Open Judicial Politics

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COLLECTED WORKS

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Contents

Part III. Decision Making

Part IV. Public Opinion

Part V. Media

Part VI. Policy Making

Introduction

The impetus for this volume was a multitude of conversations regarding pedagogy and teaching related to our judicial process courses. Based on these conversations, we identified four main threads or needs of our colleagues: First, many of us bring or want to bring more "political science" into our classes, though we also want to avoid the high costs of reinventing successful existing courses to do so. Second, our programs all require a political methodology course, and we want to reinforce those lessons in our substantive courses. We want to encourage our students' understanding of how to read and understand research studies as well as how to craft their own research questions. Third, we want to keep our courses as current as possible. And fourth, we wanted to find a way to bring the cost of our courses down, as we see so many students struggle with the high costs of a college degree. This volume (as well as any future editions) addresses each of these concerns. *Open Judicial Politics* is a compilation of new and original research in judicial politics written specifically for the undergraduate audience, thus providing accessible examples of political science research that also address some of the more current concerns and controversies in our field. Additionally, every article is accompanied by some type of classroom activity—from basic discussion questions to full-blown simulations—that makes it easier for instructors to adapt the material to their courses and enhance classes with interactives. The chapters of the volume generally follow the well-worn path of most textbooks of judicial politics, making the volume an easy companion for adoption, and the material should fit seamlessly into the preestablished structures of most courses. Finally, the volume is an open-source resource, and adoption of the text adds no cost for our students. Whether one uses one or ten articles, the cost remains nil. This volume includes twenty-two original contributions that we have grouped into nine parts. The studies cover the breadth and scope of the field of judicial politics, with attention to appellate and trial courts, national high courts and intermediate appellate courts, and US courts and their international counterparts, thus providing a large range of materials to complement any judicial process course or text. We are especially pleased that undergraduate students played key roles in the creation of several of these studies, performing data collection and analysis as well as complete authorship from stem to stern. For the second edition, we have added fifteen articles that continue to illustrate key concepts and aspects of judicial politics, following the same formula of empirical research tailored to an undergraduate audience, accompanied by a variety of classroom activities.

PART I

ACTORS IN THE JUDICIAL PROCESS

Lawyers

Lawyers are an integral part of our justice system, without whom the entire process collapses. Courts are passive institutions, and without lawyers seeking resolutions to conflicts both civil and criminal, the courts would have little to no purpose and negligible role to play in politics and policy. In our section on lawyers, we offer two avenues of research. The first lane examines the lawyers—who they are and why that matters. In "Riddled with Exclusivity," Austin Carsh, in partial fulfillment of his honors BS in political science at Oregon State University, examines the demographic characteristics of the Supreme Court Bar—the men and women who argue before the justices with some frequency. While women and people of color have made inroads in terms of representation in law school classes and the profession in general, Carsh finds that this elite level of the profession is still woefully lacking in diversity. His conclusion connects this finding to important concerns regarding the Court's agenda and legitimacy. Scott Hofer and Susan Achury take a closer look at the law school pipeline and its effect or lack thereof on the inclusivity of the federal judiciary, finding, like Carsh, that broadening law school representation does not automatically result in a more diverse and inclusive legal profession. The second avenue examines how lawyers react to losing before the Supreme Court. Too often, a loss before the US Supreme Court, particularly a loss on a constitutional question, is regarded as a death knell for the underlying position or idea. Professor Richard S. Price reveals that lawyers are not so easily dismissed. Constitutional lawyers are capable of taking a loss before the justices and reinventing their case at the state level, winning on a smaller stage and helping develop state law that is too often ignored for the larger federal arena.

Carsh, Austin. "Riddled with Exclusivity: The Homogeneity of the Supreme Court Bar in the Roberts Court."

Hofer, Scott and Susan Achury. "Examining Diversity, Inclusion, and Equity in the Legal Profession: An Analysis of Career Tracks and Representation."

Price, Richard S. "On Remand: Legal Strategies After Supreme Court Losses."

1. Riddled with Exclusivity

The Homogeneity of the Supreme Court Bar in the Roberts Court

AUSTIN CARSH

As the American public is becoming increasingly diverse (Keating and Karklis 2016) and aware of systemic discrimination, diversity is becoming a centerpiece of nearly every political discussion. On the heels of the 2018 midterm elections, the US Congress is more diverse than it has ever been (Cordes 2019). However, even in the historically diverse 116th Congress, women only make up 25 percent of the Senate and 23 percent of the House compared to 51 percent of the general population, and people of color compose 22 percent of Congress compared to over 40 percent of the general population (Hansen 2019).[1]

Likewise, the federal judiciary also has a lack of diversity (Solberg and Diascro 2018), and this overall characterization is equally accurate at the highest level—the Supreme Court. The demographics of the Supreme Court have been quite consistent throughout its existence. There have only been six justices who have not been White men in the history of the Court (Campisi and Griggs 2018). All six of them have served since 1967, when Thurgood Marshall, the first African American male to become a Supreme Court justice, was appointed. Although the current Court is the most diverse Court in history, it is still demographically homogenous, with 67 percent male justices and 78 percent White justices. In addition to gender and race, the Supreme Court has historically been educationally homogenous. Of the fifty justices who have received a law degree, 32 percent graduated from Harvard, and 14 percent graduated from Yale (Dhillon 2014).[2] The current Supreme Court is very similar in terms of education, with all nine of the justices attending either Harvard Law School or Yale Law School (Strauss 2018).[3]

1. For the purposes of this study, identities are treated distinctly. While I recognize the validity of intersectionality and how individuals belonging to multiple marginalized groups (such as women of color) experience oppression that is greater than the sum of its parts, the data in this study do not allow for an intersectional analysis. Only 12 of the 876 lawyers in the Supreme Court Bar are women of color, which makes a rigorous statistical analysis of intersectional identities next to impossible within the confines of this study.
2. The article was written in 2014 and thus does not account for the placement of Justices Gorsuch and Kavanaugh—who graduated from Harvard Law School and Yale Law School, respectively—on the Court. The percentages have been adjusted for these two additions.
3. Justice Ginsburg attended Harvard Law School for two years before transferring to Columbia Law School for her final year.

While there is an ongoing discussion about the diversity (or lack thereof) of the Court, there is almost no discussion about the diversity of the advocates who appear before it.[4] Oral argument is open to the public and is the most visible aspect of the Court. Thus oral argument provides the best opportunity to examine the diversity of those who are influential to the Court's functioning. Since today's advocates are often tomorrow's judges and justices, it is important that these individuals are included in the diversity discussion as well.

In order to practice before the Supreme Court, an attorney must first be admitted to the formal Supreme Court Bar. The barrier to entry is not high, and many lawyers will use it as a career marker even if they never intend to practice before the Court. Thus the formal Supreme Court Bar has many members. However, within the broader formal bar, a much smaller subsection exists: the lawyers who argue before the Court. These elite lawyers wield immense power and act as gatekeepers of the Court. They have the experience and relationships that allow them to shape the docket of the Supreme Court (McGuire 1995). Knowing the backgrounds and demographics of these attorneys is vital to understanding how they represent the overall populace as well as how the Supreme Court serves as a body of government. In order to get a complete understanding of how the Supreme Court works as an institution, we need to know about the justices and advocates.

Research Questions

There are three questions this investigation seeks to answer:

1. *How homogenous is the Supreme Court Bar?* In order to assess this question, the Supreme Court Bar will be analyzed in terms of the following six characteristics: gender, race, law school attended, undergraduate institution attended, employment category, and Supreme Court clerkship status.
2. *Has the Supreme Court Bar changed since* 1990? Comparisons between the current data and those from McGuire (1993) will be explored to look for any differences.
3. *How representative is the Supreme Court Bar?* The demographics of the Supreme Court Bar will be compared to the national bar and to the US population as a whole to evaluate the representativeness of the body.

4. There is also work done on the rest of the federal judiciary and state high courts. See Solberg and Diascro 2018, Federal Judicial Center 2018, and American Constitution Society 2017

Literature Review

Before delving into the data, it is important to understand the historical background that contextualizes this analysis. There are four frames that must be examined. First, the concept of representation will be explored to establish the judiciary and the lawyers who argue before them as representative institutions. At the same time, I explore the impacts of descriptive representation both broadly and within the judiciary. Second, a history of the legal education system will explore the barriers to entry in the legal profession that continue to affect the makeup of the Supreme Court bench as well as the Supreme Court Bar. Third, the history of diversity within the legal profession will further explore barriers to entry and advancement in the field. Finally, the history of the Supreme Court Bar itself will be examined, including results of previous investigations into the homogeneity of the institution. Together, these four frames provide the context necessary to discuss homogeneity within the Supreme Court Bar and the resulting impacts.

Representation

Before evaluating the question "How representative is the Supreme Court Bar?," it is critical to understand the functions and implications of representation. Hanna Pitkin's 1967 book *The Concept of Representation* is often cited as the foundation for thinking about political representation. Pitkin lays out four different views of representation: formalistic, symbolic, descriptive, and substantive. Formalistic representation is simply the actual power granted from one entity to the representative. Both symbolic representation and descriptive representation center on the demographics of the representative body, exploring how accurately they mirror the public demographically and what the effects of that mirroring are. Substantive representation is concerned with how closely the representative mirrors the public in terms of his or her policy preferences and overall political ideology.

Pitkin limits political representation to elected positions, such as legislative bodies and, to some extent, the executive branch. This definition necessarily excludes judicial branch and nongovernment lawyers as a whole. However, this distinction does not serve well in systems that employ common law and where judges set precedents and make laws through their interpretations. In these systems, judges act on behalf of the state, and their actions can be ascribed to the state as a whole, which is how Hobbes viewed formalized representation (Pitkin 1967). Even lawyers in the private sector have a role in government. Alexis de Tocqueville viewed lawyers writ large as essential to a functioning democracy. Lawyers are the arbiters between the people and the government. They help the government ensure justice when citizens violate the

law; conversely, lawyers also serve as a check on the government to ensure civil liberties are being maintained and that the government is obeying its processes (Diascro and Ivers 2006). In this sense, while not electorally representative, lawyers often act as representatives of the people and can therefore the Supreme Court bar can be evaluated in terms of its descriptive representation (Kenney 2013).

While lawyers may be representative, and Pitkin shows how we can evaluate representatives in terms of diversity, the bigger question is, Why should we? The effects of diversity are numerous. First, diversity is critical to the legitimacy and functioning of an institution. Second, descriptive representatives can serve as role models that show that institutions are accessible to people of their demographic group. Third, while not interchangeable, descriptive representation can often translate into substantive description through shared lived experiences.

Kenney (2013) argues that high levels of demographic diversity are essential for an institution in the same way that representation across geographic jurisdictions is essential. Using the example of the European Court of Justice, Kenney contends that the requirement to have one judge from every member country is a form of descriptive representation. In a hypothetical case in which one country is hurt by a ruling without a judge from that country weighing in on the decision, people within that country might be inclined to view the ruling, and the body as a whole, as illegitimate (Kenney 2013). In that same vein, Kenney asks, Why would qualities like gender and race be any different? In the United States, women and people of color are routinely affected by judicial rulings stemming from largely White and male benches. Thus it would follow that their perceptions of the judiciary as a whole would be injured in a similar way (Kenney 2013).

Empirical data backs up Kenney's argument. Descriptive representation does increase positive sentiment toward the governing body (Tate 2003). When looking specifically within the judicial branch, Scherer and Curry (2010) found that there is a direct causal link between the amount of perceived representation of African Americans in the federal judiciary and the perceived legitimacy of the judiciary among African Americans. White people were less likely to support the judiciary if they perceived either Black people to be overrepresented or White people to be underrepresented on the judiciary (Scherer and Curry 2010). When an institution looks like you belong there, you grant it greater legitimacy and authority. Thus descriptive representation is extremely important to the legitimacy of the judiciary.

Another effect of descriptive representation is that it can provide role models. Having increased diversity within an institution signals to the citizens that the institution is not only for the dominant groups; it is for the marginalized communities as well (Sapiro 1981; Mansbridge 2003). This impacts the legitimacy of an institution, as discussed above, and breaks down barriers to entry for marginalized communities (Sapiro 1981). When people in marginalized communities see their own identities reflected in government institutions, they are more likely to see that position

as an option for them in the future and are thus encouraged to pursue positions within the institution.

A third impact of diversity is that it has the potential to translate into substantive representation. It is certainly the case that descriptive representation does not automatically lead to substantive representation. After all, demographic groups are not monolithic, and individuals belonging to demographic groups can vary widely in their ideologies and values. Simply because there is a representative who is Black does not mean that the representative will represent the ideologies of all Black people. For example, Supreme Court Justice Clarence Thomas is the only Black justice currently serving on the Court, but he varies greatly from what the majority of Black Americans believe in terms of ideology (Clawson and Waltenburg 2009). There are instances in which Justice Thomas does draw on his identity in rulings, but they are few and far between.[5] However, his presence on the Court still improves the legitimacy of the Court via descriptive representation.

There is mixed evidence as to the relationship between diversity and substantive judicial impacts. Kritzer and Uhlman (1977) indicate that male and female judges do not differ on overall sentencing behavior. Walker and Barrow (1985) find that there are no significant differences between male and female judges when it comes to how they view rights of the accused or how they rule on issues specifically designated as women's issues. However, Spohn et al. (1985) found that female judges were twice as likely to incarcerate defendants.

It could be the case that although judges belonging to a certain demographic group do not always explicitly provide substantive representation for those groups, they do have a consciousness of the issues surrounding the identities they represent and can act as validators of the issues the group faces. Female judges tend to notice examples of gender bias and are more likely to agree with feminist propositions (Martin et al. 2002). Thus they are better able to identify and evaluate claims of bias against women. The same may be true of other identities.

Since oral argument is such a visible aspect of Supreme Court litigation, it stands to reason that the same three effects of descriptive representation listed above also apply to the advocates who appear before the Court. The attorneys act as representatives, and as such, examining how their identities may influence the legitimacy, accessibility, and substance of their work is crucial for this investigation.

5. In Justice Thomas's concurrence in Capitol Square and Advisory Board v. Pinette 15 US 753 (1995), he gives a great deal of historical background into the Ku Klux Klan's tradition of burning flags, informed in part by his lived experience as a Black man from the South.

Law School

In order to evaluate the homogeneity of the Supreme Court Bar, it is important to understand the pathway to the bar, beginning with law schools. Since law schools act as gatekeepers to the legal profession, demographics in law school shape the demographics of the legal profession.

The legal profession has undergone several key changes since the country's inception that have transformed the field. One of these changes is the relatively recent development and subsequent importance of a formalized legal education known as law school. For most of the existence of the legal profession, people entered the field via apprenticeships with practicing attorneys. Although the legal academy was created in 1793 at the College of William and Mary (Moline 2003), it wouldn't be until decades later that formalized legal education became the standard for entry into the profession. The early legal academy differed greatly in many aspects from the modern law school. First, the early legal academy was on the same level as an undergraduate degree. Upon formation in 1900, the American Association of Law Schools required that entrants needed only a high school diploma to enroll (Kirkwood and Owens 1961). Graduates of law programs would earn a bachelor of laws (LLB) degree rather than the now common juris doctorate (JD; Moline 2003). Second, early legal education programs differed in their focus. For most of the history of law schools, they were more focused on producing legal scholarship than on producing practicing lawyers. The education was more theoretical in nature and involved reading philosophical and religious texts (Moline 2003).

In the early nineteenth century, future Supreme Court Justice Joseph Story reorganized Harvard Law School to be more focused on teaching practical skills and treating law as a science rather than a craft (Moline 2003). By the 1870s, several other law schools followed suit. This would mark the beginning of the new approach to a legal education. Beginning in the early twentieth century, the legal academy took on the burden of training the next generation of practicing lawyers (Moline 2003). However, it would take decades for this change to permeate the field and for legal education to become the standard for all lawyers to receive prior to entering the workforce. The upper echelons of the legal profession, such as the Supreme Court, were slow to incorporate a legal education. It wasn't until 1957, with the appointment of Justice Charles Whittaker, that every member of the Supreme Court received a formal legal education (Lat and Hill 2010).

In modern times, law school is a virtual necessity for any potential lawyer. While there are still some jurisdictions where a law degree is not a requirement for licensure, most require it (Farrell 2014). Even in those jurisdictions that do not require it, test takers coming out of apprenticeships are few and far between. In 2013, only 60 of the almost 84,000 (0.07 percent) bar examinees did not have a law degree. Only 28 percent of apprenticed lawyers passed a bar exam compared to

78 percent of people who went to a law school accredited by the American Bar Association (ABA; Farrell 2014).

Law schools have historically been dominated by White males. Upon opening, many law schools explicitly excluded women. Ada Kepley was the first woman to graduate from law school in 1870 from what would eventually become Northwestern Law (Northwestern Law 2017). However, several prestigious law schools continued their female exclusion policy well into the twentieth century. For instance, Harvard Law School didn't begin admitting women until 1950 (Massari 2003). Once they began to be admitted, women remained a minority for decades. It wasn't until the 1985–86 school year that women made up 40 percent of law school enrollees (American Bar Association 2013), and women didn't become the majority in law schools until the 2016–17 school year, even though they make up 51 percent of the US population (Olson 2016).

People of color have also been systematically excluded from law school in the past. Historically, there was no real option for Blacks to get a legal education prior to the opening of Howard University in 1867 (Corbett 2008). However, enrollment was extremely limited, and it took nearly seventy years before other historically Black colleges and universities (HBCUs) would open law schools (Corbett 2008). It wasn't until 1950 that law school became desegregated by order of the US Supreme Court in *Sweatt v. Painter* 339 US 629 (1950). In *Sweatt*, the Court ruled that there was no equivalence between a hastily established Texas law school for Blacks and the well-established White-only University of Texas (UT), and thus UT may not discriminate based on race (Corbett 2008). The ruling in *Sweatt* desegregated law schools on paper.

However, the legal desegregation of law schools did not remove all barriers to entry for people of color. The admissions process into most law schools greatly emphasizes the Law School Admission Test (LSAT; Randall 2006; Corbett 2008). The LSAT has been shown to be biased against minority groups and has been used as a reason to reject applicants of color (Randall 2006). Affirmative action programs implemented in the 1950s and 1960s did help increase minority enrollment; however, there has been a stagnation of minority enrollment in the twenty-first century (Corbett 2008).[6] Minority enrollment lagged behind the general population for many years, and in 2016, just 32 percent of all entering law students were ethnic minorities, though they compose 40 percent of the total US population (Corbett 2008; American Bar Association 2018).

Law schools have been making other efforts to increase the diversity of their student body in recent years. The designator "underrepresented minority" (URM) was created to try to counteract some of the implicit bias present in the utilization of the LSAT. Being a URM does increase one's chances of admittance in law schools, and that advantage is higher in the higher tiers (Plainview

6. There has been a backlash to affirmative action programs and court rulings stopping some programs that may be contributing to the stagnation.

2017). However, those URM advantages don't always correlate to an increase in the proportion of URM students in law schools. In fact, law schools with high LSAT medians (which tend to correlate with high rankings) were more likely to see a drop in the percentage of students of color between 2010 and 2013 (Taylor 2015). In that same time frame, bottom-tier schools have seen a sharp increase in the proportion of students of color attending (Taylor 2015).

