. Selecting justices through judicial commissions appears to reduce, if not eliminate, the incentive for justices to alter their behavior to conform to changes in elite ideology. This analysis provides

additional analysis that judicial nominating commissions are not ideologically-captured institutions.

[Insert Figure 2 about here.]

The empirical inquiry does not end here, however, because institutional design shapes judicial behavior through a combination of selection and retention effects. Figure 3 illustrates the marginal effect for all four possible institutional environments as calculated in Model 3 of Table 2. Three of the four marginal effects are statistically significant and positive. The predicted probability of a liberal vote amongst commission-selected justices subject to reappointment increases by 0.033 following a one-standard deviation change from the mean value of elite ideology. For tenured justices chosen by partisan elites, the same change in elite ideology increases the predicted probability of a liberal vote by 0.057.

The largest level of responsiveness occurs among justices who are appointed by partisan elites and subject to periodic reappointment. A one-standard deviation change from the mean value of elite ideology increases the predicted probability of a liberal vote amongst these justices by 0.071. The difference in marginal effect size between partisan-reappointment judges and commission-tenured justices is statistically significant ($p = 0.045$).¹³ This finding supports the *Heightened Responsiveness Hypothesis*. This combination of appointment and retention method creates the lowest level of institutional independence among unelected state supreme courts, and the analysis reveals the lowest level of decisional independence as well. Governors and legislatures have regular opportunities to replace ideologically-distant justices with justices that will be more faithful agents. In light of these institutional arrangements, justices behave strategically to minimize the chances they are removed from the bench.

[Insert Figure 3 about here.]

As the bottom right portion of Figure 3 indicates, tenured justices appointed by judicial commissions, are not significantly influenced by elite ideology, consistent with the *Diminished Responsiveness Hypothesis*. This is not to say that this institutional design produces “better” judges or judging because that depends on one’s underlying normative commitments to the judicial role within a constitutional democracy. The claim is merely that the behavior of tenured judges chosen by judicial commissions remains consistent across changes in political context. Justices in this institutional arrangement enjoy greater levels of discretion that comes with their job security and use them to behave sincerely. Even if partisan elites sought to retaliate through a successful impeachment proceeding, there is no guarantee that the judicial nominating commission will present a more ideologically-compatible replacement. The control variables also yield some interesting results. The effect of policy preferences on judicial decisionmaking is relatively modest. The judicial ideology variable achieves statistical significance only in Models 2 and 3. Based on the results of Model 2, a one-standard deviation change from the mean value of judicial ideology reduced the predicted probability of a liberal vote by 0.010.¹⁴ The paucity of these findings adds fuel to a recent controversy in the state judicial literature. While many studies present evidence that policy preferences shape state supreme court behavior, other studies (Cann 2007; Roch and Howard 2008) have produced null findings for judicial ideology.

One possible explanation is that the typical dependent variables of judicial behavior studies—whether the justice casts a liberal vote—may not be as efficient at the state supreme court level compared to studies of the U.S. Supreme Court. For an ideological disagreement over a case outcome to occur, there must be a majority and dissenting opinion from which a justice can choose to join. Rates of dissensus on state supreme courts, however, are far from

uniform. They differ based on various institutional factors: the court's workload (Sheldon 1999) and professionalism (Squire 2008), whether the court is appointed or elected (Leonard and Ross 2014), and whether a court decides cases *en banc* or in panels (Brace, Yates, and Boyea 2012). If all state high courts had uniform rates of dissensus, policy preferences presumably would exert a stronger empirical effect.

Turning briefly to the strategic variables, tort reform significantly constrains justices from casting liberal votes in each of the three models. Based on Model 1, a one-standard deviation change from the mean value of tort reform reduces the probability of a liberal vote by 0.029. In addition to changing the public perceptions of trial lawyers (Haltom and McCann 2009, 183–226), the tort reform movement also succeeded in creating a set of tort rules that constrain state supreme court behavior. In each model, justices are significantly more inclined to cast a liberal vote when the non-business litigant is a government agency. The results of Model 1 indicate the predicted probability of a liberal vote increases by 0.170 when the government litigates a business case. Consistent with the prior findings (Cann 2002, 2007; 2009a), state supreme court justices fear reprisals from elites if government agencies are unsuccessful in their litigation. Finally, the results of Models 2 and 3 suggest justices in states with discretionary jurisdiction in civil cases are significantly more likely to cast liberal votes in business cases than justices with less docket control.

Implications for State Constitutional Design

This project provides new evidence that constitutional design affects judicial behavior in a complex, yet theoretically predictable fashion. The forms of institutional independence analyzed in this study—who controls the appointment process and whether judges face periodic reappointment—affect levels of decisional independence exercised in business cases. Just as

justices running in different types of judicial elections behave differently (Canes-Wrone and Clark 2009; Canes-Wrone, Clark, and Park 2012), justices in states with different appointive systems understand and utilize the degree of discretion they possess. Justices selected by partisan elites are significantly more sensitive to elite preferences than justices chosen by judicial commissions, and this effect becomes even larger when partisan selection is combined with periodic reappointment. Governing elites can also constrain state supreme court behavior by enacting tort reform and by litigating business cases.

In states that mirror the Article III judicial design of elite-appointed, tenured judges, the expectations of appointing principals create different behavior than captured in the federal court literature. At the federal level, the partisan nature of the judicial selection process and the fear of non-implementation lead Robert Dahl (1957, 293) to conclude, “[T]he Supreme Court is inevitably a part of the dominant national alliance.” At the state level, partisanship does not always define the judicial selection process. Unlike their brethren on the U.S. Supreme Court, tenured state supreme court justices chosen by judicial commissions behave independently of the preferences of their state’s governing coalition, despite facing institutional threats to decisional independence: non-implementation of decisions, jurisdiction stripping, legislative override, etc.

From a normative standpoint, the higher levels of responsiveness exhibited by justices appointed by partisan elites with fixed terms raises serious concerns. The notion of judges feeling the need to cast “popular” votes should give constitutional designers pause. Many political actors behave insincerely to win re-election (e.g., Mayhew 2004), and for normatively sound reasons. When legislators cast insincere votes, they advance the democratic principles of majority rule and dynamic representation. There are strong reasons to hold judges to a distinctly different standard of conduct. Even Alexander Bickel (1962), who feared the U.S. Supreme

Court enjoyed too much judicial independence, ultimately accepts the counter-majoritarian difficulty as the surest way to protect minority rights from the excesses of capricious majorities.

Judicial independence is only useful insofar as it promotes the rule of law (Geyh 2008), and judicial accountability can either support or undermine a proper judicial role. It is a mistake to assume that either independence or accountability are intrinsically good. Since 1950, 28 states have changed their judicial selection methods (National Center for State Courts 2017a). These policy debates have taken place without any rigorous empirics documenting the potential consequences of a change in constitutional design. When combining selection and reappointment methods to create a judiciary optimized to the political values of their state, constitutional designers must carefully evaluate the potential virtues and vices of the institutions they create. Political science has the potential to build an empirical foundation upon which well-informed normative and policy debates can take place.

References

- American Judicature Society. 2011. *Judicial Merit Selection: Current Status*.
http://judicialselection.us/uploads/Documents/Judicial_Merit_Charts_0FC20225EC6C2.pdf (June 9, 2017).
- Avraham, Ronen. 2014. (Social Science Research Network) *Database of State Tort Law Reforms (5th)*. Rochester, NY. SSRN Scholarly Paper. <http://papers.ssrn.com/abstract=902711> (June 1, 2014).
- Baum, Lawrence. 2003. "The Supreme Court in American Politics." *Annual Review of Political Science* 6(1): 161–80.
- Baum, Lawrence, and Neal Devins. 2010. "Why the Supreme Court Cares about Elites, Not the American People." *Georgetown Law Journal* 98(6): 1515–81.
- Bergara, Mario, Barak Richman, and Pablo T. Spiller. 2003. "Modeling Supreme Court Strategic Decision Making: The Congressional Constraint." *Legislative Studies Quarterly* 28(2): 247–80.
- Berry, William D. et al. 2010. "Measuring Citizen and Government Ideology in the U.S. States: A Re-Appraisal." *State Politics & Policy Quarterly* 10(2): 117–35.
- . 2013. "A New Measure of State Government Ideology, and Evidence That Both the New Measure and an Old Measure Are Valid." *State Politics & Policy Quarterly* 13(2): 164–82.
- Berry, William D., Evan J. Ringquist, Richard C. Fording, and Russell L. Hanson. 1998. "Measuring Citizen and Government Ideology in the American States, 1960-93." *American Journal of Political Science* 42(1): 327–48.
- Bickel, Alexander M. 1962. *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*. Indianapolis: Bobbs-Merrill.
- Blume, John, and Theodore Eisenberg. 1999. "Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study." *Southern California Law Review* 72(3): 465–503.
- Bonica, Adam, and Michael J. Woodruff. 2015. "A Common-Space Measure of State Supreme Court Ideology." *Journal of Law, Economics & Organization* 31(3): 472–98.
- Bonneau, Chris W., and Damon M. Cann. 2013. "Party Identification and Vote Choice in Partisan and Nonpartisan Elections." *Political Behavior* 37(2): 1–24.
- Bonneau, Chris W., Damon M. Cann, and Brent D. Boyea. 2012. "Campaign Contributions and Judicial Decisions in Partisan and Nonpartisan Elections." In *New Directions in Judicial Politics*, ed. Kevin T. McGuire. New York: Routledge, 38–52.