While in the aggregate law schools are becoming diverse, that will not necessarily translate into the upper echelons of the legal profession due to the stratification of law schools into different tiers and the implications for employment after graduating. While the most famous and widely cited rankings come from the *US News and World Report* (USNWR), several other rankings exist, such as the *Above the Law Top 50 Law School Rankings*, the *Academic Ranking of World Universities*, and the *Times Higher Education World University Rankings*, among others. Each of these rankings has a different methodology, yet they all tell a similar story: there are tiers of law schools. The highest tier includes the Ivy League[7], Stanford, and the University of Chicago. While the exact cutoff between Tier 1 and Tier 2 schools is difficult to ascertain, it is clear that these schools have a distinct advantage in placing their graduates into legal jobs in terms of both quantity and quality. The 2018 ABA employment reports indicate that the top twenty law schools (according to the USNWR) placed, on average, 87 percent of students into jobs that require passage of the bar compared to 64.7 percent on average for schools outside of the top twenty. Additionally, top-twenty schools placed 44 percent of their graduates into firms with over 500 people compared to 4 percent of graduates from schools outside of the top twenty. Firms with over 500 people tend to be the most prestigious and well-paid in the country. Eighty-eight percent of the Vault 50 and 79 percent of the Vault 100 most prestigious firms in the US have more than 500 lawyers, and the average number of lawyers at a Vault 100 firm is 1,176 (Vault 2018). With this in mind, it is clear that "elite" law schools have an outsized role in the legal profession. Thus an understanding of the diversity of these law schools is critical in order to understand the diversity of the upper tiers of legal employment.

When just focusing on the USNWR Top 20, the numbers shift slightly from the overall percentages. The proportion of women is slightly lower in the top twenty (50 percent) than in the rest of the schools (51.51 percent). There is a much greater disparity when looking at students of color. Students of color only make up 29 percent of the students in the top twenty, while they make up 32.7 percent of students in the rest of the schools (American Bar Association 2018). So while law schools appear to be representing students proportionally at face value, women and minority students are more likely to attend lower-ranked schools, which can affect bar passage chances as well as employment prospects. Lower-ranked schools do not provide the same opportunities to

7. The Ivy League has five law schools: Yale, Harvard, Columbia, University of Pennsylvania, and Cornell.

access the upper echelons of the legal profession, such as clerkships and appearing in front of the Supreme Court.

Legal Profession

The legal profession, much like law schools, is a historically exclusive industry. Both women and people of color face several hurdles, explicit and implicit, in trying to enter the legal profession. While progress has been made, significant obstacles still exist.

Women were explicitly banned from practicing law for many years. Belle Babb Mansfield became the first woman admitted to a state bar when in 1869, Iowa admitted her (Morello 1986). At the time, Iowa was the only state bar that admitted women. In 1872, the Supreme Court heard *Bradwell v. Illinois*, 83 US 130 (1872), in which Myra Bradwell appealed a decision by the Illinois Supreme Court that had prevented her from being admitted to the Illinois state bar. The Supreme Court ruled in favor of Illinois, thus causing a major setback for women. The Court ruled that practicing law was not a right guaranteed by the Privileges and Immunities Clause of the Fourteenth Amendment, and thus Bradwell did not have a right to be admitted to the Illinois state bar (*Bradwell v. Illinois*). As her case was moving up to the Supreme Court, Bradwell and other feminist activists successfully pushed for a law in the Illinois state legislature that made gender-based discrimination in employment illegal (Willis 2017). Thus Bradwell and women at large were allowed into the Illinois state bar in 1872.

However, the simple removal of explicit barriers to enter bar admissions did not guarantee gender equality in the profession. In addition to the law school discrimination discussed above, women face implicit bias in the legal field. Even into the twenty-first century, the stereotype that women belong in the home more than the office continues to persist. This stereotype negatively affects women's ability to enter and move up in the legal field especially (Negowetti 2015).

Currently, women still only make up around 36 percent of the national bar (American Bar Association 2017). While this is an improvement from ten years ago, when women made up only 32 percent, women still constitute a sizeable minority of lawyers, especially considering they now make up a majority of law school classes. With the recent arc toward parity in law school entrants and graduates, the barriers for entry into the field may be eroding. However, the barriers to advancement in the field remain firmly in place.

Many prestigious positions within the legal field remain heavily male-dominated. In private practice, men only make up 55 percent of associates yet constitute 82 percent of managing partners, 82 percent of equity partners, and 78 percent of partners (American Bar Association

2017). In 2016, only 35 percent of lawyers who were promoted to partner were female (Minority Corporate Counsel Association 2017). In-house counsels for major corporations are also male-dominated: 75.2 percent of Fortune 500 in-house counsels are male (American Bar Association 2017). Additionally, the wage gap is present in the legal field, with female lawyers making less than 90 percent of the wages of male lawyers.

The public sector sees much the same disparity that the private sector sees. While women made up 51 percent of total clerkships in 2009, they made up just 45 percent of the most sought-after federal clerkships (National Association of Law Placement 2010). In 2015, women made up just 38 percent of assistant US attorneys (Mukamal and Sklansky 2015). The pattern holds in the judiciary as well, with women being underrepresented in judgeships. In 2016, women made up 33 percent of the Supreme Court, 35.9 percent of the federal courts of appeal, and 33 percent of the federal district courts (American Bar Association 2017). State courts reflect a similar pattern, with 30 percent of state judgeships being occupied by women (American Constitution Society 2017).[8]

People of color have also had a difficult time breaking through in the legal field. Although there hasn't been the explicit discrimination by state bar associations that women faced, racist attitudes have long made it challenging for people of color to succeed in the legal profession.[9] The first lawyer of color was Macon B. Allen, who was admitted to practice in Maine in 1844 (Conway 2017). However, Allen was not joined by many other Black lawyers. For instance, in Virginia, there were only 54 Black attorneys in 1900 despite there being more than 660,000 Black residents in Virginia at the time (Marshall 2003; US Census Bureau 1901).

Similarly to women, people of color face significant implicit bias in professional life. People of color in law firms face discrimination in the hiring process and lawyer evaluations. It has long been established that there is severe discrimination in job interviews, with people of color often receiving less interview time and eye contact than White applicants (Word, Zanna, and Cooper 1974). Traditionally White-sounding names will get more callbacks than traditionally Black or Hispanic names (Bertrand and Mullainathan 2003). These forms of discrimination are seen in the

8. The stereotypes affecting women's careers are not limited to the legal field. Women also see similar discrimination in science, technology, engineering, and math (STEM) jobs (Sekaquaptewa 2011); corporate positions; and politics. Only 5 percent of Fortune 500 companies have a female CEO (Zarya 2018). Only 20 percent of the US Congress are women (Manning 2018), and there has never been a female president or vice president of the United States. On the state level, 12 percent of governors (Center on the American Governor 2018) and 25.4 percent of state legislators are women (Center for American Women and Politics 2018).
9. Since people of color were systematically excluded from a large number of law schools, there was no need for bar associations to explicitly prohibit them.

legal field, as the ideal law candidate tends to be described as having traits that are associated with White male professionals (Negowetti 2015).

Even after an attorney of color has been hired, he or she faces implicit bias in the workplace. In firms, associates of color will often receive lower-profile cases than similarly situated White associates (Negowetti 2015). The effect of this is twofold. First, it often disadvantages associates of color when it comes to partner promotions (Negowetti 2015). Roughly 25 percent of law firm associates are minorities, but only 10 percent of equity partners are (Minority Corporate Counsel Association 2017). Second, it negatively affects the ability of attorneys of color to make connections in the law firm, which causes high attrition rates (Negowetti 2015). Attorneys of color make up 27 percent of leaving attorneys despite only representing 16 percent of law firm attorneys (Minority Corporate Counsel Association 2017).

The ills of implicit bias in legal employment are not limited to law firms. In 2010, 16 percent of all clerkships and 14 percent of federal clerkships were held by people of color (National Association of Law Placement 2010). Judgeships are also hard to come by, as only 21 percent of federal judges (Federal Judicial Center 2017) and 20 percent of state judges are minorities (American Constitution Society 2017).[10]

While the once-immense barriers to entry are being broken by women and people of color in the legal profession, these groups are still wildly underrepresented in prestigious positions.

10. The difficulties of finding employment for people of color due to implicit bias are hardly contained to the legal field. People of color often experience similar difficulties in the business world, where 27 percent of senior executives at Fortune 500 companies are people of color (Jones 2017). While that appears proportional at first glance, when broken down further into racial categories, a wide disparity is observed. Twenty-one percent of senior executives are Asian, 3 percent are Latino, and 2 percent are Black (Jones 2017). A similar pattern occurs in high-profile public-sector jobs. Congress currently consists of 21.6 percent people of color; 9.4 percent are Black, 8.5 percent are Latino, 3.3 percent are Asian / Pacific Islander, and 0.36 percent are American Indian (Manning 2018). There has only been one president of color and no vice presidents of color. In 2015, people of color only made up 18.1 percent of state legislators (National Conference of State Legislators 2015). Six percent of governors are minorities, with two Latino and one Asian governor (Center on the American Governor).

Supreme Court Bar

There are more than three hundred thousand lawyers admitted to the official bar of the US Supreme Court (Robinson 2016). Admittance is often viewed as a symbolic recognition of accomplishment in the legal field. In order to be admitted, a lawyer must (1) be admitted into and in good standing with the highest court in their state for three years and (2) be sponsored by two members of the Supreme Court Bar (Supreme Court 2018). As a result of the high rates of entry as well as the lack of purging of the bar, the official Supreme Court bar is massive. However, most of those individuals will never engage directly in litigation before the Supreme Court. Given the cumbersome and inaccurate nature of this official listing, most research into the Supreme Court Bar focuses on those who are actively engaged in Supreme Court litigation. McGuire (1993) defined the active Supreme Court Bar as those engaged in any stage of Supreme Court litigation, encompassing the certiorari phase, merits briefing, and the most visible stage: oral argument.

While McGuire's definition does capture every aspect of Supreme Court litigation, when looking specifically at representation, I argue it should be limited to the most visible aspect of litigation: oral argument. Oral arguments are consistently displayed to the public in mainstream newspapers and blogs and other online articles (examples include Liptak 2018; Gray 2018). Since representation requires the body being represented (in this case, the people) to be aware of the representation, the focus on oral argument and the personalities involved make it the best arena for assessing representation.[11]

In addition, advocates who appear in front of the Court multiple times act as gatekeepers who have disproportionate influence over the docket of the Court. Due to their reputations and experience litigating matters before the Court, these "repeat players" are often more successful and influential than "one-shotters" (McGuire 1995; Galanter 1974). Thus for the purposes of this chapter, the Supreme Court Bar will be defined as those advocates who appear in front of the Court in oral argument.

The biggest group of repeat players are members of the office of the solicitor general (OSG). Tasked as the official representation of the US government before the Court, this office is involved in most Supreme Court cases. The OSG has a great deal of influence during all stages of litigation. A brief from the OSG supporting a petition for certiorari can dramatically increase the odds of that petition being granted (Teger and Kosinski 1980; Caldiera and Wright 1988). Attorneys in the OSG are quite experienced in appellate litigation (DeSousa and Meyer 2013). Like the rest of

11. Outside of opinion announcement, oral argument is really the only visible aspect of the Court's functioning. Oral argument also serves as the only direct interaction between the justices and the attorneys.

the profession, OSG is heavily male-dominated. Until the appointment of future Supreme Court Justice Elena Kagan in 2009, there had not been a permanent female solicitor general (SG; Sarver 2008).[12]

In the private sector, the legal field has been specializing rapidly to the point where there are litigators who almost exclusively practice appellate litigation (Marvell 1978). It isn't uncommon for a case to change hands from one lawyer to another as it moves up in the appeals process (Marvell 1978). Many of the most frequent Supreme Court advocates, such as Carter G. Phillips and Paul Clement, are specialists and have experience in the OSG. Firms will often hire people out of that office to bolster their appellate litigation divisions (Alder 2018).

One way the Supreme Court Bar has been quite limited historically is by geography. Since the Court is in DC, lawyers in close proximity to DC had a "practical monopoly" for many years (Warren 1911). Although transportation is more readily available in modern times, the clustering of legal markets has caused this to be repeated in more modern times (McGuire 1993). In 1990, Washington, DC; New York; and Chicago were all overrepresented in the Court when compared to the percentage they make up of the national bar (McGuire 1993). The concentration of litigators is likely due to the types of cases that make it to the Supreme Court. The large firms located in these markets are more likely to have clients that will be subject to Supreme Court litigation (such as major corporations), and thus those firms are more likely to appear than smaller firms (McGuire 1993).

The Supreme Court Bar has also been historically limited in other demographics. Given the history described earlier, it is not surprising that male litigators far exceed female litigators in all aspects of the Supreme Court Bar (McGuire 1993). Men tend to dominate most of the traditional paths to Supreme Court litigation—federal clerkships and working in the OSG are stepping-stones to the world of high-level appellate advocacy (Sarver 2008). This has translated to a domination of Supreme Court litigation as well.

In 1990, women only made up 7.3 percent of the Supreme Court Bar despite making up 13 percent of the national bar (McGuire 1993). From 1993 to 2001, 98.38 percent of oral arguments had at least one male advocate; however, only 23.27 percent of oral arguments had at least one woman advocate (Sarver 2008). Through the first half of October term 2018, women constituted only 15 percent of Supreme Court advocates (Robinson and Rubin 2019).

In addition to gender, the Supreme Court Bar has been historically homogenous in terms of race. McGuire (1993) found that the Supreme Court Bar was 98 percent White. Part of this

12. Barbara Underwood briefly served as the acting solicitor general at the beginning of the George W. Bush administration (Groll and Yiang 2009).

was due to low numbers of lawyers of color in the national bar (particularly among Hispanics). However, even when national bar proportions are taken into consideration, ethnic minorities are still underrepresented.

The Supreme Court Bar also tends to be elite in its education. Lawyers from "distinguished" and "strong" law schools have been overrepresented in the Supreme Court Bar. Harvard, the University of Michigan, and the University of Texas at Austin were the top three represented schools. All three of these schools are in the USNWR Top 20. Educational homogeneity was even more pronounced when just looking at the "inner circle of the Bar," defined as those who participated in more than one merits case before the Supreme Court from 1977 to 1982. Within that group, 53.3 percent of lawyers went to "distinguished" schools, and 18.8 percent attended "strong" schools. Harvard, Yale, Columbia, and the University of Chicago are the top four schools represented in this "inner circle," collectively making up 32.2 percent (McGuire 1993). These four schools are all within the top five of the USNWR rankings.

Conclusion

These four concepts combine to give the necessary context to this investigation and its importance. With those frames in mind, I will now go into the methods that will govern this investigation.

Data and Methods

All analyses employ population data of attorneys participating in oral arguments before the Supreme Court between October term 2005 and October term 2016.[13] Six different characteristics were collected for each lawyer: gender, race, employment at the time of the argument, law school attended, undergraduate institution attended, and whether they had a Supreme Court clerkship. Law schools were grouped into tiers via the USNWR rankings: Tier 1 (one through twenty), Tier 2 (twenty-one through fifty), and Tier 3 (all remaining law schools). Undergraduate institutions were categorized as either public or private.

Throughout my analysis, I employ two different ways of measuring the membership of the Supreme Court Bar. The first measure is the total number of appearances at oral argument (N =

13. At the time of this data collection, these were the only years of the Roberts Court.

2,173). Since there are some advocates who appear before the Court multiple times in the period under study, the number of oral argument "slots" allows for accurate measuring for who the Court and the public see most often. The second measure is the individual lawyers (N = 876), which is simply just treating every lawyer, regardless of the number of times he or she has appeared, as one. For example, Paul D. Clement, who has fifty-eight appearances before the Court, accounts for fifty-eight slots but only one individual lawyer.

Slots measure the frequency of who the Court and the public see, so this measurement is more useful when evaluating representation. In order to determine if a group is under- or overrepresented, it is necessary to know not just whether the group is being represented but also the extent to which they are being represented. All three impacts of representation discussed in the previous section depend on visibility, which is determined by frequency of appearance.

However, looking at the individual level is still useful when it comes to assessing the level of access a group has to the institution, even if their representation does not reflect that access. McGuire (1993) uses individual-level data, so all comparisons to that data use individual-level data as well. Demographic information came from legal directories such as Martindale-Hubbell, official firm websites, or sites managed by the lawyers themselves (such as LinkedIn), with the Oyez Project and C-SPAN providing some pictures that were used to determine ostensible gender and race.

The characteristics are analyzed separately, and the three research questions will be analyzed according to the following explanations.

1. *How homogenous is the Supreme Court Bar*? In order to assess this question, the Supreme Court Bar will be analyzed in terms of the following six characteristics: gender, race, law school attended, undergraduate institution attended, employment category, and Supreme Court clerkship status. Both slot-level and individual-level data are compared.
2. *Has the Supreme Court Bar changed since* 1990? The demographics of the individuals who argued in front of the Court during the Roberts Court will be compared to those from McGuire (1993) in terms of gender, race, and law school attended.
3. *How representative is the Supreme Court Bar*? The demographics of the Supreme Court Bar will be compared to the national bar and to the US population as a whole to evaluate the representativeness of the body in terms of racial and gendered makeup.

P-values represent the probability that the observed difference is caused by chance. This study uses a 95 percent confidence level, so any p-value that is less than 0.05 is considered statistically significant. All p-values in the tables are derived from results of difference in proportions tests. It is worth noting that the comparisons between these data and McGuire (1993) are imperfect due to the slight difference in the operational definitions of the Supreme Court Bar. However, due to the factors explained above, I believe that it is very likely that those who made it to the oral argument

stage in 1990 were less diverse than the population of those participating in general. Thus if these differences have any effect on the conclusions of this investigation, they only serve to make the conclusions stronger due to the fact that any increases in diversity seen would likely have been even bigger if the two definitions were identical.

Results and Discussion

Gender

The Supreme Court Bar is still extremely male dominated (see tables 4.1.1 and 4.1.2). Despite the more than twofold increase in women's proportion of the Supreme Court Bar from 1990 to the Roberts Court, women still only make up about 16 percent of the Supreme Court Bar. There are a couple possible explanations for this minor incremental change.

	Total Argument Slots	**Individual Attorneys**	**Difference (Slot-Indiv)**	**p-value**
Male	1804 (83.02%)	724 (82.65%)	0.36	0.81
Female	362 (16.66%)	145 (16.55%)	0.1	0.95
Unknown	7 (0.32%)	7 (0.80%)	-0.48	0.07
Total	**2173**	**876**		

Table 4.1.1. Members of the Supreme Court Bar in the Roberts Court by gender

	Non-SG Individuals (n=831)	**McGuire (n=325)**	**Difference**	**p-value**
Male	83.27	92.62	-9.35	P<0.0001*
Female	15.89	7.38	8.51	P=0.0002*

Table 4.1.2. Comparison between the Supreme Court Bar in McGuire (1993) and the Supreme Court Bar in the Roberts Court (without members of the Office of the Solicitor General by gender

	Oral Argument Slots	**National Population**	**Difference**	**p-value**
Male	83.02%	64%	19.02%	p<0.0001*
Female	16.66%	36%	-19.34%	p<0.0001*

Table 4.1.3. Proportion of oral argument slots by gender in the Roberts Court compared to the national bar

	Oral Argument Slots	National Population	Difference	p-value
Male	83.02%	49.2	-33.82	p<0.0001*
Female	16.66%	50.8	-34.14	p<0.0001*

Table 4.1.4. Proportion of oral argument slots by gender in the Roberts Court compared to the general population

The first possible explanation is that while the change is small, it is commensurate with the shifts elsewhere in the legal profession ladder. Back in 1986, the national bar was about 13.1 percent women compared to 36 percent in 2017 (Curran et al. 1986 qtd in McGuire 1993; American Bar Association 2017). Women's representation is increasing at a similar rate in both the national bar and the Supreme Court Bar. In the national bar, women make up 2.7 times the proportion they made in 1986 compared to women making up 2.3 times as much in the Supreme Court Bar. Additionally, there was no significant difference in the proportion of slots and bar membership, and men and women had no differences in the average amount of cases per person, suggesting that women and men participate at equal rates once they have made it to the Supreme Court Bar. If that is the case, then perhaps the increase is just a "trickle up" effect from women making up a larger share of the national bar and law schools. Under this theory, women's representation in the Supreme Court Bar is likely to continue to increase, as women now make up the majority of law students (Olson 2016). Additionally, if this is the case, parity is not likely to happen anytime soon given the sheer size of the legal industry and the embeddedness of gender norms in the profession.