- Bonneau, Chris W., and Melinda Gann Hall. 2009. *In Defense of Judicial Elections*. New York: Routledge.
- Brace, Paul, and Brent D. Boyea. 2008. "State Public Opinion, the Death Penalty, and the Practice of Electing Judges." *American Journal of Political Science* 52(2): 360–72.
- Brace, Paul, and Melinda Gann Hall. 1995. "Studying Courts Comparatively: The View from the American States." *Political Research Quarterly* 48(1): 5–29.
- . 1997. "The Interplay of Preferences, Case Facts, Context, and Rules in the Politics of Judicial Choice." *Journal of Politics* 59(4): 1206–31.
- . 2001. "'Haves' versus 'Have Nots' in State Supreme Courts: Allocating Docket Space and Wins in Power Asymmetric Cases." *Law & Society Review* 35(2): 393–417.
- Brace, Paul, Jeff Yates, and Brent D. Boyea. 2012. "Judges, Litigants, and the Design of Courts." *Law & Society Review* 46(3): 497–522.
- Brambor, Thomas, William Roberts Clark, and Matt Golder. 2006. "Understanding Interaction Models: Improving Empirical Analyses." *Political Analysis* 14(1): 63–82.
- Brinks, Daniel, and Abby Blass. 2011. "The Conceptualization and Measurement of Judicial Power." Presented at the Annual Meeting of the American Political Science Association, Seattle.
- Bushnell, Eleanore. 1992. *Crimes, Follies, and Misfortunes: The Federal Impeachment Trials*. Urbana, IL: University of Illinois Press.
- Caldeira, Gregory A. 1987. "Public Opinion and The U.S. Supreme Court: FDR's Court-Packing Plan." *American Political Science Review* 81(4): 1139–53.
- Canes-Wrone, Brandice, and Tom S Clark. 2009. "Judicial Independence and Nonpartisan Elections." *Wisconsin Law Review* 2009(1): 21–66.
- Canes-Wrone, Brandice, Tom S. Clark, and Jason P. Kelly. 2014. "Judicial Selection and Death Penalty Decisions." *American Political Science Review* 108(1): 23–39.
- Canes-Wrone, Brandice, Tom S. Clark, and Jee-Kwang Park. 2012. "Judicial Independence and Retention Elections." *Journal of Law, Economics, and Organization* 28(2): 211–34.
- Cann, Damon M. 2002. "Campaign Contributions and Judicial Behavior." *American Review of Politics* 23(Fall): 261–74.
- . 2007. "Justice for Sale? Campaign Contributions and Judicial Decisionmaking." *State Politics & Policy Quarterly* 7(3): 281–97.
- Caufield, Rachel Paine. 2007. "How the Pickers Pick: Finding a Set of Best Practices for Judicial Nominating Commissions." *Fordham Urban Law Journal* 34(1): 163–202.

- . 2010. “What Makes Merit Selection Different.” *Roger Williams University Law Review* 15(3): 765–92.
- Choi, Stephen J., G. Mitu Gulati, and Eric A. Posner. 2010. “Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary.” *Journal of Law, Economics, and Organization* 26(2): 290–336.
- Clark, Tom S. 2010. *The Limits of Judicial Independence*. New York: Cambridge University Press.
- Collins, Paul M. 2006. “Transforming the Original U.S. Supreme Court Judicial Database: An Alternate Approach for Use with Stata.” *Law & Courts* 16(1): 22–24.
- Curry, Todd A., and Mark S. Hurwitz. 2016a. “Institutional Effects on the Careers of State Supreme Court Justices.” *American Review of Politics* 35(1): 44–64.
- . 2016b. “Strategic Retirements of Elected and Appointed Justices: A Hazard Model Approach.” *The Journal of Politics* 78(4): 1061–75.
- Dahl, Robert A. 1957. “Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker.” *Journal of Public Law* 6(2): 279–95.
- Deno, Kevin T., and Stephen L. Mehay. 1987. “Municipal Management Structure and Fiscal Performance: Do City Managers Make a Difference?” *Southern Economic Journal* 53(3): 627–42.
- Devins, Neal. 2010. “How State Supreme Courts Take Consequences into Account: Toward a State-Centered Understanding of State Constitutionalism.” *Stanford Law Review* 62(6): 1629–93.
- Ferejohn, John A., and Larry D. Kramer. 2002. “Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint.” *New York University Law Review* 77(4): 962–1039.
- Fitzpatrick, Brian T. 2009. “The Politics of Merit Selection.” *Missouri Law Review* 74(3): 675–710.
- Flango, Carol R., and David B. Rottman. 1998. *Appellate Court Procedures*. Williamsburg, Va.: National Center for State Courts.
- Gelman, Andrew, and Jennifer Hill. 2007. *Data Analysis Using Regression and Multilevel/Hierarchical Models*. New York: Cambridge University Press.
- Geyh, Charles Gardner. 2008. “Methods of Judicial Selection & Their Impact on Judicial Independence.” *Daedalus* 137(4): 86–101.
- . 2013. “The Dimensions of Judicial Impartiality.” *Florida Law Review* 65(2): 493–552.

- . 2014. “Judicial Independence as an Organizing Principle.” *Annual Review of Law and Social Science* 10(1): 185–200.
- Goelzhauser, Greg. 2016. *Choosing State Supreme Court Justices: Merit Selection and the Consequences of Institutional Reform*. Philadelphia, Pennsylvania: Temple University Press.
- Gray, Thomas. 2017. “The Influence of Legislative Reappointment on State Supreme Court Decision-Making.” *State Politics & Policy Quarterly* (forthcoming).
<http://journals.sagepub.com/doi/abs/10.1177/1532440017699973>
- Gryski, Gerard S., Eleanor C. Main, and William J. Dixon. 1986. “Models of State High Court Decision Making in Sex Discrimination Cases.” *Journal of Politics* 48(1): 143–55.
- Hall, Matthew E. K., and Jason Harold Windett. 2013. “New Data on State Supreme Court Cases.” *State Politics & Policy Quarterly* 13(4): 427–45.
- Hall, Matthew E.K. 2014. “The Semiconstrained Court: Public Opinion, the Separation of Powers, and the U.S. Supreme Court’s Fear of Nonimplementation.” *American Journal of Political Science* 58(2): 352–66.
- Hall, Melinda Gann. 1987. “Constituent Influence in State Supreme Courts: Conceptual Notes and a Case Study.” *Journal of Politics* 49(4): 1117–24.
- . 1992. “Electoral Politics and Strategic Voting in State Supreme Courts.” *Journal of Politics* 54(2): 427–46.
- . 1995. “Justices as Representatives: Elections and Judicial Politics in the American States.” *American Politics Research* 23(4): 485–503.
- . 2001. “State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform.” *American Political Science Review* 95(2): 315–30.
- . 2014a. *Attacking Judges: How Campaign Advertising Influences State Supreme Court Elections*. Stanford University Press.
- . 2014b. “Representation in State Supreme Courts Evidence from the Terminal Term.” *Political Research Quarterly* 67(2): 335–46.
- Hall, Melinda Gann, and Paul Brace. 1994. “The Vicissitudes of Death by Decree: Forces Influencing Capital Punishment Decision Making in State Supreme Courts.” *Social Science Quarterly* 75(1): 136–51.
- Haltom, William, and Michael McCann. 2009. *Distorting the Law: Politics, Media, and the Litigation Crisis*. University of Chicago Press.