While it seems plausible, there is one major flaw in this explanation: in terms of frequency of appearances, men dominate both the top and bottom. The top ten most frequent attorneys before the Court were all men, with an average of thirty-nine appearances. The most frequent female attorney was the twelfth most frequent overall with twelve appearances. The top ten women were ranked twelfth, nineteenth, twentieth, twenty-third, twenty-ninth, thirty-third, thirty-fifth, thirty-sixth, thirty-seventh, and forty-fifth and had an average of fifteen appearances. At the other end of the spectrum, there were 653 attorneys who only argued one case, and 542 of them were men, which dramatically drags the average for male attorneys down. So even though appearances in oral argument is proportional to the overall membership of the informal Supreme Court Bar, a deeper dive into the data suggests that male attorneys make up the elite of the elite.

A second potential explanation lies in the OSG. This office makes up a full 30 percent of oral argument appearances. As part of the executive branch, the OSG is shaped by the president. The current investigation spans the last half of the George W. Bush administration and the entirety of the Barack Obama administration. President Obama has had a demonstrated commitment to increasing diversity in the government as a whole but especially in the judicial branch (Solberg

and Diascro 2018). President Obama's desire for diversity carried over into the OSG. Not only did he name the first female SG in Elena Kagan (Oyez 2019), but his hires were considerably more diverse than the prior OSG and the Supreme Court Bar overall. There were 266 oral argument slots that were argued by attorneys hired by the Obama administration. Of those 266, 107 (40.2 percent) were by women. For comparison, 23.76 percent of all OSG arguments and 16.66 percent of all oral arguments were performed by women. Female members of the Obama OSG argued nearly 30 percent of all oral arguments by women. If all Obama OSG hires are removed, women's share of oral argument slots decreases from 16.66 percent to 13.42 percent, which is significant (p = 0.0397). So President Obama's appointments did make a difference in the representation of women in the Supreme Court Bar.

Race

	Total Argument Slots	**Individual Attorney**	**Difference (Slot-Indiv)**	**p-value**
White	1869 (86.01%)	728 (83.11)	2.9	0.042
Black	24 (1.10%)	11 (1.26%)	-0.16	0.71
Latinx	28 (1.29%)	15 (1.71%)	-0.42	0.37
Asian	123 (5.66%)	18 (2.05%)	3.81	<0.0001
Other/Unknown	129 (5.94%)	104 (11.87%)	-5.93	<0.0001
Total	**2173**	**876**		

Table 4.2.1. Members of the Supreme Court Bar in the Roberts Court by race

	Non-SG Individuals (n=831)	**McGuire (n=325)**	**Difference**	**p-value**
White	83.39%	98.15%	-14.76	P<0.00001*
Black	1.20%	0.923%	-0.277	P=0.9235
Latinx	1.56%	0.923%	0.637	P=0.5761
Asian	1.93%	0%	1.93	P=0.02516*

Table 4.2.2. Comparison between the Supreme Court Bar in McGuire (1993) and the Supreme Court Bar in the Roberts Court (excepting solicitor general) by race

Similar to gender, the Supreme Court Bar is still dominated by White lawyers, with 86 percent of oral argument slots and 83 percent of all lawyers (see table 4.2.1). At first glance, it appears that the

Supreme Court Bar has been diversifying, though, with White attorneys' share decreasing from 98 percent in 1990 (see table 4.2.2). However, there's some reason to be skeptical of this assessment. Eleven percent of all lawyers in the Supreme Court Bar were not able to be identified with a certain race. Meanwhile, Asians were the only minority group to see any significant increase. Excluding lawyers whose race is unknown, White attorneys constitute 91.4 percent of oral argument slots and 94 percent of individual lawyers. So while there has been some progress in representation, the racial makeup of the Supreme Court Bar has not shifted nearly as much as it has in the case of gender.

The one group that has made significant progress is Asians. In 1990, there were no Asians in the Supreme Court Bar, but from 2005 to 2016, they made up 5.9 percent of oral argument slots and 2 percent of total lawyers. Asian lawyers are vastly overrepresented in oral argument given their total Supreme Court Bar membership. This is likely caused by the prevalence of Asian lawyers in the OSG. The top five Asian lawyers by frequency all had significant OSG experience and were among the lawyers who appeared in front of the Court the most.[14] Those five made up 85 percent of all oral arguments performed by Asians as well as 60 percent of all oral arguments performed by attorneys of color.

Black and Latinx representation has remained pretty stagnant, with no significant differences in their percentages from 1990 to the Roberts Court. There has been one Black attorney with twelve appearances (from the OSG) and two Latinx attorneys with seven appearances each (one from the OSG, one solely from the private sector). Every single other Black and Latinx attorney had three or fewer appearances. Given the advances Black and Latinx people have made in the upper echelons of the professional world, this would seem to indicate that there are additional barriers in the legal field that prevent these two groups from increasing their representation.

Another interesting thing is the intersection between race and employment. Minority attorneys are more likely to represent interest groups. Appearances on behalf of interest groups only make up 3.3 percent of all oral arguments yet make up a significant portion of minority representation. Attorneys appearing as part of an interest group were more diverse than the bar as a whole, with 75.3 percent of them being White, 6.8 percent being Black, 4.1 percent being Latinx, and 6.85 percent being Asian. The trend becomes clearer when looking at the percentage of a racial group that interest group lawyers make up (see table 4.2.3).

14. It is worth noting that all five of these Asian lawyers (Neal Katyal, Anthony Yang, Sri Srinivasan, Kannon Shanmugam, and Pratik Shah) are all men.

Race	Interest Group Lawyers	% of IG lawyers	% of Racial Group that are IG lawyers
White	55	75.3%	2.9%
Black	5	6.8%	20.8%
Latinx	3	4.1%	10.7%
Asian	5	6.8%	4.1%
Unknown	5	6.8%	3.9%

Table 4.2.3. Interest group lawyers by race

Only 2.9 percent of appearances by White lawyers are from interest groups compared to 20.8 percent of appearances by Blacks, 10.4 percent of appearances by Latinx attorneys, and 4.1 percent of appearances by Asians. So not only are interest group lawyers more diverse than the rest of the Supreme Court Bar, but they also constitute a significant percentage of minority appearances.

In the gender section, a theory was explored suggesting that President Obama's commitment to diversity throughout his administration made a difference in the number of women appearing before the Supreme Court. In addition to gender diversity, President Obama was also dedicated to racial diversity. Did this translate into a racial diversification of the Supreme Court Bar through the OSG? Yes, although less so than for gender. During the Obama administration, several attorneys of color were hired, and oral argument appearances were more diverse than the Supreme Court Bar on average. Seventy-four percent of appearances in this category were White, 4.1 percent were Black, 3 percent were Latinx, and 9.4 percent were Asian. Obama hires to the OSG constituted a major percentage of appearances before the Court for minorities, with 45.8 percent of Black appearances, 28.6 percent of Latinx appearances, and 20.3 percent of Asian appearances. Overall, Obama administration hires made up 25 percent of all appearances by attorneys of color.

	Total Argument Slots	National Bar	Difference	p-value
White	86.01%	85%	1.01	P=0.1979
Black	1.10%	5%	-3.90	p<0.0001*
Latinx	1.29%	5%	-3.71	P<0.0001*
Asian	5.66%	3%	2.66	P<0.0001*
Other/Unknown	5.94%	2%	3.94	P<0.0001*

Table 4.2.4. Proportion of oral argument slots by race in the Roberts Court compared to the national bar

	Total Argument Slots	National Population	Difference	p-value
White	86.01%	60.7	25.31	P<0.0001*
Black	1.10%	13.4	-12.3	P<0.0001*
Latinx	1.29%	18.1	-16.81	P<0.0001*
Asian	5.66%	5.8	-0.14	P<0.8161
Other/Unknown	5.94%	4.2	1.74	P<0.0001*

Table 4.2.5. Proportion of oral argument slots by race in the Roberts Court compared to the national population

Compared to the national bar and the national population, minorities are immensely underrepresented. White lawyers are actually at parity representation when compared to the national bar but are vastly overrepresented when it comes to the overall US population. Asian attorneys are overrepresented based on their proportion of the national bar but at parity representation with respect to their share of the US population. Both Black and Latinx lawyers are underrepresented compared to both the national bar and the US population.

Law School

	Argument Slots	Individual Attorney	Difference (Slot-Indiv)	p-value
Tier 1	1628 (74.92%)	484 (55.25%)	19.67	<0.0001
Tier 2	218 (10.03%)	126 (14.38%)	-4.35	0.0007
Tier 3	265 (12.20%)	224 (25.57%)	-13.37	<0.0001
Unknown	62 (2.85%)	42 (4.79)	-1.94	0.0104
Total	**2173**	**876**		

Table 4.3.1. Members of the Supreme Court Bar in the Roberts Court by law school tier attended

There is clear stratification among the different tiers of law schools. Those attending Tier 1 schools, defined as the top twenty schools in the USNWR rankings, made up just over half of the bar (55 percent) but about three-fourths of the oral argument (75 percent), making them vastly overrepresented in oral argument ($p < 0.0001$). Meanwhile, both Tier 2 (USNWR twenty-one through fifty) and Tier 3 (all other schools) are significantly underrepresented in oral argument. Attorneys from Tier 1 schools argued, on average, 3.36 times before the Court compared to 1.73 times for attendees of Tier 2 schools and 1.17 times for layers from Tier 3 schools. The top ten most frequent advocates all went to Tier 1 schools, averaging 39 oral arguments. The most frequent

advocate from a Tier 2 school argued thirty times, and the most frequent advocate from a Tier 3 school argued twenty-four times. However, both of them were from the OSG. All of this suggests that while people are able to argue before the Court from all tiers of law schools, in order to be a repeat player, it is a virtual necessity to go to a highly ranked school.

Breaking down the tiers more, the data point to even more concentration at the top. the top three schools in the USNWR rankings (Yale, Stanford, and Harvard) are vastly overrepresented, with graduates making up 24 percent of the bar but 37 percent of the oral arguments ($p < 0.0001$). The top six schools (the top three plus Chicago, Columbia, and NYU) are also overrepresented, with 35 percent of the Supreme Court Bar and nearly half (49 percent) of oral arguments ($p < 0.0001$). Overall, there are three times as many appearances from graduates of Tier 1 schools than of all other schools combined.

Of the top ten most frequent advocates, nine of them are from USNWR top ten schools. Of these, three are from Yale, which has been number one every year since the rankings have existed.

	Non-SG Individuals (n=831)	**McGuire (n=324)**	**Difference**	**p-value**
Harvard	12.76	8.64	4.12	P=0.06303
Michigan	2.65	5.25	-2.63	P=0.0438*
UTA	3.01	3.39	-0.38	P=0.8798
Alabama	0.12	2.47	-2.35	P<0.00001*
George Washington	1.08	2.16	-1.08	P=0.2596
UVA	2.29	2.16	0.13	P=1
NYU	3.37	1.85	1.52	P=0.2392
Berkeley	2.17	1.85	0.32	P=0.915
Florida	0.84	1.54	-0.7	P=0.464
Illinois	0.48	1.54	-1.06	P=0.1412
Notre Dame	1.08	1.54	-0.46	P=7317
Penn	0.84	1.54	-0.7	P=0.464
St. Louis	0.48	1.54	-1.06	P<0.1412
Yale	8.18	1.54	6.64	P<0.00001*

Table 4.3.2. Comparison between the Supreme Court Bar in McGuire (1993) and the Supreme Court Bar in the Roberts Court (excepting solicitor general) by law school attended

On an individual level, the Supreme Court Bar seems to be even more top-heavy than it was in 1990 when it comes to individuals who are unaffiliated with the OSG (see table 4.3.2). Three

different law schools experienced statistically significant changes between 1990 and 2005–16. The University of Michigan law school's share of the Supreme Court Bar was nearly cut in half from 5.3 percent to 2.7 percent ($p = 0.0438$). The University of Alabama's law school share dropped from 2.5 percent to 0.12 percent, having only one lawyer argue in the first twelve years of the Roberts Court ($p < 0.0001$). The only school that had a significant increase was Yale Law School, which saw its representation increase more than fivefold from 1.5 percent to more than 8 percent ($p < 0.0001$). Harvard Law School's increase is squinting toward significance ($p = 0.06303$). Of the statistically insignificant changes from 1990, only three of them are increases, and all three of those schools are in the USNWR top 10.

Intuitively, it does make sense that an institution in the upper echelons of a field would require top-notch credentials and thus have proportionally more lawyers from the top-ranked law schools. However, when there is such a concentration of power at the very top as there is in the Supreme Court Bar, then those law schools effectively act as intellectual bottlenecks, and the schools themselves can have an outsized influence on the institution.

With that in mind, it would also follow that an office as prestigious as the OSG would be filled with people with high credentials—in this case, degrees from top law schools. The data bears this expectation out, with over 90 percent of oral argument slots and 82 percent of individual lawyers from the OSG coming out of Tier 1 law schools. While slots from Obama hires to the OSG were only 86 percent from Tier 1 law schools, it is still more than the overall Supreme Court Bar average, so President Obama didn't significantly change the office in that regard.

Undergraduate Institution

	Total Argument Slots	**Individual Attorneys**	**Difference (Slot-Indiv)**	**p-value**
Private	1445 (66.50%)	499 (56.96%)	9.54	<0.0001
Public	627 (28.85%)	302 (34.47%)	-5.62	0.0023
Unknown	101 (4.65%)	75 (8.56%)	-3.91	<0.0001
Total	**2173**	**876**		

Table 4.4.1. Members of the Supreme Court Bar in the Roberts Court by type of undergraduate institution attended

Undergraduate schools are polarized in the Supreme Court Bar, albeit to a lesser extent than law schools. Unlike law school, there is no predominant ranking system for undergraduate institutions, especially given the diversity of majors available. Thus this investigation is solely focused on public versus private undergraduate institutions. While not a perfect proxy, private

institutions are commonly considered to be more prestigious than public universities (Wong 2018). Private undergraduate institutions are overrepresented in oral argument relative to their individual representation in the Supreme Court Bar, with 66.5 percent of the argument slots and only 57 percent of the individual lawyers. Likewise, public undergraduate institutions are underrepresented in oral argument.

Undergraduate institutions in and of themselves probably are not a great predictor of arguing in front of the Court. After all, there are 13.3 million college students in the United States, with around 3.4 million of them attending private universities (NCES 2018; NAICU 2018). With the many different types of undergraduate majors and programs available, simply going to a private school does not dramatically increase those chances. However, going to an elite school can often shape the opportunities one has after attending (Wong 2018). In that sense, it is important to see if elite undergraduate colleges translate to a more elite law school placement.

In the Supreme Court Bar, there is an association between tier of law school and type of undergraduate institution. Sixty-nine percent of those from private undergraduate schools went to Tier 1 schools compared to just 41 percent from public undergraduate schools. Additionally, of those from Tier 1 law schools, 71 percent went to private institutions and 25 percent to public institutions. For Tier 2 law schools, the proportions are exactly the same, with 48.4 percent of them coming from private institutions and 48.4 percent coming from public institutions. In Tier 3 law schools, only 41 percent come from private and 51 percent come from public schools. This would suggest that the path to the Supreme Court Bar starts even before matriculating into law school.

Employment Category

	Total Argument Slots
Federal Government	684 (31.48%)
State and Local Government	233 (10.72%)
Interest	73 (3.36%)
Vault 100 Firm	620 (28.53%)
Other Firm	316 (14.54%)
Solo	39 (1.79%)
Academic	61 (2.81%)
Public Defenders	77 (3.54%)
In-House counsel	5 (0.23%)
Unknown	65 (2.99%)
Total	**2173**

Table 4.5.1. Members of the Supreme Court Bar in the Roberts Court by employment category

As has been noted previously, the OSG dominates oral argument slots, claiming 31.5 percent. The impact of the OSG is not limited to its direct representation, though—several of the top private Supreme Court litigators had experience in the OSG. The next biggest group is Vault 100 firms, which make up 28.53 percent of the slots. Of the twenty-six lawyers who argued ten or more cases, twenty-three of them spent at least some of their slots representing the OSG. The other three also had OSG experience, including one SG; they just did not spend time there during the Roberts Court. Attorneys such as former SG Paul Clement, former SG Theodore Olson, and former acting SG Neal Katyal have all left the OSG to join lucrative practices in Vault 100 firms, which are the second-most represented employment category.

	Non-SG individuals (n=831)	**McGuire (n=325)**	**Difference**	**p-value**
Private	52.71	75.08	-22.37	P<0.0001*
State and Local	19.45	16.61	2.84	P=0.296
Organized Interests	6.74	2.46	4.28	P=0.0066*
Academic	5.30	1.85	3.45	P=0.01508*
Legal Aid	8.424	1.54	6.88	P<0.0001*
Corporate	0.241	1.23	-0.99	P=0.09877

Table 4.5.2. Comparison between the Supreme Court Bar in McGuire (1993) and the Supreme Court Bar in the Roberts Court (excepting solicitor general) by employment category

Once the OSG is removed, the attorneys from both Vault 100 and non–Vault 100 firms make up a majority of the Supreme Court Bar. However, the share of private practice attorneys has actually decreased by 31 percent since 1990. With the exception of in-house corporate lawyers, every other category saw an increase, with all but one being statistically significant. Legal aides and public defenders saw the biggest increase, jumping from 1.54 percent to 8.42 percent. Some of this increase could be due to the changing nature of the Supreme Court docket. From 1978 to 1997, cases about criminal procedure represented 23.98 percent of all cases, while from 1998 to 2017, they represented 27.75 percent, which is a significant increase (two-sided p-value = 0.004; Spaeth et al 2018). Since public defenders and legal-aid clinics focus on criminal cases, an increase in the proportion of the docket would naturally result in an increase in the number of slots that they would occupy. Coupled with the fact that most public defenders will only appear once (five of the seventy public defenders who appeared before the Court had multiple arguments, and two of those five were solely due to a second oral argument in the same case), a significant increase in the proportion of criminal procedure cases is very likely to have contributed to the rise in proportion of public defenders.

The next largest increase was organized interests, such as the American Civil Liberties Union (ACLU) or the Judicial Crisis Network. Interest groups are nothing new to the Court, with groups such as the National Association for the Advancement of Colored People (NAACP) Legal Defense Fund consistently turning to the Court to advance their causes (Collins 2008). Additionally, interest groups such as the Federalist Society and the Heritage Foundation have massive power in the nomination process of not only the Supreme Court but also the rest of the federal judiciary (Baum and Devins 2017; Kelly 2018). The American public is looking toward the Court (rather than Congress) to resolve certain issues, such as abortion or gerrymandering (Tavernise 2018; Daley 2018). The Supreme Court has even become a campaign issue, with candidates in both the Democratic and Republican Parties creating litmus tests for judges they would nominate (Debenedetti 2016; Wolf 2016). The increasing view of the Supreme Court as a political institution, combined with the lack of productivity in Congress, might be driving the movement toward using the judiciary to enact policy, which would explain the increase in interest groups.

Academic representation has also increased significantly, from 1.85 percent in 1990 to 5.30 percent in 2018, which is driven by the rise in clinical education. Passed in 2016, ABA standard 303(b) requires law schools to offer substantial opportunities to participate in clinical work (Stark and Hunt 2018). Clinical education offers law students the opportunity to get experiential training in legal work by participating in real legal cases (Stark and Hunt 2018). Clinics often focus on a type of practice, such as housing law or family law. Appellate clinics have become quite popular and have taken cases to the Supreme Court (Fisher 2013). Both Stanford Law School and the University of

Virginia School of Law have had multiple arguments in front of the Roberts Court, with Stanford's clinic boasting seven different appearances.