- Hanssen, F. Andrew. 1999. "The Effect of Judicial Institutions on Uncertainty and the Rate of Litigation: The Election versus Appointment of State Judges." *Journal of Legal Studies* 28(1): 205–32.
- Harvey, Anna, and Barry Friedman. 2006. "Pulling Punches: Congressional Constraints on the Supreme Court's Constitutional Rulings, 1987–2000." *Legislative Studies Quarterly* 31(4): 533–62.
- Helland, Eric, and Alexander Tabarrok. 2002. "The Effect of Electoral Institutions on Tort Awards." *American Law and Economics Review* 4(2): 341–70.
- Henschen, Beth M., Robert Moog, and Steven Davis. 1990. "Judicial Nominating Commissioners: A National Profile." *Judicature* 73(6): 328–34.
- Kang, Michael S., and Joanna M. Shepherd. 2011. "The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions." *New York University Law Review* 86(1): 69–130.
- King, Kate. 2016. "Chris Christie Nominates Democrat to New Jersey Supreme Court." *Wall Street Journal*. <http://www.wsj.com/articles/chris-christie-nominates-democrat-to-new-jersey-supreme-court-1460423587> (October 7, 2016).
- Kritzer, Herbert M. 2014. (Social Science Research Network) *Supreme Court Elections and Tort Law Decisions*. Rochester, NY. SSRN Scholarly Paper. <http://papers.ssrn.com/abstract=2463918> (January 24, 2016).
- Langer, Laura. 2002. *Judicial Review in State Supreme Courts: A Comparative Study*. Buffalo, NY: State University of New York Press.
- Leonard, Meghan E., and Joseph V. Ross. 2014. "Consensus and Cooperation on State Supreme Courts." *State Politics & Policy Quarterly* 14(1): 3–28.
- Long, J. Scott, and Jeremy Friese. 2014. *Regression Models for Categorical Dependent Variables Using Stata*. 3rd ed. College Station, TX: Stata Press. <http://www.stata-press.com/books/regression-models-categorical-dependent-variables/> (September 22, 2016).
- Madden, Richard L. 1986. "Commission Set to Recruit and Screen New Judges." *New York Times*: 1.
- Mayhew, David R. 2004. *Congress: The Electoral Connection*. New Haven: Yale University Press.
- McCall, Madhavi. 2008. "The Politics of Judicial Elections: The Influence of Campaign Contributions on the Voting Patterns of Texas Supreme Court Justices, 1994–1997." *Politics & Policy* 31(2): 314–343.

- McLeod, Aman. 2012. "The Party on the Bench: Partisanship, Judicial Selection Commissions, and State High-Court Appointments." *Justice System Journal* 33(3): 262–74.
- Murphy, Walter F. 1964. *Elements of Judicial Strategy*. Chicago: University of Chicago Press.
- Nagle, Luz. 2011. (Social Science Research Network) *Colombia's Faceless Justice: A Necessary Evil, Blind Impartiality, or Modern Inquisition?* Rochester, NY. SSRN Scholarly Paper. <http://papers.ssrn.com/abstract=1804423> (March 27, 2013).
- National Center for State Courts. 2009. "Amended State Constitutional Provisions Regarding Reductions to Judicial Salaries (January 2009)." *Judicial Salary Resource Center*. http://www.ncsconline.org/d_kis/salary_survey/provisions.asp (April 8, 2011).
- . 2017a. "History of Reform Efforts: Formal Changes Since Inception." *Judicial Selection in the States*. http://judicialselection.us/judicial_selection/reform_efforts/formal_changes_since_inception.cfm?state= (June 9, 2017).
- . 2017b. "Methods of Judicial Selection: Judicial Nominating Commissions." *Judicial Selection in the States*. http://judicialselection.us/judicial_selection/methods/judicial_nominating_commissions.cfm?state= (June 9, 2017).
- Nemacheck, Christine. 2008. *Strategic Selection: Presidential Nomination of Supreme Court Justices from Herbert Hoover through George W. Bush*. Charlottesville, VA: University of Virginia Press.
- Nolan, Jim. 2015. "Governor Slams GOP Plan to Oust His Pick from Va. Supreme Court." *Richmond Times-Dispatch*. http://www.richmond.com/news/virginia/government-politics/article_cfc22cb9-bd30-5544-9544-99a9ef3babdb.html (December 13, 2016).
- O'Callaghan, Jerome. 1991. "Another Test for the Merit Plan." *Justice System Journal* 14(3): 477–85.
- Owens, Ryan J., Alexander Tahk, Patrick C. Wohlfarth, and Amanda C. Bryan. 2015. "Nominating Commissions, Judicial Retention, and Forward-Looking Behavior on State Supreme Courts An Empirical Examination of Selection and Retention Methods." *State Politics & Policy Quarterly* 15(2): 211–38.
- Peretti, Terri Jennings. 2002. "Does Judicial Independence Exist? The Lessons of Social Science Research." In *Judicial Independence at the Crossroads: An Interdisciplinary Approach*, eds. Stephen B. Burbank and Barry Friedman. Thousand Oaks, CA: Sage Publications, Inc, 103–33.
- Poole, Keith T., and Howard Rosenthal. 1985. "A Spatial Model for Legislative Roll Call Analysis." *American Journal of Political Science* 29(2): 357–84.