Clerkship Status

	Total Argument Slots	Individual Attorneys	Difference (Slot-Indiv)	p-value
Yes	945 (43.49%)	169 (19.29%)	24.2	<0.0001
No	1228 (56.51%)	707 (80.71%)	-24.2	<0.0001
Total	**2173**	**876**		

Table 4.6.1. Members of the Supreme Court Bar in the Roberts Court by Supreme Court clerkship

Relative to their share of individual lawyers in the Supreme Court Bar, attorneys with a Supreme Clerk clerkship are overrepresented, with 43.5 percent of the oral arguments and only 19.3 percent of individual lawyers. A Supreme Court clerkship is one of the most sought-after and prestigious law positions in the country. With only thirty-five to forty clerkships annually[15], these positions are extremely competitive and will all but guarantee a long and thriving legal career for those who get one (Lat 2018). Given its prestige and its relation to the Supreme Court, it is no surprise that former clerks enjoy success as Supreme Court litigators. Seven of the top ten most frequent advocates had a clerkship.

As they are so prestigious, clerks in the Supreme Court tend to come from elite law schools and move to elite positions afterward. Of those who argued with a clerkship, 88.7 percent came from a Tier 1 school. However, table 4.6.2 demonstrates that even when accounting for law school, a clerkship is associated with far more appearances.

Law School Attended	Average # of appearances with clerkship	Average # of appearances without clerkship
Tier 1	5.69	2.20
Tier 2	7.75	1.32
Tier 3	5.67	1.16

15. Each active justice (nine) gets four clerks, so there are thirty-six clerks. Each retired justice gets up to one clerk per term. The number of retired justices changes periodically, but there are currently four. Thus in total, there are about forty Supreme Court clerkships annually.

Table 4.6.2. Number of appearances by law school tier attended and clerkship status

It appears that the two most significant predictors of arguing in front of the Court are working at the OSG and having done a Supreme Court clerkship. However, these are not necessarily independent events. Since the OSG is exclusively about Supreme Court litigation, it stands to reason that experience as a Supreme Court clerk would be strongly desired. The numbers bear this out to a certain extent. Attorneys with a Supreme Court clerkship make up 60 percent of the appearances and 51 percent of all individuals from the OSG. So while someone from the OSG is more likely to have a Supreme Court clerkship than an individual representing a different litigant, it is far from a necessity to have a Supreme Court clerkship to enter the OSG.

Conclusion

The first research question this investigation seeks to answer is, How homogenous is the Supreme Court Bar? Very. Of the six qualities investigated, a clear majority of the bar shared the same characteristic on all but the completion of a judicial clerkship. The Supreme Court Bar is dominated by White men who attended private undergraduate schools and top law schools and are employed by Vault 100 firms. Even though only 19.3 percent of attorneys within the bar have a Supreme Court clerkship, 43 percent of oral arguments were performed by a former clerk, so there is still a concentration of power.

The second research question is, Has the Supreme Court Bar changed since 1990? Although the Supreme Court Bar has become more diverse than it was in 1990, it is still extremely homogenous. It remains a White, male-dominated, and elite institution and is certainly not representative of the people. Not only are there barriers of entry to joining the Supreme Court Bar, but even within the Supreme Court Bar, historically dominant and elite groups have huge advantages in appearing in front of the Court.

The third research question is, how representative is the Supreme Court Bar? Compared to both the national bar and the population at large, the Supreme Court Bar is not very representative.

The path to becoming a Supreme Court litigation specialist begins early in life, going back at least as far back as the beginning of undergraduate studies. There is a small and narrow path that favors members of historically privileged communities, who flow through elite law schools and clerkships, both of which are less diverse than average (American Bar Association 2018; National Association of Law Placement 2010).

The pipeline to the Supreme Court Bar is riddled with exclusivity. Every step along the way, from

attending an undergraduate institution to practicing as an attorney, acts as a barrier to entry that works against women and people of color. Each new step compounds the difficulty for historically marginalized communities to move on to the next step.

The OSG does offer hope that the tides will be changing soon. Given that the OSG often acts as a springboard for lucrative appellate practices, with the more diverse set of lawyers hired by Obama, it would be expected that some will go on and continue to practice after leaving the OSG. For example, five women who have recently left the OSG have gone into private appellate practice (Alder 2018). These women, along with the attorneys of color, will be able to use the advantages of being a former member of the OSG and continue arguing at high rates, which would be expected to further diversify the Supreme Court Bar.

The impacts of the homogeneity of the Supreme Court Bar go beyond just symbolic representation and the lack of role models. Supreme Court specialists are significantly more likely to win their cases than nonspecialists (Lazarus 2008). Since descriptive representation can translate into substantive representation, the demographics of the Supreme Court Bar could easily translate into the substance of the types of cases they argue.

For example, female judges are more likely to recognize types of gender bias than male judges (Martin et al. 2002). Using that same logic, perhaps male Supreme Court specialists will be less likely to believe the merits of a gender discrimination claim. Since men are the majority of Supreme Court specialists, that claim has a greater chance of being brought by a nonspecialist (and therefore having less of a chance of succeeding, regardless of merit) if it gets brought at all. Thus substantive areas of law can be greatly affected by the diversity reflected within the Supreme Court Bar.

Additionally, the direction of the Supreme Court's docket can be influenced by a small number of people, many of whom have strong ideological leanings. For example, Paul Clement, who appeared the most of anyone in the study period, is very public about his conservative ideology and is an active member of the Federalist Society. There is a plethora of discourse, both public and academic, about how the Court has been steadily shifting to the right.[16] These pieces usually focus on the ideology of the justices—especially after the relatively moderate Justice Kennedy was replaced with the very conservative Justice Kavanaugh. However, because of how familiar conservative advocates like Paul Clement and Theodore Olsen (thirty-eight appearances) are, they are able to get more of their cases docketed. The Supreme Court gets around eight thousand petitions each year and grants around eighty of them (Supreme Court 2019). So people like Clement and Olsen who get multiple cases docketed each year have the ability to actively shape

16. Examples of public discourse include Bazelon (2018) and Sherman (2018). An academic example of such discourse is Perkins et al. (2007).

the agenda of the Court. Further research should examine the ideologies of all the advocates before the Court to look for possible effects.

Further research could also look into the litigants and how they influence the demographics of the bar. This analysis focuses heavily on the "supply" side of the bar—that is, factors that influence an individual's ability to gain entrance. But the supply side is not the whole picture; the demand side could also contain key insight into how people get into the Supreme Court Bar. Since everyone in the Supreme Court Bar is hired by a client, the criteria for entry are determined by a market. For example, research could look into whether certain types of litigants prefer certain types of attorneys and how that might influence who is desirable in the market. If clients' demand about who they want to represent them in the Supreme Court skews toward people with the traditionally sought after elite credentials (top-tier law school, Supreme Court Clerkship, etc.), it would help clarify the path to the bar and strategies to diversify the bar moving forward.

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Class Activity

1. What would be some viable strategies for increasing the diversity of the Supreme Court Bar?
2. If you are a client seeking to appeal to the Supreme Court, what qualifications would you look for in a potential attorney?

2. Examining Diversity, Inclusion, and Equity in the Legal Profession

An Analysis of Career Tracks and Representation

SCOTT HOFER AND SUSAN ACHURY

Entering the legal profession in the United States has been viewed by many as a ticket to financial stability and a fulfilling career. Unfortunately, for most of American history, the profession, either through formal or informal barriers, has been largely off-limits to everyone except White men (Latourette 2004; Long 2016). While recent efforts to diversify the profession have successfully increased the presence of historically underrepresented groups, career outcome disparities take a long time to alleviate, and the legal profession is still significantly whiter and more male dominated than the American population as a whole (Long 2016). Data collection efforts have revealed some of the systemic obstacles for women and people of color (POC) to thrive in the legal profession; however, these analyses often explore different sectors of the legal profession separately—representation at private practices and on the bench. These analyses also oversimplify the concept of diversity, and few works have focused on assessing levels of inclusiveness and equity at all.[1] Identifying and measuring gaps in the participation of marginalized groups in the legal profession is key to designing and implementing policies that effectively shrink the gap.

In this chapter, we compare the gender and racial gaps in representation for private-practice careers versus careers in the federal courts. We advance the literature by examining these trends together rather than separately, which allows us to assess differences in career tracks. The diversity, inclusion, and equity framework helps us further explore diversification efforts, uncovering generalizable trends for women and POC. In particular, we highlight how this framework allows us to identify key obstacles to an equitable justice system. We compare the differences in representation of women and racial minorities in private practice and on the federal bench. We determine that diversifying the bench has proven more challenging. Overall, we point to the intervention of political actors in the nomination process and the effect of partisanship and ideological preference toward diversification might cause prolonged disparities in the court system.

1. See Sommerland (2014) in England using the DIE framework to assess the use of merit. In the US, see, e.g., Pearce, Wald, and Ballakrishnen (2014); Rhode and Ricca (2014). Notice all these works are focused exclusively on private practice.

Research Questions

Based on the Diversity, Inclusion, and Equity Framework, we compare the representation gap of women and POC in private practice with that on the federal bench. We offer a measurement of the underrepresentation of women and racial minorities in the legal profession and point out paths for future research:

1. How diverse are the federal bench and private practice? Using diversification in law schools as a benchmark, we identify the gap in representation of women and POC within the entry-level positions.
2. How inclusive are the federal bench and private practice? Given the lack of policies in law schools promoting equal access to different career paths, we measure the gap in advancement for women and POC from entry-level positions to the highest positions within their career tracks.
3. How equitable are the federal bench and private practice?

Literature Review

To address our research questions with adequate appreciation of the obstacles facing underrepresented groups pursuing a legal career, we start by examining the Diversity, Inclusion, and Equity Framework (hereafter, DIE framework). This conceptual framework is then applied to past diversification trends, historic pioneers, and the early days of the profession in America. Next, we identify the extensive efforts to diversify the profession with a focus on law school admissions. Finally, we discuss the most common paths to a legal career and utilize the DIE framework to predict legal career outcomes.

The Importance of a Framework: Assessing Diversity, Inclusion, and Equity

The study of efforts to diversify the legal profession will necessitate a systematic method of analysis. Otherwise, anecdotes, platitudes, and rare examples may skew our perception of progress. While *diversity* itself is a commonly used term, its use often refers to multiple distinct concepts. To better address and assess efforts to add descriptive representation to the legal

profession, we must start by delineating terms. We focus on three essential concepts in our framework: diversity, inclusion, and equity.

Diversity describes the entrance of women, racial minorities, and any other underrepresented demographic into the profession. It means that a wide variety of socially defined groups, perspectives, and experiences are involved. Diversity is the lowest standard for representation of marginalized groups because it is limited only to their presence. It marks the first step of entrance into the equation but little else. Although promoting diversity has improved access for underrepresented groups, this alone cannot correct disparities at the highest levels of the profession; additional corrective measures are necessary to enhance inclusion and equity. It is essential to provide conditions for people from diverse backgrounds to thrive in the profession to address disparities at the highest levels. Inclusion is the intermediate corrective action, which recognizes the need to construct an environment of support for underrepresented groups. While diversity opens the door for underrepresented groups within the profession, there are still significant barriers to success. *Inclusion* is a commitment to recognizing existing biases and making efforts to confront them. Implicit biases in the profession continue after employment begins, with minority associates being assigned lower-profile cases, given fewer support resources, and being less likely to make networking connections (Negowetti 2015). Without active efforts to promote inclusivity and understand the contributions to the profession among minoritized and marginalized groups, the status quo has been to discount their efforts when it comes time for promotions or advancement (Obasogie 2017).

Finally, the purpose of diversification and inclusion efforts is to gain equity in the profession. *Equity* is when the distribution of power, benefits, and burdens is not skewed by demographic factors, such as race and gender. When racial, gender, and demographic characteristics no longer skew the likelihood of reaching the pinnacles of success in a legal career, the profession can be called equitable. This represents a new status quo, in which discriminatory practices are so isolated, sporadic, and rare that they do not influence the overall balance of power. In an equitable profession, all socially defined groups are included proportionally to the population at all levels of power. The DIE framework advances our understanding of diversification efforts by distinguishing these higher and lower forms of descriptive representation. Without these distinctions, it is easy to conflate diversity in the ranks of law school students as equally crucial to equity at the highest levels of the legal profession. Now that we have identified a suitable framework for discussion, we will revisit some historical trends in diversification efforts.

Historic Diversity Trends in the American Legal Profession

Like much of American society, the legal profession, with few exceptions, was strictly segregated until the 1960s; this initial disparity has never been fully corrected (Moore 2007). During the early nineteenth century, the practice of law was a trade similar to most others. Rather than attending law schools, lawyers were taught through apprenticeships (Carp et al. 2019; Moliterno 1991; Gawalt 1973). As a result, many lawyers attained their jobs by following in the footsteps of their fathers. Once law schools replaced apprenticeships, they typically denied admittance to any applicant who was not White and male, effectively refusing diversity at its most fundamental level (Barnes 1970; Fossum 1981; Kidder 2003).

The story of racial diversity in the legal profession began in 1845 when Macon Allen became the first non-White lawyer licensed to practice in the United States. His license to practice law marked a major milestone at a time when slavery was still legal in the United States and racialized justice was the norm, not the exception (Smith 1993). Although formal barriers to the representation of racial minorities in the profession were technically broken, the impact was relatively minor, and the legal profession remains one of the whitest industries in America (Rhode 2013; Rhode and Ricca 2014; Wald 2011). Despite policies meant to promote diversity by hiring racial minorities, a pattern of higher attrition rates among legal professionals from underrepresented backgrounds illustrates a lack of an inclusive environment. Even overall racial diversity levels are striking low. As of 2017, roughly 13 percent of lawyers in the United States are not White; however, non-White residents of the United States make up nearly 40 percent of the population (Laffey and Ng 2018). Black Americans make up 13.3 percent of the population but only 5 percent of lawyers; Hispanic and Latino Americans make up 17.8 percent of the population but only 5 percent of the active attorneys in the United States (Laffey and Ng 2018). Although efforts have been made that did increase access to the profession, these disparities illustrate the barriers facing racial minorities in the legal profession (Laffey and Ng 2018).

Inclusion of women in the legal profession began when Arabella Mansfield was admitted to the Iowa Bar Association in 1869. Unfortunately, she was never given the opportunity to practice law (Chafa 2020). This trend of purely symbolic diversity continued in 1870, as Ada Kepley was admitted to law school but repeatedly denied in her attempts to practice law (Gorecki 1990). Women were systematically excluded from the profession by informal admittance processes in law schools and bar associations. Despite minuscule diversity levels, women still experienced discrimination in employment that effectively scuttled their hopes for successful careers (Krakauer and Chen 2003; Drachman 1989). Female lawyers began to make very modest inroads in diversity starting around the time of women's suffrage (Bowman 2009). The first women admitted to the American Bar Association joined in 1918. However, female lawyers were an exception in the field of law even half a century later. By 1970, only 4 percent of America's lawyers were female,

and most of them were only in entry-level positions (Bowman 2009). Most progress in diversity levels for women has happened in the last fifty years, as women went from about 4 percent of the legal profession to 35 percent today (Bowman 2009; Laffey and Ng 2018). This was primarily the result of pioneering women who helped foster an environment of inclusion through female-oriented networking and programs to address the frequently hostile conditions (Kay and Wallace 2009; Kay and Gorman 2008).

Diversity progress has been significant and time dependent; however, inclusion is still lacking. Women make up almost 50 percent of summer associates[2] in the United States today but only 18 to 20 percent of lawyers in the highest echelons of legal practices—partners (Laffey and Ng 2018). There are several reasons for the continued lack of inclusion in the legal profession. One of the biggest is the exclusivity of social networks within the profession (Headworth et al. 2016; Fernandez and Fernandez-Mateo 2006; Rider et al. 2016). Success in law careers requires knowing the trade but also knowing some key actors with connections to lucrative jobs. The legal profession's origins as an exclusive White and male industry in the United States created a homogenous network that has helped maintain the status quo through informal connections and implicit biases (Fernandez and Fernandez-Mateo 2006; Rider et al. 2016). Students at top law schools often benefit equally from the high-quality teaching at these institutions and the social networks created within the law school. The legal profession requires both hard skills—knowledge of the law—and soft skills, such as socializing and developing a clientele. Social networks are one way for employers to vet prospective employees for the necessary soft skills (Fernandez and Fernandez-Mateo 2006). Existing disparities mean those with the most power to hire or fire are predominately White and male. Ultimately, these exclusive trends are a significant factor in the higher rates of attrition for women and racial minorities in the profession (Rider et al. 2016).

Issues associated with homogeneity in the legal profession have been mainly addressed by looking at admissions processes to top law schools in the United States. America's school districts remain highly racially segregated, and schools that primarily serve non-White communities are frequently underfunded (Rothstein 2015). As a result, students from predominantly non-White schools do not receive the same quality of primary and secondary school education and may settle for a lesser undergraduate education. The cascading effect occurs as students from lower-ranked undergraduate institutions are less appealing to the top law programs (Dowd 2015). Racial wealth disparity is further exacerbated by the high cost to attend law schools, which may serve as an insurmountable barrier for those at or below middle-class incomes (Harper and Griffin 2010). Societal-level disparities tend to impact all levels of education, but efforts to improve diversity in

2. See Sommerland (2014) in England using the DIE framework to assess the use of merit. In the US, see, e.g., Pearce, Wald, and Ballakrishnen (2014); Rhode and Ricca (2014). Notice all these works are focused exclusively on private practice.

the profession tend to converge on the admissions process and financial aid resources available to law school applicants from underrepresented backgrounds (Jewel 2008; Rothstein and Yoon 2008; Kennedy 2019). By the 1970s, America's top law schools began to actively promote diversity through different programs, including scholarships and reserving spots expressly to encourage gender and racial representation (Kennedy 2019; Jewel 2008). This marked the first step toward dramatic change, but it has been quite limited. Without thoroughly examining diversification and inclusiveness as different processes, one may not realize how progress with diversification still masks the disproportionate likelihood of female lawyers to hold low-seniority positions and less power in the profession (Kay and Gorman 2008).

Addressing the Diversity Problem: Affirmative Action and Beyond

Starting with *Sweatt v. Painter* 339 U.S. 629 (1950), which was cited in the influential *Brown v. Board of Education* 347 U.S. 483 (1954), the courts began to side with underrepresented minority groups who sought admissions to previously segregated schools (Kidder 2003). In the *Sweatt* case, Texas's system of supposedly "separate but equal" law schools for black and White applicants was ruled unconstitutional. While Heman Marion Sweatt was begrudgingly admitted into the University of Texas Law School, by the mid-1960s civil rights legislation promoted efforts to either "boost" minority applicants or reserve spots in a "racetrack" system (Rothstein and Yoon 2008). In the years between *Sweatt* and the Civil Rights Act of 1964, the admissions process for universities, including law schools, went from efforts to discourage non-White applicants to a system that promoted diversity at some level (Sander 2004; Kennedy 2019).

Affirmative action programs faced significant backlash and were frequently undermined by university leadership; however, there is extensive evidence that these policies did promote diversity in legal training (Sander 2004; Rothstein and Yoon 2008). Legal challenges to the system of boosting or reserving seats for minority applicants occurred frequently, and over time, some ambitious programs were limited by legal actions.[3] The US Supreme Court struck down racial quota systems; however, it refused to strike down nonquota systems that sought to add diversity. Some universities incorporated nonracial ways to promote racial diversity by offering generous

3. Some famous cases dealing with these questions include *Regents of Univ. of California v. Bakke*, 438 US 265 (1978); *Grutter v. Bollinger*, 539 US 306 (2003); *Hopwood v. University of Texas*, 78 F.3d 932 (5th Cir. 1996); *Podberesky v. Kirwan*, 956 F.2d 52 (4th Cir. 1992); *Johnson v. Board of Regents of Georgia* 263 F.3d 1234 (11th Cir. 2001); and *Gratz v. Bollinger* 539 US 244 (2003).

financial aid provisions for low-income and disproportionately non-White applicants (Sander 2004; Kennedy 2019).