- Reddick, Malia. 2010. *Judging the Quality of Judicial Selection Methods*.
http://www.judicialselection.us/uploads/documents/Judging_the_Quality_of_Judicial_Sel_8EF0DC3806ED8.pdf (March 8, 2013).
- Roch, Christine H., and Robert M. Howard. 2008. "State Policy Innovation in Perspective Courts, Legislatures, and Education Finance Reform." *Political Research Quarterly* 61(2): 333–44.
- Rosenberg, Gerald N. 1992. "Judicial Independence and the Reality of Political Power." *The Review of Politics* 54(3): 369–98.
- Rubin, Edward L. 2002. "Independence as a Governance Mechanism." In *Judicial Independence at the Crossroads: An Interdisciplinary Approach*, eds. Stephen B. Burbank and Barry Friedman. Thousand Oaks, CA: Sage Publications, Inc, 56–102.
- Schaffner, Brian F., and Jennifer Segal Diascro. 2009. "Judicial Elections in the News." In *Running for Judge: The Rising Political, Financial, and Legal Stakes of Judicial Elections*, ed. Matthew Streb. New York: NYU Press, 115–39.
- Schaffner, Brian F., and Matthew J. Streb. 2002. "The Partisan Heuristic in Low-Information Elections." *Public Opinion Quarterly* 66(4): 559–81.
- Segal, Jeffrey A., Chad Westerland, and Stefanie A. Lindquist. 2011. "Congress, the Supreme Court, and Judicial Review: Testing a Constitutional Separation of Powers Model." *American Journal of Political Science* 55(1): 89–104.
- Sheldon, Charles H. 1999. "The Incidence and Structure of Dissensus on a State Supreme Court." In *Supreme Court Decision-Making: New Institutional Approaches*, eds. Cornell W. Clayton and Howard Gillman. Chicago: University of Chicago Press, 115–34.
- Shepherd, Joanna M. 2009a. "Are Appointed Judges Strategic Too?" *Duke Law Journal* 58(7): 1589–1626.
- . 2009b. "The Influence of Retention Politics on Judges' Voting." *Journal of Legal Studies* 38(1): 169–206.
- . 2013. (American Constitution Society) *Justice At Risk: An Empirical Analysis of Campaign Contributions and Judicial Decisions*.
http://www.acslaw.org/ACS%20Justice%20at%20Risk%20%28FINAL%29%206_10_13.pdf (June 17, 2013).
- Shor, Boris, and Nolan McCarty. 2011. "The Ideological Mapping of American Legislatures." *American Political Science Review* 105(3): 530–51.
- Shugerman, Jed Handelsman. 2010a. "Economic Crisis and the Rise of Judicial Elections and Judicial Review." *Harvard Law Review* 123(5): 1061–1150.

- . 2010b. “The Twist of Long Terms: Judicial Elections, Role Fidelity, and American Tort Law.” *Georgetown Law Journal* 98(5): 1349–1413.
- . 2012. *The People’s Courts: Pursuing Judicial Independence in America*. Cambridge, MA: Harvard University Press.
- Squire, Peverill. 2008. “Measuring the Professionalization of U.S. State Courts of Last Resort.” *State Politics & Policy Quarterly* 8(3): 223–38.
- Tabarrok, Alexander, and Eric Helland. 1999. “Court Politics: The Political Economy of Tort Awards.” *Journal of Law & Economics* 42(1): 157–88.
- Tarr, G. Alan. 2012. *Without Fear or Favor: Judicial Independence and Judicial Accountability in the States*. Palo Alto, CA: Stanford University Press.
- Vlaicu, Razvan, and Alexander Whalley. 2012. “Hierarchical Accountability in Government: Theory and Evidence.” http://faculty1.ucmerced.edu/awhalley/web/HierAcct_Vlaicu_Whalley.pdf (October 29, 2014).
- Waltenburg, Eric N., and Charles S. Lopeman. 2000. “Tort Decisions and Campaign Dollars.” *Southeastern Political Review* 28(2): 241–263.
- Watson, Richard Abernathy, and Rondal G. Downing. 1969. *The Politics of the Bench and the Bar; Judicial Selection under the Missouri Nonpartisan Court Plan*. New York: Wiley.
- Windett, Jason H., Jeffrey J. Harden, and Matthew E. K. Hall. 2015. “Estimating Dynamic Ideal Points for State Supreme Courts.” *Political Analysis* 23(3): 461–69.
- Yelnosky, Michael J. 1996. “Rhode Island’s Judicial Nominating Commission: Can ‘Reform’ Become Reality?” *Roger Williams University Law Review* 1(1): 87–135.
- Yoon, Albert. 2006. “Pensions, Politics, and Judicial Tenure: An Empirical Study of Federal Judges, 1869–2002.” *American Law and Economics Review* 8(1): 143–80.