There is strong evidence that these policies have promoted diversity in law schools. Rothstein and Yoon (2008) find that without affirmative action policies, nearly 60 percent of all black law school students would not have attended law school at all; meanwhile, at the top-tier law schools, there would be a nearly 90 percent decline in racial representation of black students if admissions were race blind (Kennedy 2019). Even after admission, informal barriers in the profession frequently limit future employment prospects as law students plan a career.

Law Career Tracks: Private Practice and Public Interest

While access is a necessary step toward a representative legal profession, granting such access to women and POC has been insufficient to achieve equity. Within the career tracks, essential differences between private practice or public interest careers have gone unexamined. As law students work toward graduation, they generally must choose a career path defined by this dichotomy.[4] These two career tracks have a great degree of variation in working conditions, pay, and promotion opportunities within the chosen track (Sander and Bambauer 2012). Still, some generalizations can be made. Typically, those who choose to work in private practice start as associates (entry-level positions) and eventually begin to own a part of their firm and be paid in profits as well as salary.[5] Reaching the equity partner level is no small accomplishment and represents one of the highest positions in private practice.

Law students who pursue the public interest path may take on entry-level positions as public defenders for the indigent; however, this position usually pays significantly less than entry-level positions at private firms (Bacak et al. 2020). The highest levels on the public interest career path are generally becoming an attorney general, state supreme court justice, or federal judge. These positions pay well but are especially appealing for the public esteem and security they provide. These careers are the result of a lifetime of public service and come with high opportunity costs. Advancing to appointment as a judge in any context is usually the high point in a public

4. While there are some examples of federal appointments of judges coming from private practices, this is not the most common path. Despite being an informal and nonexclusive process, there is a strong norm that law school students should choose a trajectory for their career based on one of these two tracks.
5. It should be noted that this career path appears to be rarer and rarer as the legal business norm moves away from this type of ownership model (Randazzo 2019).

interest career. Efforts to diversify law school cohorts improved access to law schools; however, corresponding gains in the profession have been slow and not always incremental in both career paths.

Table 1 presents the participation percentage of women, POC, and women of color in the private sector and the federal bench compared to the US population and access and success in legal education in 2019. Data on the participation of women and POC in private practice is based on the annual report of the National Association for Law Placement (NALP) showing that representation of people of color in associate positions in private practices has continued to increase since 2010 (from 19.53 percent to 25.44 percent) following widespread layoffs in 2009. After a decade, the adverse effects of the 2008 economic crisis on diversification efforts have finally been reversed (NALP 2019). The percentage of African American female associates remains barely below the 2009 figure.[6] The 2008 financial crisis disproportionately hurt women and people of color in the profession, which illustrates that despite gains in diversity, there has been little progress made toward true equity in the profession. Efforts to diversify ranks have successfully added voices of color and women to entry-level positions, but once in these positions, there is often limited support and limited upward mobility (Kay et al. 2016; Payne-Pikus et al. 2010).

		Women (%)	POC (%)	Women of color (%)
Benchmark	US population*	50.75	31.3	18.8
Supply	Law school enrollment	54	30.1	18.8
	Law graduates**	52.4	31	18
Private practice	Entry-point at private practice (associate)***	46.77	25.44	14.48
	Highest-point at private practice (equity partner)***	24.17	9.55	3.45
Federal bench	Federal judiciary at the lowest point (district courts)****	20.72	15.92	5.49
	Federal judiciary at the middle point (circuit courts)***	5.49	0.04	0.90
	Federal judiciary at the highest point (Supreme Court)***	27.82	13.91	6.95

Table 1. Representation of women and POC in private practice and the federal bench (2019)

6. One notable area of improvement in diversity since 2009 has been that LGBT lawyers have continuously risen and are the marginalized group with the highest representation among the summer associate ranks, where nearly 7 percent of all summer associates were reported as LGBT (NALP 2019).

*Data from the US Census Bureu, Annual Estimates of the Resident Population by Sex, Race, and Hispanic Origin for the United States: April 1, 2010 to July 1, 2019.

** Data from ABA Standard 509 Information Report Spreadsheets for 2019.

***Data from National Association for Law Placement, Report on Diversity in the US, 2019.

****Data from the Federal Judicial Center.

While trends in private practice are best viewed in the context of business, the diversification of the federal bench follows political procedures. The politics of promoting diversity on the bench may present greater barriers for women and POC. The impact of a single president on the composition of the bench can significantly increase representation. For example, the Obama administration made efforts to improve diversity; however, active steps to diversify the bench did not continue under the Trump administration. By July 2020, Trump had appointed a quarter of all the active federal judges; 25 percent were female, compared to 45 percent of Obama appointees. However, Trump appointed women at a rate similar to previous Republican presidents, drawing comparisons to the G. H. W. Bush administration (Jeknic et al., this volume). Meanwhile, only 18 percent of Trump's appointments were non-White, compared to 36 percent of Obama appointees (Gramlich 2021). Trump did not share the same zeal for appointing diverse candidates to the federal bench and failed to increase diversity in the judiciary significantly; however, due to the preexisting lack of diversity in race and gender, Trump's appointments have mostly just maintained the status quo in terms of the proportion of women and POC (see Jeknic et al., this volume).

Data and Methods

We use data from the US Census Bureau, American Bar Association, National Association for Law Placement, and the Federal Judicial Center to examine representation in entry-level positions all the way to the highest level in private practice, to compare it with the federal judiciary. We merge data as percentages to account for the differences in the size of the private practice and the federal judiciary and within each of these career paths.

Using the DIE framework to analyze gender and racial participation patterns in private practice, we analyze two categories: associate and equity partner. Diversity in private practice is measured as racial and gender representation as associates, the lowest ranks within the firms. For private practices, the hierarchy is designed for upward progression, so representation at the entry point (associate) signifies diversity, and inclusiveness is signified by the percentage of underrepresented groups moving up the hierarchy to equity partners. By analyzing differences between associates

and equity partners, we can see the representation of women and POC in multiple stages of their careers.

In the federal judiciary we look into three levels: the district judges, the circuit, and the US Supreme Court. The implementation of the DIE framework is challenging in the judiciary, and we were only able to partially implement it due to data limitations. Diversity on the federal bench is difficult to identify, as judgeships are not considered entry-level positions for those working in the public sector. In this career track, positions such as clerks and public prosecutors, among others, are considered the starting point for progression into judgeships.[7] Measurements of diversity in public service should be assessed by looking at racial and gender demographics in the career choices of those aiming to get on the bench. Data limitations make it impossible to analyze the early career choices of those aiming to access the federal bench. Federal judgeships, regardless of the hierarchy, are a terminal stage in a legal career, a fact reinforced by the life tenure for all levels and little upward mobility (Epstein et al. 2013). Thus racial and gender diversification of the bench is an indicator of inclusiveness, as it means that women and POC surmounted the structural biases against them and achieved a position of influence in the policy-making process.

The comparison between representation of women and POC in private practice and the federal judiciary uses diversity at law schools as a benchmark. Law schools determine the supply of diverse lawyers and to that extent their potential for a successful career. Admission marks the entrance into the legal profession; however, obstacles still await students from minoritized backgrounds. Improved access to legal training dramatically improved the diversity numbers at law schools, yet inclusion—the actions to support underrepresented students—is still lacking. Studies illustrate that focusing on law firm practice and partnership models to respond to advancement, attrition, and lack of re-engagement effectively achieves greater representation, particularly of women. An example of this is reassessing the competencies necessary to the success of law firms to value the work typically done by women (Seuffert et al. 2018). Frequently the labor of underrepresented groups is underappreciated or overlooked; meanwhile, this matter is made worse when combined with a lack of support or networking in the profession. Our analysis identifies inclusion as the percentage of racial minorities and women who progress in the legal profession beyond law school admissions to successful promotion in their chosen career track. For private practice, this means moving from an associate to a partner; meanwhile, in the public interest track, this means any position as a judge.

A comprehensive analysis of the cascade effect of exclusion and the glass ceiling, or the obstacles

7. This varies by president and level of court (Epstein et al. 2013). However, in the aggregate, it is possible to identify the patterns in terms of elite law school, clerking for a federal judge, and serving as a state judge or US attorney (McMillion 2014). Career changes from private practices to judgeship are often reserved to those at top-tier law firms.

for advancement in legal careers, is needed to identify why the achievements for women and POC follow different patterns. This is an area of research that remains understudied and undertheorized. Pipeline explanations of gender and racial diversification of the legal profession have previously focused on the creation of a pool of "qualified" jurists (Cook 1984; Martin 1987). This approach has been challenged by empirical studies showing that access to legal education does not ensure similar gains in the participation of women and POC in the legal profession. For minority groups in the profession, equity would be an equal proportion of currently underrepresented groups at all positions of power in the profession. Since legal careers advance over time along a hierarchy in both tracks, equity can be measured by the proportion of partners in private practices and the proportion of federal judges. While there is still considerable work to be done in creating equity, our analysis will assess the current efforts goal (Polden and Teague 2020).

Results

A reconceptualization that differentiates between diversification and inclusiveness makes it possible to target specific barriers to equity in the legal profession and reveals undertheorized patterns of the process. Table 2 shows a snapshot of the representational gap of racial minorities and women in the legal profession in 2019.[8] First, notice that in terms of diversity in law schools, access is roughly proportional to the US population and the percentage of women in law school is 3 percent above their proportion of the national population. In terms of inclusiveness in law schools, we find that there is about a 5 percent difference between women and POC entering the program and those who completed it. However, the gap significantly increased in the transition from graduation to the early stages of legal careers; this difference becomes even more striking when comparing women and POC's success in private practices with the federal bench. Accounting for this gap, further research should focus on identifying differences in the size of the gap within categories of law schools, especially since recent studies show that there is no longer a gap in terms of qualifications (Sen 2017). It is possible that top-tier schools are more successful at placing racial minorities and women into private practices than into the early stages toward judgeship. It could also be that economic disadvantages for joining a public career disproportionately affect women and POC.

8. Because the data are collected by different agencies using different methodologies, comparisons and the estimation of the differences across the stages in the legal career may include measurement errors. However, the numbers indicate patterns that should be further investigated with future data collection efforts.

Representation gap across and within career paths	Women	POC	Women of Color
Equity gap in law school enrollment	-3.25	1.2	0.0
Equity gap in law school enrollment	5.63	5.56	0.8
Gap between career paths (private associate vs district court)	26.05	9.52	8.99
Equity gap in the entry-point at private practice (private associate vs US population)	3.98	5.86	4.32
Equity gap in the federal judiciary at the lowest point (district courts vs. US population)	30.03	25.44	14.48

Table 2. Measuring the gaps (2019)

In terms of the differences between women and POC, we find that women have achieved greater levels of representation than racial minorities in both the private and the public sectors. Even for women of color, the gap is smaller than for the aggregate of POC. The gap between the percentage of the population and the entry point in private practice is the smallest for women (3.98 percent) and the largest for POC (5.86 percent). A comparison between the early stages of women and POC in private practice and on the federal bench is currently impossible as we lack data on entry-level career choices that typically culminate in federal judgeships. But considering only clerkships at the US Supreme Court, we can see that the percentages of gender and racial representation are lower than those in private practice. For example, according to data from the National Law Journal, in 2017, only 5.5 percent of US Supreme Court clerks were POC, and only 25 percent were women (Mauro 2017). While these numbers reflect a significant increase compared to those reported in 2005, at both points in time the rates were lower than participation in private practices. So we find evidence that in terms of gender, race, and their intersection, the federal bench is less representative than private practice. Figure 1 presents the evolution of these patterns over time.

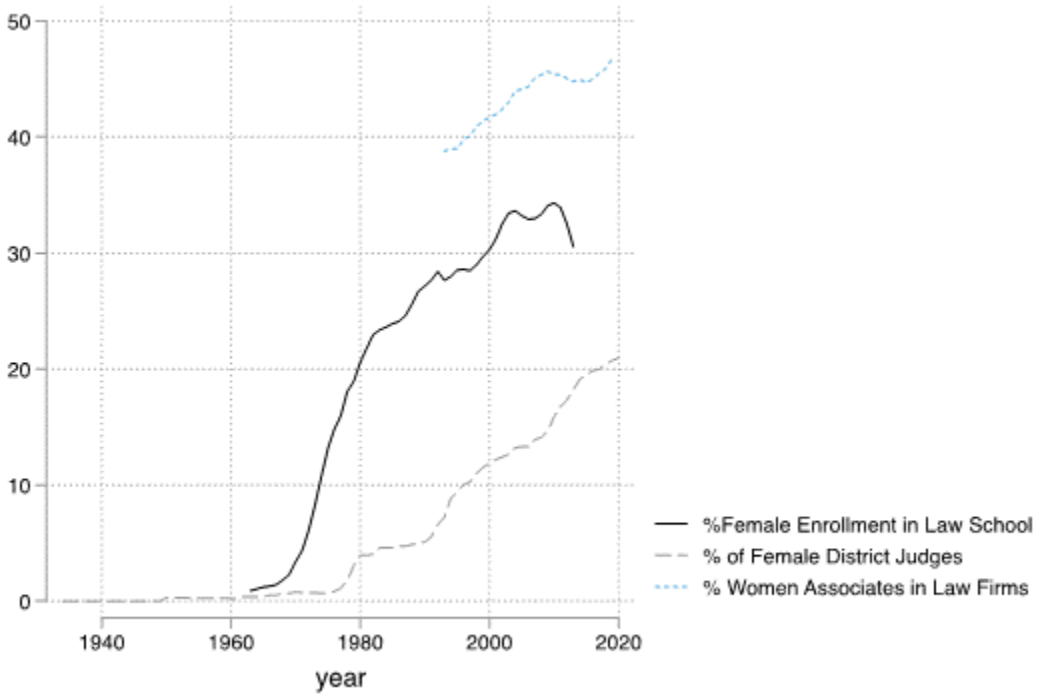

Figure 1. *Female representation in entry-level positions of private practice and the federal courts*

From a historical perspective, we find women are disproportionately participating in private practice rather than public service. For example, we see that while enrollment in law school was at its peak in the early 2000s (around 33 percent), about 46 percent of the private market was made up of women. In contrast, women accounted for only 13 percent of district judges. Also, we see that enrollment and private practices are more sensitive to economic crises such as in 2008, while female participation as district judges was not affected, due to lifetime tenure.

As the percentage of associate women in private firms is closer to parity, it is still necessary to make sure law schools address issues of gender equality that make it possible to create an opportunity for female legal professionals to achieve parity across different career choices. A paired t-test compares gender diversity using a sample of twenty-one years to determine whether there was a statistically significant mean difference between the percentage of women in law schools and the percentage of associate lawyers in private firms. There is a higher participation rate of women as associates (41.6 to 43.8 percent) as opposed to law students (30.3 to 32.4 percent): a statistically significant gap of 11.3 percent.[9] Notice also that inclusiveness in private practices

9. Statistically significant at the 95 percent confidence level. The 95 percent confidence interval is 10.9 to 11.8 percent

shows that both the gender and the racial minority gap widen when we compare the entry position of associate to that of equity partner.

The most critical situation in terms of gender diversity is the exclusion of women in the federal judiciary. Figure 1 indicates a lag of almost twenty years between the beginning of female enrollment in law school and their inclusion in the federal district courts. While this trend can be in part explained by the inherent inertia of federal appointments—once there, they are there for life—it also exemplifies the need to develop policies that protect the diversity in private practices from economic factors. This is nicely illustrated with the economic crisis in 2008. It affected women in private practices, but it coincided with the beginning of the Obama administration, during which the largest number of women and people of color were appointed to the bench (Solberg and Diascro 2018). Different factors may explain this trend, including the role of political actors in determining the composition of the bench and the potential self-exclusion given the economic burden of the public interest path along with the additional uncertainty of advancement in this path. Evidence from the state supreme courts supports this claim. Racial and gender diversification of state supreme courts has been more successful where the political actors determine the composition of the bench via judicial appointments, as opposed to states where judicial elections determine the court's composition (Robbins and Bannon 2019).

The lack of gender representation in the private sector is greater if we measure the gap between women in leadership roles versus associate or inferior roles. This approach is necessary for developing a perspective that can examine the conditions that make associate women less likely to be promoted than men. For example, in 2019, women accounted for 24.17 percent of partners, but just 1 in 5 equity partners were women (20.3 percent). Figure 2 illustrates the glass ceiling in private practice. Notice that the pace of improvement is slower at the top compared to the associate level. The difference between the percentages of female associates versus equity partners reveals that the gap has proven resilient. A modest and consistent improvement of about 2 percent reduction in this disparity has occurred during the last five years.

Meanwhile, the gap between female representation within firms as associates and partners remains steady at around 25 percent. This may introduce doubt about whether existing inclusion policies have been sufficient to increase representation in the highest positions of power in private practices. While gender equality at the lowest levels in private practice seems achievable in the near future, the lack of inclusiveness has reinforced the glass ceiling for women in this career path. Women remain severely underrepresented at the highest levels of power despite dramatic gains at the lowest levels of private practice.

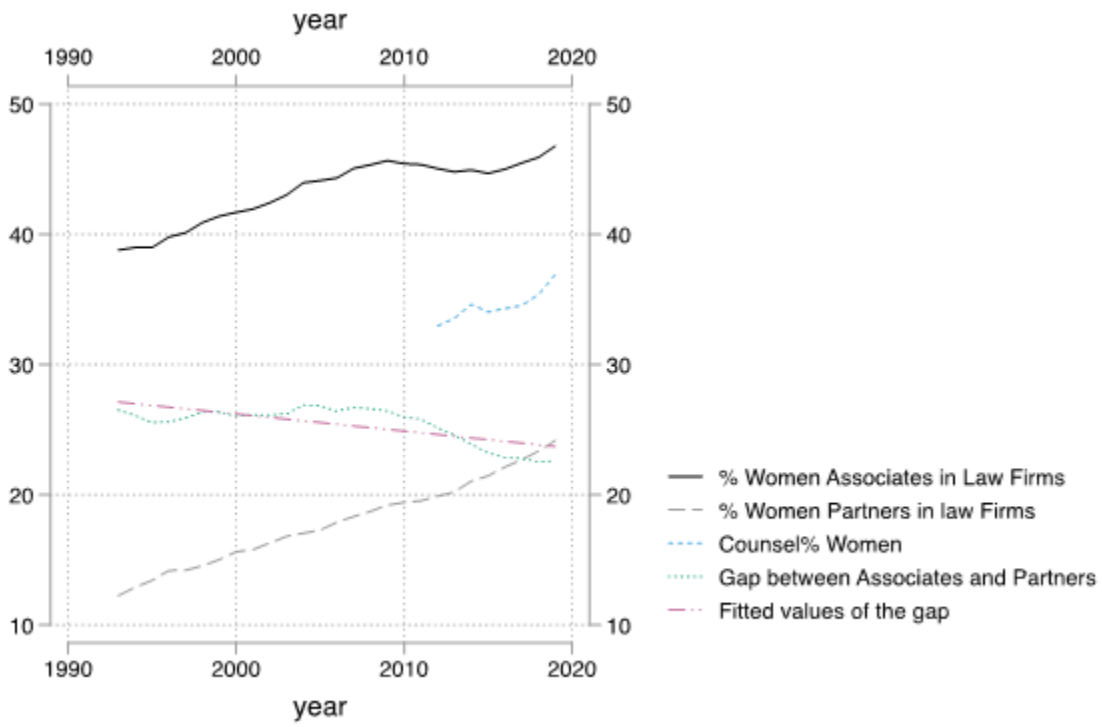

Figure 2. *The glass ceiling in private practice*

Figure 3 shows differences in the level of inclusiveness achieved through the three levels of the federal bench. Since there is minimal mobility across the judicial hierarchy and judgeships are seen as the terminal position for the majority of the appointments, the gap between the levels may only reflect the willingness of the political actors involved in appointment and nomination to create spaces for women and POC. It relies on political actors pushing for marginalized groups to participate at the highest levels of the hierarchy, where they can have a greater influence on policy making and the possibility of social change. The gap across the levels of the hierarchy demonstrates that female participation is four times greater in district courts compared to the circuit courts. It also conveys that Democratic presidents have had more success in diversifying the composition of the highest court.

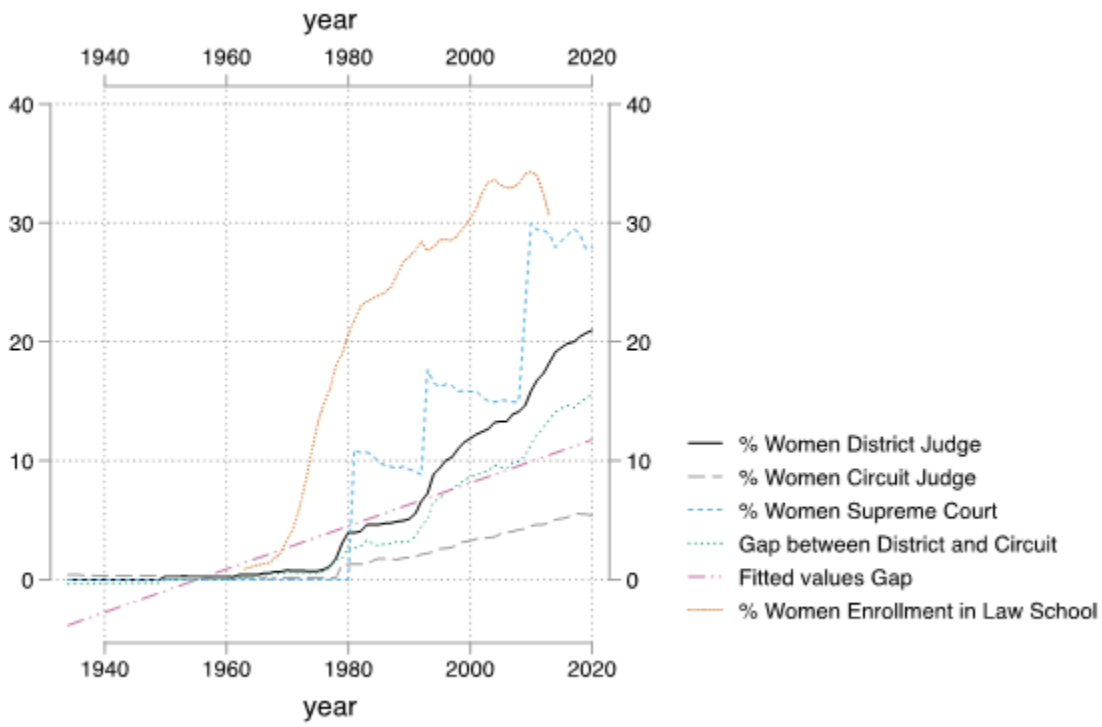

Figure 3. *The glass ceiling in the federal bench*

Patterns of racial diversification are similar to those of gender diversification; the representation of people of color in the private sector is closer to their population percentages than their representation in the federal court system. Estimates of population from the US Census (2010) suggest that men of color represent 19 percent and women of color, another 19 percent, of the total population.[10] The percentage of associates of color has been continuously increasing during the last decade, and today they represent about 25 percent of the entry positions in private firms. Interestingly, the percentage of minority enrollment in law schools is lower than the participation in private offices, which raises some questions about the system's ability to create an adequate supply of attorneys of color.

When comparing gender diversification with racial diversification efforts, some differences are noteworthy. While the gender gap in law school enrollment has been declining since 2008, there is still a gap of 20 percent. For POC, there would need to be double the current rate of participation

10. This is considering any non-White person to be a person of color and is the broadest interpretation of the term, including Asian, Black, Hispanic, Native American and any multiracial person.

in law school to get to proportional representation. This is particularly troublesome as we see that enrollment in law school has declined across all minoritized groups, including women and POC.

Figure 4 shows that at the end of 1990, the ratio of representation of POC between the private sector and the federal bench was 1 to 1. Since then, the gap has grown immensely. Today, people of color are more represented in private practice than on the federal bench. The inability of political actors to keep up with the inclusiveness efforts of private firms may illustrate a failing of the political process to adequately recognize the accomplishments of attorneys of color. Further, it is also highly dependent on which party controls political institutions as Democrats have typically promoted more marginalized candidates to the bench than Republicans.

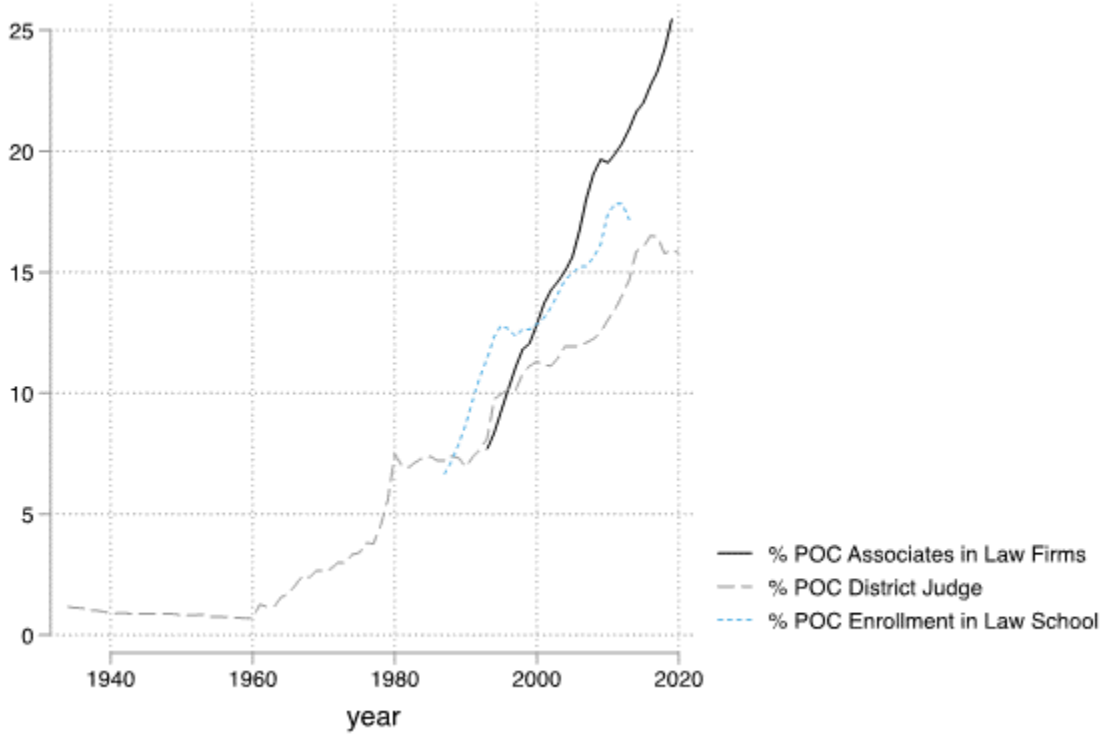

Figure 4. *POC representation at the lowest level of private practice and federal courts*

We find that the gap has actually increased in terms of the differences between POC associates and partners. Currently, the disparity is 10 percent greater than it was at the end of the 1990s. Figure 5 reveals an increase in the gap between representation at the entry level for jurists of color and partnership in private firms. It is clear that policies related to inclusiveness in private practices are needed in order to address the widening gap. Despite more well-trained attorneys of color than at any point in history, the problem of attrition and a lack of career progression for racial minorities has kept the highest positions of power disproportionately White.

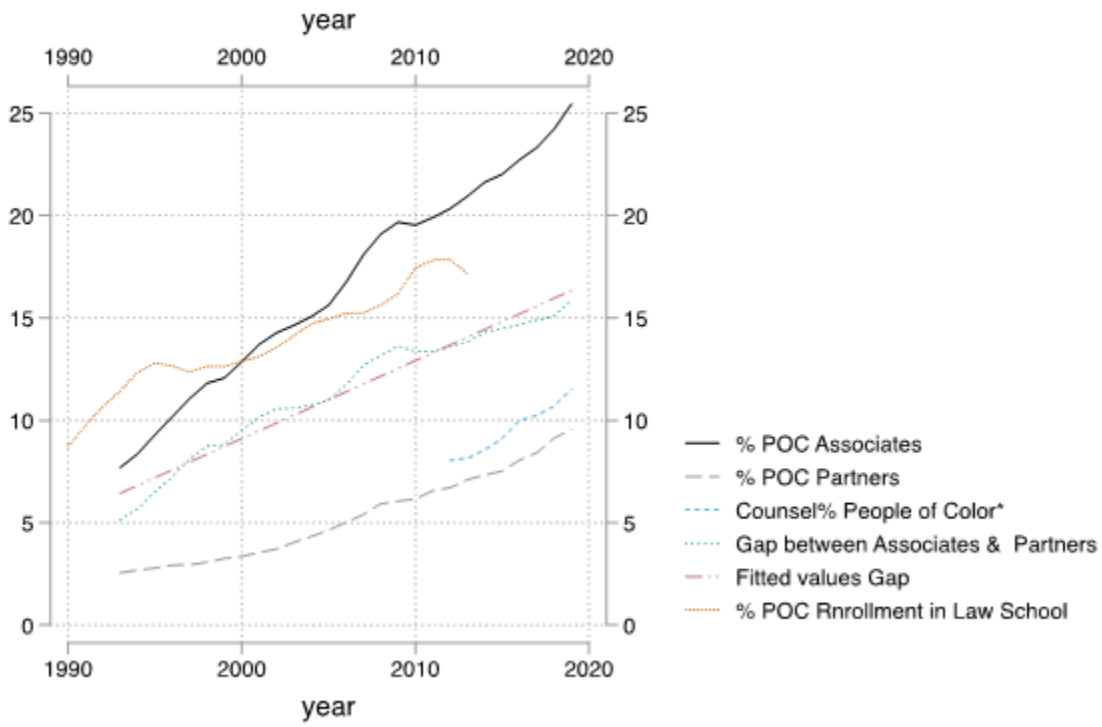

Figure 5. *Racial gap in private practice*

Finally, figure 6 examines the relationship of power within the federal judicial hierarchy. Similar to the imbalances of power in private practice, within the judicial system, jurists of color are more likely to preside over the lower courts (district courts) rather than higher courts in the hierarchy. The racial gap on the federal bench is larger in the circuit than in the district court, where POC are represented three times more often. Similar to the case for women, the gap between district courts and the circuits has been widening over time. We also see that the percentage of minority enrollment in law school is higher than minority representation at any level of the bench. Despite significant efforts to close the qualification gap for racially minoritized people, the improved credentials have not led to a correction of the disparity between people of color at the highest and lowest levels of the profession.

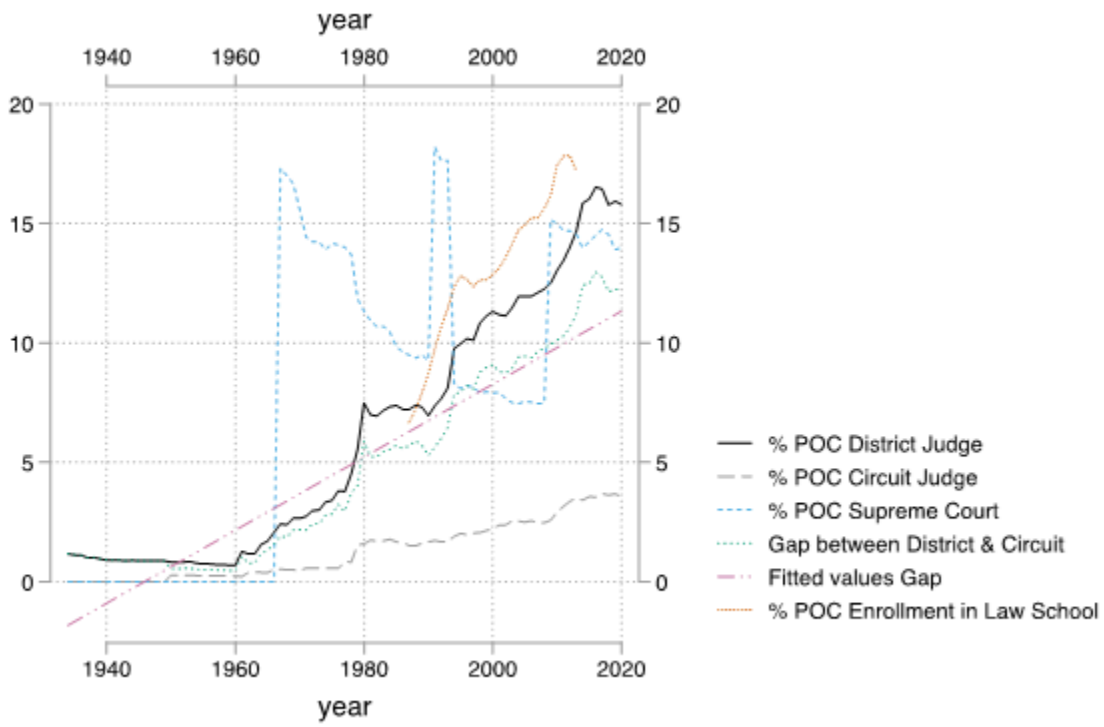

Figure 6. *Racial gap in the federal bench*

What Is Needed to Achieve Gender and Racial Equity?

After applying the DIE framework to measure the gaps in racial and gender representation in the legal profession, it becomes obvious that optimism about gains in descriptive representation may be naïve. While diversity itself is at or near all-time highs in almost every level of the profession, the gains have been primarily at entry-level positions or in law school enrollment; meanwhile, the rate of attrition for women and POC in the profession is disproportionately high, and promotions are disproportionately low (Kay et al. 2016; Payne-Pikus et al. 2010). The DIE framework allows us to put this trend into context as it distinguishes that diversity in the entry levels must be met with inclusiveness in order to eventually achieve equity.

Our analysis adds to the existing literature by comparing women and POC's lack of representation throughout their careers across the hierarchies of private practice and the federal judiciary while differentiating between diversity, inclusion, and equity. We find that the increase in diversity for women and racial minorities between private practice and the federal bench has been uneven in terms of achievements and timing. While efforts to diversify law school cohorts have had a huge impact on the number of marginalized people entering private practices, this push has

not resulted in immediate shifts in the inclusiveness of the profession and has only minimally moved the profession toward the ultimate goal of racial and gender equity. Through this lens, we uncovered the need for inclusiveness programs at early stages in legal careers, such as clerkships in law schools to promote women and racial minority representation on the bench. While recognizing the progress in terms of diversity, the need for improvements in inclusiveness to achieve equity is patent. The analysis presented in this chapter calls for further research on why diversification and inclusion efforts have been more successful for White women than for men and women of color.

Attempts to remedy the considerable disparities in the legal profession must first address huge disparities in the American education system and the current climate of unequal access to quality education. Law schools have been a focus for advocates of diversification; however, efforts by law schools focused exclusively on the admission process cannot solve the current racial and gender gaps at the top of the profession nor can they remove the existing barriers for marginalized groups in the profession. The pipeline to women and POC at the higher levels of the legal profession cannot exclusively rely on the creation of a pool of "qualified" jurists (Cook 1984; Martin 1987). Increased representation of marginalized communities in law schools is a move in the right direction. Without removing obstacles and providing adequate support systems for minoritized communities in the legal profession, attrition rates will still hamper attempts at racial and gender equity (Kay et al. 2016; Gorman and Kay 2010). That is to say, without real efforts to remove the barriers still in place in the legal profession, especially the informal barriers related to support structures and social networks, the larger goal of equity will remain out of reach.

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Understanding T-Tests

In the social sciences, researchers are always concerned that the results they find are occurring

because of real-world causes rather than merely measurement error or random chance. For example, you could be an A (95 percent average) student but have a tough day and a lousy test—let's say you score an 85 percent on this test. While the 85 percent result may not adequately describe your abilities as an A (95 percent) student, sometimes A students do not get As on their assignments or tests, but they still are A students nonetheless. In statistics, this is problematic, because taking an average of any given test for the whole class might not reflect the actual performance of the class, but rather that some students, for all sorts of reasons, did not perform as usual on their tests. Researchers need a way to determine the appropriate amount of confidence or trust that they can place in these results. For this reason, researchers use a concept called **statistical significance**. Statistical significance is a way to quantify how confident researchers are that the inferences they draw from their data illustrate some sort of effect rather than just random luck or circumstances. Generally, social scientists will declare their results to be statistically significant when they can be at least 95 percent confident that the results they are reporting are not simply due to random chance or error.

A t-test is one of the simplest ways to determine whether there are significantly significant differences between two groups. In this case, *significant* means the confidence we have that the differences between these two groups result from real differences and not just random chance. For example, let's look at the average LSAT score for accepted students at Columbia Law School compared to the average LSAT score for accepted students at Harvard Law School. At Columbia, the average LSAT score is 172, and at Harvard, the average LSAT score is 173. At first glance, it is obvious that there is a difference between the two schools; however, Columbia students might argue that this metric doesn't tell the whole story. The year (2019) for which this number was calculated might not be representative of all years. Or maybe by sheer random luck, a few Harvard students guessed and got correct answers, which skewed the statistics. In any measurement of group averages, in this case the average LSAT score, there is some amount of random chance. While Harvard is happy to advertise their higher scores on this metric, it is important to determine how sure we can be that this difference doesn't reflect differences in random chance rather than actual real differences in performance. After all, students taking the LSAT might miss a question here and there for random reasons. How positive can we be about this difference between the scores? Is it fair to say that the difference is caused by Harvard having superior students?

How Does a T-Test Work?

When conducting a t-test, statisticians are concerned with three main concepts: absolute difference, standard deviation, and sample size. First is the amount of **absolute difference** between the two means. The absolute difference is simply how far apart the two groups' averages

are from one another. The reason for this is pretty obvious. If we are attempting to compare two groups by their LSAT scores and one group averages 150 while the other group averages 175, the large amount of difference between the two groups' average (25 points) is a strong signal that there really is a cause (or than random chance) explaining the difference. In our previous example comparing Harvard and Columbia, the absolute difference is simply 173-172. An absolute difference of 1 point is much less likely to be significant than a 25-point difference, all things considered.

Second, we are concerned about the **standard deviation** of the group. Standard deviation is a measure of how much difference there is within each sample population. Using the Harvard versus Columbia example, the standard deviation would be the difference between accepted students within both schools. If there is a lot of variation within each sample, then we are not as confident that the difference between the samples is really the result of a cause. A wide variety of reported test scores in either class indicates that the means are less representative of the whole population. For example, if the range of test scores is 120–80 for Columbia, then the 172 average could be the result of outliers. Meanwhile, if there is a very small standard deviation, we can be more confident that there is a real difference. For example, if the test scores at Harvard range from 172 to 174, the average of 173 is not being determined by a few high scores or a few low scores; instead, it is being determined by a large number of test scores in the same range. As a result, the smaller the standard deviation between the two comparison groups, the higher the degree of certainty we can have in the results.

Finally, statisticians are always concerned with **sample size**. *Sample size* is simply the number of observations—in this case, test scores. In general, the larger the sample size, the more confident we can be about the resulting trends. For example, if we were to compare Harvard and Columbia, but one school's average was based on only five LSAT scores while the other average was based on five thousand LSAT scores, we would be much more confident in the average generated from the larger sample. A sample with five thousand observations cannot be easily skewed by one or two outlier cases; meanwhile, a sample of five observations could change dramatically if only one or two test scores are very high or very low.