¹ Throughout the manuscript, I will use the term judge and justice interchangeably. Likewise, while some states do not call their court of last resort a “state supreme court,” I employ the term state supreme court to refer to state high courts.

² In addition to the length of term requirements, eight of the twelve states with unelected high courts impose a mandatory retirement age.

³ There are three exceptions. In Connecticut, the judicial nominating commission is not involved in judicial retention decisions. Instead, both houses of the general assembly vote to reappoint. In Hawaii, justices only need the support of the judicial nominating commission to receive a new term. In South Carolina, which has a nominating commission, and Virginia, which does not, the governor plays no formal role in appointing or reappointing justices, and the governor does not play a role in judicial retention in Vermont.

⁴ The closest approximation to this model might be trial judges in Colombia, who are hidden from view during drug trafficking cases to limit the possibility of assassination (Nagle 2011).

⁵ Nevertheless, these justices tend to be successful when seeking reappointment. According to the State Supreme Court Career Database, only three justices serving since 1970 have failed when attempting to secure reappointment. This figure could be somewhat deceptive because those justices who sense a hostile reappointing audience may choose to resign or retire instead.

See <http://www.lsu.edu/faculty/bratton/research.htm>.

⁶ Many studies that do isolate merit selection focus on whether it leads to the selection of justices with different qualifications, not how those justices behave (Goelzhauser 2016; Reddick 2010; Watson and Downing 1969).

⁷ A search of the Procedural Posture field for the word abortion reveals only two abortion cases from the 12 states with appointed state supreme courts.

⁸ The analysis excludes criminal cases because a vote for the business litigant would also be a vote for a criminal defendant, which would be classified as a liberal vote.

⁹ The coding of justices in New Jersey reflects whether they have achieved tenure or are still in their freshman term.

¹⁰ See, e.g., *United Cable Television Services, Corp. v. Dep't. of Public Utility Control*, 235 Conn. 334 (1995) (affirming a public utility issuance of a certificate of public convenience and necessity to a competing cable company); *New Castle County v. Wilmington Hospitality, LLC*, 963 A.2d 738 (2008) (holding a developer's equal protection claim presented triable issues of fact); *Blue Cross and Blue Shield of Central New York v. Comptroller*, 89 N.Y.2d 160 (1996) (holding unconstitutional a state law granting the Comptroller power to conduct audits of private health insurance corporations); *Charles Smith Management, Inc. v. Dep't of Taxation*, 251 Va. 353 (1996) (affirming the Department of Taxation's assessment of an aircraft use tax). In each of these cases, the government was seeking a liberal disposition.

¹¹ To determine the presence of a government litigant, I searched the party names for the phrases "State," "Commonwealth," "City," or "County."

¹² These categories are caps on non-economic, punitive, and total damages; reforms to split recovery, collateral source, punitive evidence, periodic payments, contingency fee, comparative fault, and joint and several liability rules; as well as reforms to patient compensation funds. This dataset is available at <http://www.utexas.edu/law/faculty/ravraham/dstlr.html>.

¹³ The marginal effect of elite ideology amongst commission-tenured justices is not significantly different than commission-reappointment justices or partisan-tenured justices. The marginal

effect of elite ideology among partisan-reappointment justices is significantly larger than commission-reappointment justices ($p = 0.023$), but it is not significantly different from partisan-tenured justices.

¹⁴ A robustness check using a dichotomous variable for each judges' party affiliation (courtesy of the State Supreme Court Career Database) in lieu of ideology reveals Democrats are significantly more likely to cast liberal votes than their Republican counterparts across all three models, but only at the $p < 0.10$ level.