The Takeaway

T-tests are used to determine the amount of confidence that there is an actual difference between the two groups not caused by random chance. Whenever we compare group averages, there is a risk that some of the differences are caused simply by things like measurement error or random luck. For example, suppose we wanted to compare the performance of two different classes on the same test. In that case, there might be random things such as unclear questions, unusual

attendance, grading errors, or other random events that do not tell us much about the actual performance. In groups, outliers or observations that are far from the norm can drive the averages for groups, especially in cases where the sample size is small. Statisticians use a t-test to assess how confident they can be that there is real difference between two groups rather than simply measurement error, random chance, outliers, or other forms of uncertainty.

Activity Questions

1. True or False: It is possible to compare two groups based on their averages and assume that differences between the group averages are the result of real differences between the group populations with 100 percent certainty.
2. True or False: Larger sample size increases the certainty that group-level statistics are adequately summarizing the information from the group rather than a few outliers.
3. True or False: When comparing the averages of two different population groups, small variation within the groups (usually measured as standard deviation) will increase our confidence that there is a statistically significant difference.
4. True or False: Researchers use the concept of statistical significance to determine how confident they are that their statistical inferences are determined by factors other than randomness, luck, or measurement/sample error.
5. True or False: The typical level of confidence used to define statistical significance is 85 percent. It means that researchers are 85 percent confident that the results are not produced by random chance.

3. On Remand

Legal Strategies After Supreme Court Losses

RICHARD S. PRICE

Supreme Court Losses and Strategic Reactions

Law and courts research often overlooks an important question: What do lawyers do after an adverse decision? Law and courts research is dominated by a concern with winning. This naturally comes with considerations of loss, but only as the other side of a dichotomous variable. When we ask whether justices decide issues based on law, policy, strategy, or some combination (Epstein and Knight 1998; Graber 2006; Segal and Spaeth 2002), we are naturally asking what helps some parties win. The debate over legal efficacy assumes victory is a key condition; if courts reject a legal claim, it would appear pointless to then inquire over whether victory has value. So winning is the key variable, and subsequent questions tend to focus on the components of winning or their effects. Here, I take a different tack. The goal here is to understand what strategies lawyers adopt when they face the worst-case scenario: a Supreme Court of the United States (SCOTUS) loss. As developed below, I argue that a SCOTUS loss, while certainly suboptimal, is not always the end of the case. Lawyers strategically develop legal arguments based on the signals sent by courts over time. When the signal changes dramatically from SCOTUS, strategic litigators on remand to the state's highest court work to salvage their case by turning to state constitutional law as a last-ditch effort to preserve a victory.

To some degree, losses define much of the concern of law and courts research in unspoken ways. If we take the common criticism that judicial review is undemocratic (Bickel 1962), it is because the democratic process rejected some argument that becomes the basis for litigation. American government is decentralized and fragmented, giving losers in one venue many opportunities to thwart their opponents' success. In other words, litigation may serve as a veto point (Krehbiel 1998). Thus when the New York legislature legalized abortion in 1970, and the Oregon people legalized physician-assisted suicide in 1996, their right-to-life opponents went to court to invalidate the democratic action (Price and Keck 2015). This is the classic story of American cause litigation: claimants lose in one venue and move to the courts as a means of mitigating that loss. This of course works in reverse as well. A SCOTUS loss need not be the end of the legal process. For example, J. Mitchell Pickerill (2004, 42) found that in 47 percent of cases of invalidated federal law from 1954 to 1997, Congress responded with either amended or new statutes often designed

to reach the same result as the invalidated law. In his reevaluation of the New Deal constitutional crisis, Barry Cushman (1998) concluded that a significant aspect of the crisis involved New Deal legislators and executive branch officials adapting to SCOTUS's concerns.

Scholars have not ignored the nature of loss in litigation, but they have tended to focus on sociolegal studies of cause litigation more than what we might term regular litigation. Marc Galanter (1974) illustrated the value of strategic settlement for repeat players in the legal system because they avoided cases that might create adverse precedent through loss, a dynamic that Catharine Albiston (1999) developed further through a study of the strategic use of procedural mechanisms to shape the early law of a new federal statute. This line of research helps establish that sometimes, powerful litigants may intentionally "lose" a case, such as through strategic settlement, to preserve a legal environment that suits their long-term interests. The interest here, however, is with the more traditional litigation where we can presume that winning is the goal.

Douglas NeJaime (2011) developed a theory of loss in social movement litigation. Importantly, he looks at how "strategies developed in the wake of loss operate as second-best alternatives—as responses to the failure of the initial tactic" (971). The presumed goal of such litigation, of course, is victory on the group's policy issue. Having lost, savvy organizers must strategize around their secondary options. For his study of LGBT and Christian conservative activism, NeJaime concluded that "internally, savvy advocates may use litigation loss (1) to construct organizational identity and (2) to mobilize outraged constituents. Externally, these advocates may use litigation loss (1) to appeal to other state actors, including courts and elected officials, through reworked litigation and nonlitigation tactics and (2) to appeal to the public through images of an antimajoritarian judiciary" (947). In a study of loss in prosegregation litigation, Christopher Schmidt (2015, 1199–1212) emphasized how even litigation losses could be turned to support the message of white Southerners as moderate defenders of a legitimate tradition. One key mobilizing aspect of litigation losses is that they are high-profile events that "can act as a lever for legislative counteraction that reverses the legislative action challenge in the lawsuit, or it can instigate legislation that overrules or minimizes the judicial precedent created by the litigation" (Depoorter 2013, 837). One example of this dynamic is the public and legislative response to *Kelo v. New London* (2005), where the publicity of the Supreme Court's opinion led nearly all states to put some greater limits on economic development takings (Somin 2015, 135–64).

While social movements may be able to turn losses into public mobilization victories, most litigants are not part of broader social movements. Everyday rights claimants are more concerned with their individual situation than with establishing a favorable precedent for broader social change. A person who believes she was wrongfully convicted has a more traditional goal: to get out of prison. Most lawyers serve these traditional clients, where even if the lawyers have broader goals themselves, the primary goal is to reverse some negative treatment of their client's rights. A SCOTUS loss is likely to be particularly troubling, as it is often assumed to foreclose any chance of

success. As I explore here, strategic lawyers have other options available to them provided by the peculiarities of American federalism.

Due to a quirk of American federalism, state supreme courts have the ability to disregard federal rights retrenchment. While SCOTUS is the final interpreter of federal law, it has no power to interpret state law (Michigan v. Long 1983). As SCOTUS retrenched away from some forms of liberal rights protections in the 1970s and 1980s (Keck 2004), many liberal judges and law professors turned to state constitutional law as a means of preserving liberal policy goals. The most famous example is Justice William Brennan's (1977) invitation to litigants and state courts to ignore new federal precedents that he saw as undermining the successes of the Warren Court.[1] This led to a new form of judicial federalism: the use of state constitutions to provide rights protections that are separate and beyond the minimal requirements of federal doctrine.

Judicial federalism provides some claimants with a method of salvaging something from a SCOTUS loss. For a strategic litigant, turning to state supreme courts can offer an additional opportunity to win after her case is rejected at the federal level. Judicial federalism is a distinctly second-best alternative for social movements that seek broad national policy (Farole 1998, 21), but for regular litigants, a win is a win. A person whose conviction is reversed because a search was found to be unconstitutional seems unlikely to care about the niceties of legal doctrine that achieved this goal. While judicial federalism is potentially a source of significant state court independence, empirical studies routinely discovered that state courts overwhelmingly relied on federal doctrine in most rights disputes (Beavers and Emmert 2000; Cauthen 2000; Emmert and Truat 1992; Esler 1994; Fino 1987; Latzer 1991). Studies of legal arguments presented to state supreme courts found that without some degree of incentive, lawyers rarely briefed issues of state constitutional rights (Price 2013, 2015, 2017).

This continued dominance of federal constitutional law is unsurprising given the path-dependent nature of law. With the nationalization of constitutional rights law during the Warren Court era, state constitutional law largely disappeared from legal discussions and education. Though they provide significant attention to state-level variation in common law, law schools teach constitutional law as the product of SCOTUS decisions exclusively (Sutton 2009; Williams 1991). Because "courts' early resolutions of legal issues can become locked-in and resistant to change" (Hathaway 2001, 604–5), the embedding of federal constitutional doctrine to the exclusion of other potential sources of remedy leaves lawyers trained to respond by following the path already broken. Lawrence Friedman (2011) argued that the weak development of state constitutional rights

1. To be fair, this is a pessimistic reading of Brennan's argument. He presents his case as a faithful adherence to the principle of federalism, but as Earl Maltz (1988) argues, this seems difficult to square with Brennan's history (but see Williams 1998). For a more principled and nuanced defense of judicial federalism, see Linde (1970).

law is directly related to this path dependence. Breaking from this path is difficult. It requires lawyers to support a new path through not only bringing cases for the court to act on (Epp 1998) but also offering ideational support in the form of legal arguments that take state constitutional law seriously (Price 2013). This last form of support is complicated by the lack of a professional community dedicated to supporting state constitutional law strategically (Hollis-Brusky 2015). As most lawyers would find it daunting to "imagine a world in which there is no federal law" and make state claims from scratch (Friesen 2006, 1–64), I argue that lawyers rely on judicial signals before turning to state constitutional rights claims.

The first signal, and the most relevant to this study, comes externally from SCOTUS. When a federal argument is rejected, either reversing or minimizing a rights claim, strategic lawyers have little choice but to turn to alternative state claims. The problem is that they are limited by their training to conceptualizing constitutional law solely in federal doctrinal terms. Thus on remand, these lawyers are likely to engage in SCOTUS avoidance. In essence, these arguments invite the state supreme court to apply the now rejected federal argument under the auspices of state constitutionalism to avoid review. The second signal comes from within a state. Some state supreme courts decided to encourage state constitutional arguments by providing specific guidance or instruction to lawyers (see Price 2013, 2015). The goal of these internal signals is often to overcome the tendency of lawyers to speak in federal terms only. I will illustrate this theory with a case study of George Upton.

The Case of George Upton

On September 11, 1980, an unidentified woman called the Yarmouth, Massachusetts, police department to report that "a motor home full of stolen stuff [is] parked behind the home of [George Upton] and his mother" (Commonwealth v. Upton 1983).[2] Under questioning, the woman described the nature of the goods and said that she had seen them personally at some unspecified time and place. The woman eventually agreed to the officer's assertion that she was an ex-girlfriend of Upton. After visually confirming that a motor home was on the property, the officer obtained a search warrant based on the information from the phone call. After a variety of stolen items were discovered, Upton was charged with burglary and related crimes. Upton ultimately appealed his conviction to the Supreme Judicial Court of Massachusetts (SJC), arguing that the search warrant was invalid.

Initially, Upton's lawyers argued a fairly standard Fourth Amendment claim: the warrant affidavit

2. I draw the following basic case facts from this decision.

lacked probable cause under Aguilar-Spinelli. In short, this doctrine required that an affidavit demonstrate both the informant's basis for the knowledge and the veracity of the information (Aguilar v. Texas 1964; Spinelli v. U.S. 1969). Shortly after this brief was filed, SCOTUS decided *Illinois v. Gates* (1983). The rigid Aguilar-Spinelli test was jettisoned in favor of a more amorphous "totality of the circumstances" test; determinations of probable cause were subjected to a deferential standard of review, where a higher showing of veracity could overcome deficiencies in the informant's basis for knowledge and vice versa. As this issue implicated the only significant constitutional issue in Upton's case, the SJC ordered new arguments on the effect of this change.

Upton's lawyers carefully framed Gates as a minor change at most, but perhaps realizing that this was a shaky argument, they argued a new theory: Article 14 of the Massachusetts Declaration of Rights mandates the continued application of the now discarded federal rule.[3] Despite the fact that the state constitution had been virtually ignored in the first argument, Upton now argued, "It is obviously the province and indeed, the obligation, of [the SJC] to interpret this state's constitution."[4] While the brief noted textual differences between the state and federal provision and the prerevolutionary history of the Massachusetts Constitution, the primary argument amounted to an attack on Gates. It cited Justice Brennan's dissent to show how the Fourth Amendment was being "eviscerated": "To allow informants to become the oracle of law enforcement agencies is to decimate the Fourth Amendment."[5] With such decimation becoming a reality at the federal level, the SJC must enforce the prior protective rule under the state provision.

The SJC concluded that Gates only minimally modified Fourth Amendment doctrine and that the warrant affidavit lacked sufficient probable cause. SCOTUS reversed in a short opinion that demonstrated annoyance at the SJC's distortion of Gates (Massachusetts v. Upton 1984, 732). On remand to the SJC, a third brief now relied solely on the state constitution. The remand brief immediately framed the issue as whether the SJC should "accept or reject two watershed Fourth Amendment decisions of the United States Supreme Court . . . as the model for interpreting"

3. The article states, Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws. [There are no pages, it is a constitutional provision. It is equivalent to citing the First Amendment
4. Commonwealth v. Upton, 458 N.E.2d 717, defendant's supplemental brief at 25.
5. Upton, defendant's supplemental brief at 32, 34–35.

the state search provision.[6] The claimant discussed some of the same textual and historical differences as the supplemental brief in greater detail, but again the primary concern was with attacking the policy of Gates. Relying on law professors' critiques of the new trend in Fourth Amendment law, the remand brief attacked the logic of Gates as both faulty and a poor basis for a constitutional rule: "The current 'totality of the circumstances' test . . . is so vague and formless, and carries with it such extreme risk of confusion and abuse, that it is incapable of protecting the Article 14 rights of the people of" Massachusetts.[7]

George Upton's story illustrates the theory well. In his initial appeal, he followed the path laid out by decades of Fourth Amendment law. The lawyers had no real reason to expect to need another argument. Only as SCOTUS shifted did they start to present an alternative and, ultimately, exclusive argument around the state constitution. This new argument eventually managed to win after a SCOTUS loss.

Research Design

The focus of this study is on rights claimants who won in a state supreme court,[8] lost on appeal to SCOTUS, and then were heard on remand. While other elements of the litigation process provide information to the courts, the legal briefs are the primary method of influencing appellate courts. I do not consider opposing briefs or amicus curiae briefs, as the focus is on how lawyers respond to losses; thus the claimant's brief is the most appropriate to explore that question. This resulted in two types of cases. First, remand cases are those where SCOTUS issued a full decision on the merits of the issue reversing the state court's decision. Second, consideration cases are those where SCOTUS issued a summary reversal and remand to consider the effect of a recent decision. While consideration cases presented a less definitive negative signal about the viability of the rights claim at issue, they are likely to be instances where a recent federal doctrinal change undermined the viability of the claim. I estimated that about sixty cases should have briefs available, and I collected briefs from thirty-three cases for both initial and remand stages, twenty-

6. Commonwealth v. Upton, 476 N.E.2d 548 (Mass. 1985), defendant's brief on remand at 1. The second decision was United States v. Leon (1984), establishing the good-faith exception to the exclusionary rule.
7. Upton, 476 N.E.2d 548, defendant's brief on remand at 15.
8. State supreme court is used as a generic term for the highest appellate court even if that court uses a different title, such as the New York Court of Appeals.

four reversal and nine consideration cases. My sample includes briefs from fourteen states. Only the issue directly reviewed by the US Supreme Court was included in my remand analysis.

Coding constitutional arguments as either state or federal can be complicated at times, and I followed three basic rules (Price 2013, 340–41; 2015, 1412–13). First, briefs are typically separated into different legal points, and where the point heading or point clearly identifies the argument as either federal or state based alone, then it is coded accordingly. This holds true even in arguments that are presented as solely state constitutional issues but rely heavily on federal cases and doctrines. Second, where the point cites both federal and state constitutional provisions, I follow Farole's (1998, 33) standard, with the state citation treated as filler where it is simply presented as part of a string cite without any independent development or rationale. However, where the reference to a state provision is accompanied by some kind of supporting argument, even if vague, it is coded as a separate state argument even if it is not included in a separate point. Third, at times an argument fails to specify a constitutional basis for an argument. Instead, a point may simply refer generally to a "right to counsel," for example, and I examined the precedents offered to determine the coding. Where the precedent is dominated by federal cases, I code the argument as federal. Where the precedent points to state cases primarily, I follow Esler's (1994) method of examining those decisions, and if the precedents appeared to rely on independent analysis of the state constitution, I code the argument as state based. Given the assumption that federal law will tend to dominate constitutional claims, my rules are intended to err in favor of state coding, where arguments are vaguely presented. Additionally, I coded certain content measures, taking guidance from state constitutional theory (State v. Gunwall 1986; Tarr 1998, 182–83). Ultimately I coded the following elements for their presence or absence: textual differences between constitutions, discussion of state constitutional history, prior state constitutional precedent, examples of judicial federalism from the home state, precedent from other states, examples of judicial federalism from other states, structural arguments, matters of state and local concern, and public attitudes. The total number of factors referenced in an argument is used as a rough idea of the complexity of the legal claim. However, I make no claim that a certain number of these factors makes a "good" argument or that all are strictly "legal"; it is only an indicator of the nonpolicy arguments used by lawyers in state constitutional claims.

Discussion

Aggregate Trends

	Federal Arguments	State Arguments	Total
Initial Brief	32 (84%)	6 (16%)	38
Remand Brief	10 (25%)	30 (75%)	40
Total	**423678**		

Table 1: Aggregate arguments.

Table 1 demonstrates the expected breakdown in broad terms: state arguments were uncommon until the negative SCOTUS action suggested that lawyers look elsewhere for protection. Six of the thirty-eight arguments at the initial stage were state-based claims, and of these, only two were the primary argument. In the remaining four cases, the state claim was relatively minor and secondary to the federal claim. Only on remand did lawyers tend to discover state constitutional claims. As with George Upton's case, these state claims were ignored until federal retrenchment forced lawyers to look elsewhere. While a fairly diverse set of issues is present, two areas are dominant: speech (29 percent) and search and seizure (23 percent).

Initial Appeal

The fact that federal claims dominated at the initial appeal is unsurprising. This fits with existing research findings that state constitutional rights claims are relatively rare in both litigant arguments as well as court decisions. Additionally, the structure of this study focuses only on cases where a federal rights claim was viable enough for a state supreme court to sustain it and thus set the stage for SCOTUS review. This is not to say that litigants ignored the existence of state constitutions; in seventeen (53 percent) of the federal arguments, they did cite the state provision. This citation, however, amounted to little more than simply noting the existence of the provision. Litigants in six cases did make clear state constitutional arguments.

In three of these initial state claims, the likely negative trend in federal protection was evident, and thus the arguments sought to provide an alternative path early. The clearest signal of federal retrenchment was present in *Pap's A.M. v. City of Erie* (1998) involving a challenge to a local regulation of nude dancing. While the brief argued that decisions from two decades prior

suggested a degree of protection, it had to admit that SCOTUS was moving in a different direction given the decision in *Barnes v. Glen Theaters* (1991) to uphold a substantially similar statute. In barely a page, the claimant acknowledged that Barnes upheld a similar law but stressed that it lacked a majority and detailed how SCOTUS broke into three parts, with the key difference being over how to apply the standard for regulating symbolic conduct. The claimant turned to a recent federal decision holding that the narrowest decision should control and proceeded to argue that the focus of the inquiry then should turn on Erie's sole focus on the moral disapproval of nude dancing. Realizing that this argument might be a long shot, the claimant turned to a state claim that developed some classic elements of constitutional arguments. This included noting the fact that the Pennsylvania provision predated and influenced the First Amendment, relying on a few recent state decisions expanding some state constitutional protections.[9] The key to this argument, however, turned not on state constitutional law but on the problematic trend toward federal retrenchment:

> First Amendment jurisprudence in this area seemed somewhat clear prior to the Supreme Court's decision in Barnes. Although no opinion in Barnes garnered a majority, the case has muddied First Amendment legal waters. In interpreting the state Constitution, this Court may look to decisions of other state courts as well as to federal court decisions both pre- and post-Barnes. However, the most cogent analysis of nude dancing as protected by freedom of expression is contained in Justice White's dissenting opinion in Barnes.[10]

The claimant thus invoked avoidance language: SCOTUS has retracted protection, and the state court should resist by applying the logic of the dissenting opinion. More attention is paid to White's logic than was given to the fractured opinions of the Barnes majority. Utilizing, in part, decisions from Colorado, Oregon, and Washington, the claimant argued that this dissenting opinion provided the better foundation for a state constitutional rule that would treat a nude dancing ordinance as content-based regulation of expression.

Similarly, two other arguments appeared to anticipate federal retrenchment. In *State v. Hershberger* (1989), the claimant asserted that the application of a vehicle signs requirement infringed on the free exercise rights of the Amish. While SCOTUS had not yet resolved the case that would dramatically limit federal protection (Employment Division v. Smith 1990), the claimant noted that it had recently affirmed a similar Amish religious exemption issue only by an equally divided vote, signaling a deep division on the issue (Jensen v. Quaring 1985). The claimant spent most of the state argument demonstrating that the state court could provide greater protection, that other states had done similarly in a variety of rights areas, and that the textual differences between the state and federal provisions "tends to cut against the strict separation of belief

9. Pap's A.M. v. City of Erie, 719 A.2d 273 (Pa. 1998), appellant's initial brief at 21–23.
10. Pap's A.M., appellant's initial brief at 23.

from conduct" under the former.[11] Similarly, in *People v. Conyers* (1980),[12] the claimant argued a supplementary state claim that impeachment use of silence was unconstitutional, and while the US Supreme Court had not ruled on the precise circumstances involved there, it had shown approval for the similar use of illegally obtained statements.

Both federal retrenchment and state encouragement played a role in *State v. Recuenco* (2005). The case centered on whether violations of the right to have a jury determine all aspects of the charged crime can be harmless error. SCOTUS had shown a history of embracing harmless-error analysis for various criminal procedure rights, noting that "most constitutional errors can be harmless" (Neder v. U.S. 1999, 8). In addition to this federal retrenchment, the Washington Supreme Court had signaled broad interest in state constitutional law in general (Price 2013) and had issued decisions noting how the state jury provision grants broader protection in some areas. Influenced by these signals from the Washington court, the claimant provided a well-developed independent state argument that stressed the textual differences between the state and federal provisions, the expansive Washington precedent, and structural differences to justify an independent state rule. Apparently, the claimant was so confident that this original state argument was sufficient that on remand, the claim was simply reasserted via reference to the initial appeal.

Interestingly, two initial arguments were solely state based, lacking any federal claim, and ultimately only ended up before SCOTUS through the weaknesses of the state court's decision. In *Witters v. State* (1984),[13] the state denied funding for a course of Bible study. Instead of relying on the federal test (Lemon v. Kurtzman 1971), the state[14] justified the decision based solely on the state constitutional Blaine Amendment, which prohibited any public money from paying for a course of religious study.[15] The state relied on a number of Washington Supreme Court decisions imposing a strict prohibition of state aid to religious education under this provision even if such

11. State v. Hershberger, 444 N.W.2d 282 (Minn. 1989), appellant's initial brief at 41.
12. People v. Conyers, 49 N.Y.2d 174 (1980), defendant-respondent's initial brief.
13. Witters v. State, Commission for the Blind, 102 Wash.2d 624 (1984), petitioner's initial brief.
14. Witters is an unusual case in that the issue revolved around competing constitutional limitations with the claimant asserting a free-exercise argument and the state using the establishment clause to combat the issue. Because SCOTUS only dealt with the later claim, I used the state's establishment claim for this study, as the state was arguing for a broader constitutional rule.
15. Washington Constitution, Art. I, Sec. 11 reads in part, "Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion. . . . No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment."{~?~AQ: Page(s)?}As with earlier, constitutional provisions have no page numbers.

assistance was allowed under the First Amendment.[16] Despite this fact, the Washington Supreme Court proceeded to base its decision on federal doctrine and upheld the denial (Witters v. State, Commission for the Blind 1984). Similarly, in *People v. Caballes* (2003), the claimant carefully presented only a state claim that a dog sniff during a traffic stop was unconstitutional presumably because the US Supreme Court had rejected similar dog sniffs claims previously (United States v. Place 1983). Unlike Witters, the claimant did rely heavily on federal doctrine for the logic of the argument even though it was careful to avoid reliance on the Fourth Amendment. The Illinois Supreme Court failed to make any clear statement as to the constitutional basis for its decision, and thus SCOTUS assumed jurisdiction. The experiences in these two cases highlight the fact that legal framing alone cannot control how state courts deal with the issue even if it can influence those courts.

The initial stage demonstrates the expected dominance of federal rights doctrine. Only in a few instances were state arguments presented, and nearly always because the writing was on the wall, federal retrenchment seemed likely. In two cases, the state court had signaled some interest in state constitutional doctrine, and this likely contributed to those arguments.

On Remand

As table 1 illustrates, federal arguments were made on remand but at a much lower rate. Nearly all these federal claims came in consideration cases, which is as expected given that SCOTUS issued a remand to consider some new precedent but made no substantive ruling. Typically, these federal claims focused on distinguishing the new precedent. For example, when SCOTUS reversed and remanded the Ohio Supreme Court's invalidation of a hate crimes enhancement statute in light of *Wisconsin v. Mitchell* (1993), the claimant's federal analysis sought to distinguish the Ohio law from that of Wisconsin. The claimant argued that unlike Wisconsin, Ohio only applied its enhancement statute to five crimes, and this fact made the case a content-based statute within fighting words and should be invalidated for the same reason as the law in *R.A.V. v. City of St. Paul* (1992).[17] Three claimants failed to make a state argument on remand. In one, a consideration case, the claimant simply asserted that the new SCOTUS precedent did not require a different result.[18] Two

16. State Higher Educ. Assistance Auth. v. Graham, 84 Wash.2d 813 (1974); Weiss v. Bruno, 82 Wash.2d 199 (1973).
17. State v. Wyant, 624 N.E.2d 722 (Ohio 1994), appellant's brief on remand at 9–17.
18. Desimone v. State, 996 P.2d 405 (Nev. 2000), appellant's supplemental points and authorities at 1 ("Nothing in United States v. Ursery compels this court to reverse its decision . . . and the judgment previously entered by this court should be reinstated.")

claimants in reversal cases simply abandoned the issue, with one turning to a nonconstitutional claim around evidentiary law[19] and the other asserting previously undecided federal constitutional issues even though the state claim was not foreclosed until two months after the brief was filed.[20] Every other case on remand not only presented a state claim but relied almost exclusively on state law.

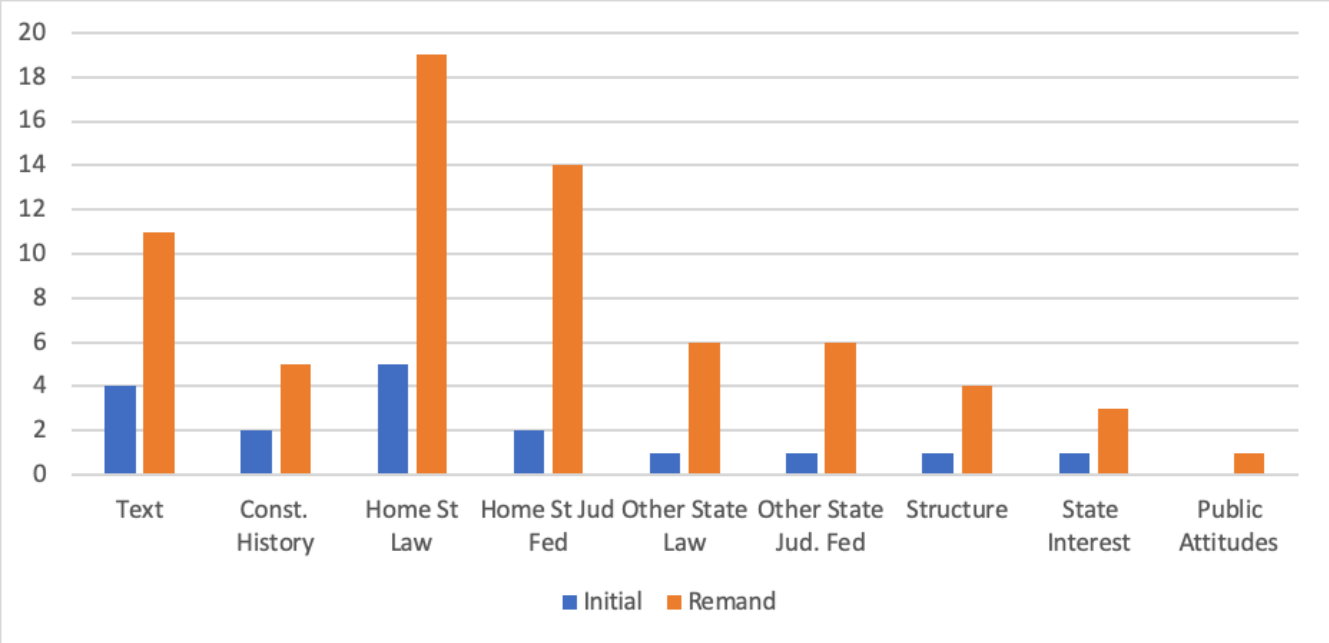

Figure 1: Legal argument frequency

Figure 1 depicts the frequency of types of legal arguments offered to support a state constitutional claim. A number of factors rarely appeared in claimant arguments. For example, only one argument utilized a public attitude claim. A case involving whether funding of religious vocational training violated the state's establishment clause noted that voters had overwhelmingly rejected a constitutional amendment designed to bring the state constitutional language in line with the federal clause.[21] Similarly, state interest and structure arguments were uncommon. One example

19. Fensterer v. State, 509 A.2d 1106 (Del. 1986), defendant below-appellant's brief on remand.
20. Commonwealth v. Hicks, 596 S.E.2d 74 (Va. 2004), appellee's brief on remand; Elliot v. Commonwealth, 593 S.E.2d 263 (Va. 2004), declaring that the state constitution provided no greater protection for speech.
21. Witters v. State, Commission for the Blind, 112 Wash.2d 363 (1989), respondent's brief on remand at 25.

of a structural argument came from a Florida case where a man was not informed that an attorney was available to him. On remand, the claimant argued that the federal rule should not be applicable in Florida because prosecutors have unilateral power to file criminal charges and the federal rule would allow them to delay charging a defendant in order to deny access to counsel.[22] Textual difference arguments were found in a relatively large number of arguments, likely because such arguments are relatively easy. State constitutional history, on the other hand, is harder to utilize because such history is not practiced widely or of general knowledge. Such arguments are made primarily where state courts themselves have discussed the history in question. For example, a Wisconsin claimant arguing for the invalidation of the state's hate crimes law relied heavily on a state justice's concurring opinion establishing that the textual differences in the state constitution were intended to suggest a broader level of protection.[23] Interestingly, other state law was not commonly discussed.

As lawyers are trained to reason from legal precedents, it is unsurprising that they utilize home state law most frequently. Interestingly, nearly half of the state arguments noted examples of judicial federalism from their state supreme court. By noting their court's history of rejecting federal law, the claimants likely seek to reassure justices that they will not be doing anything wrong this time. This is particularly important in states where the court has a history of resistance to judicial federalism. For example, all three Ohio remand briefs, where judicial federalism was rare (Tarr and Porter 1988, 124–83; Williams 2009, 197), noted a recent decision interpreting the state's right-to-bear-arms provision as an individual right.[24] In nearly two-thirds of the state arguments, claimants discussed state decisions on point with the legal issue of concern. A few of these arguments took the form of examples of precedent expanding state protection in the area at issue. For example, in *Immuno AG v. Moor-Jankowski* (1991),[25] the issue involved constitutional limitations on libel law, and the remand brief noted two examples where the New York Court of Appeals expanded state speech doctrine, one of which specifically related to libel law. Interestingly, both of these precedents were available at the initial stage, but no state claim was made then. Other claimants noted statutory or common-law rules as a means to demonstrate

22. Haliburton v. State, 514 So.2d 1088 (Fla. 1987), supplemental brief of appellant on remand at 8.
23. State v. Mitchell, 504 N.W.2d 610 (Wis. 1993), defendant-appellant's memorandum of law on remand at 9–11.
24. Wyant, appellant's brief on remand at 8; State v. Robinette, 685 N.E.2d 762 (Ohio 1997), appellee's brief on remand at 10; American Association of University Professors, Central State University Chapter v. Central State University, 717 N.E.2d 286 (Ohio 1999), appellee / cross appellant's brief on remand at 13–14. The opinion cited was Arnold v. City of Cleveland, 67 Ohio St.3d 35 (1993).
25. Immuno AG v. Moor-Jankowski, 77 N.Y.2d 235 (1991), defendant-respondent's brief on remand at 45–46, 47–48 (citing Arcara v. Cloud Books, Inc., 503 N.E.2d 492 [N.Y. 1986] and O'Neill v. Oakgrove Construction, Inc., 523 N.E.2d 277 [N.Y. 1988]).

a state law commitment to the more protective rule. Often, the claimant sought to concoct a precedent that supposedly provided a controlling interpretation of the state provision without discussion. One of the clearest examples of this is in *Van Arsdall v. State* (1987)[26] on the issue of harmless-error analysis from the violation of a defendant's confrontation rights. The argument rested heavily on a precedent that rejected harmless error in a similar case on federal law grounds but that also cited the state constitutional provision. The claimant presented this cite as creating a controlling state precedent that harmless error was inappropriate regardless of any changes in federal law.

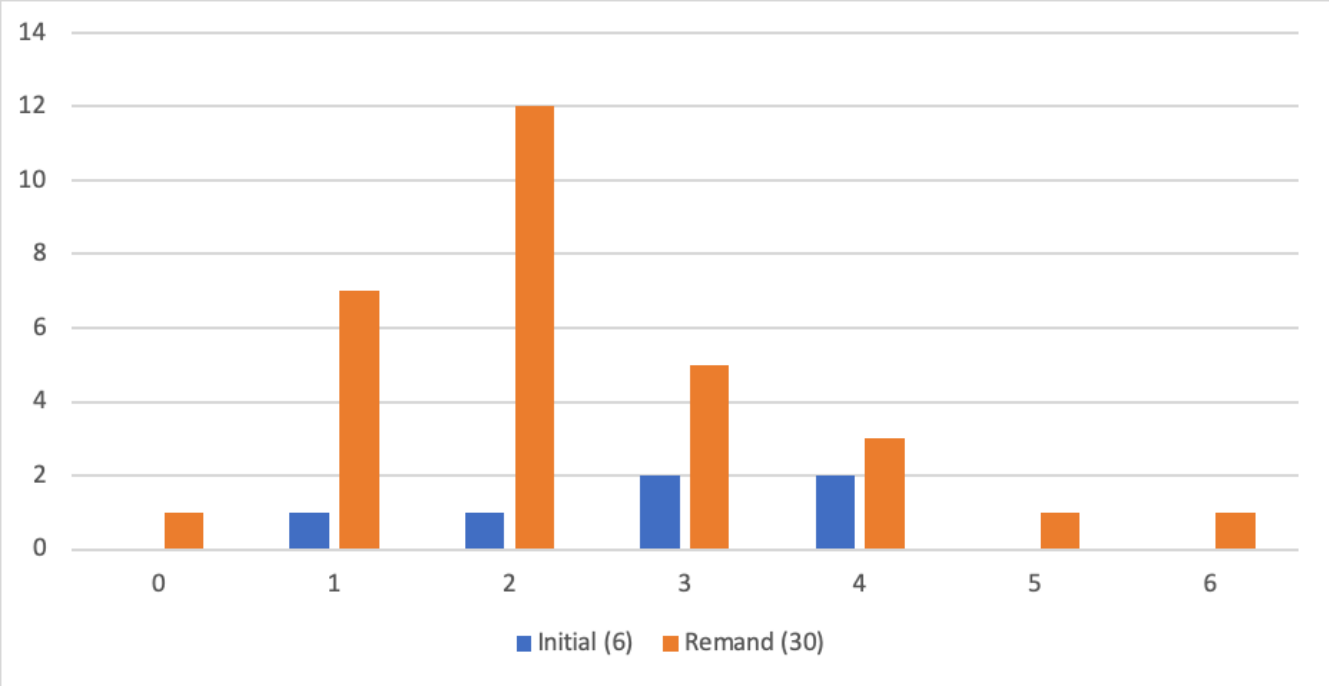

Figure 2: Total number of arguments

Figure 2 provides a rough complexity measure by totaling the number of legal factors cited by each rights claimant. Two-thirds of the claimants noted two or fewer factors in their state constitutional arguments, with the most common combinations looking to textual differences and home state law, as noted above. Interestingly, of the five briefs to note four or more of the factors, three[27] were cases with a state argument on initial appeal, suggesting that those lawyers may have

26. Van Arsdall v. State, 524 A.2d 3 (Del. 1987), defendant-appellant's brief on remand.
27. People v. Caballes, 851 N.E.2d 26 (Ill. 2006), defendant-appellant's brief on remand; State v. Recuenco, 163 Wash.2d 428 (2008), petitioner's brief on remand; Witters, respondent's brief on

been better prepared to expand on those arguments than lawyers who had to create a whole new argument from scratch. Figures 1 and 2 demonstrate that legal factors are certainly present in state constitutional arguments on remand, but most are utilized as an attempt to shore up the state court's initial supportive federal decision. The clearest evidence for this claim is the fact that virtually all of this same legal evidence was available on initial appeal, and yet twenty-four of the thirty arguments pressing state claims on remand were not mentioned in the initial appeal. Remand briefs are responding not to changes in state legal factors but to changes in federal law, and it is the policy underlying these changes that received significant attention.

While remand arguments almost always engaged in some of the legal arguments we might traditionally expect lawyers to make, nine remand claimants (30 percent) attacked the Supreme Court as being reckless in its actions. Some were relatively gentle and complained of how SCOTUS's decision was a "radically changed approach" or that its decisions were "curiously inconsistent."[28] Other claimants were more dramatic in their attacks. In a search and seizure case, the claimant argued that recent federal decisions were "eviscerating the Fourth Amendment's protection, culminating in last term's two rulings leaving only tattered remains of the federal exclusionary rule."[29] A claimant in another search and seizure case stressed the progressive diminution of rights at the federal level and wondered, given the major federal retrenchment, "what liberty interest and privacy rights have survived under the Fourth Amendment. It is thus left to [the Ohio Supreme Court] to determine whether any meaningful protections for Ohio citizens shall remain."[30] The single strongest attack on the Supreme Court came in a speech case from New York:

> Over the past decades the Supreme Court of the United States has slowly retreated from the expanded frontiers of liberty so painstakingly established by the "Warren" Court. The Supreme Court has radically revised traditional notions about the meaning and purpose of our Bill of Rights. Widespread inhibition of human rights resulting from a systematic repression of individual liberty has been seen by many of our high state courts as alarming and intolerable. Consequently, today state courts across the country are construing their own constitutions as providing broader individual protections than once afforded by their federal counterparts.[31]

remand. Part of the reason for more complex arguments may also be the fact that two of these cases were influenced by the Washington Supreme Court's strong adherence to a specific approach to state constitutional law (Price 2013).

28. State v. Carter, 596 N.W.2d 654 (Minn. 1999), appellant's brief on remand at 6; People v. Belton, 55 N.Y.2d 49 (1982), appellant's brief on remand at 5.
29. Commonwealth v. Sheppard, 476 N.E.2d 541 (Mass. 1985), appellant's brief on remand at 16.
30. Robinette, appellee's brief on remand at 19.
31. People v. Ferber, 57 N.Y.2d 256 (1982), appellant's brief on remand at 6.

Such claims add little to the weight of a legal argument and seem intended to undermine the natural deference toward SCOTUS in matters of constitutional law. If SCOTUS is acting in a reckless and dismissive manner, deference is undeserved and may actually be dangerous to the state's citizens. State courts have a duty to aggressively defend their citizens against these irrational actions through their state constitutions. While these kinds of overt attacks on SCOTUS's legitimacy are not the norm, nearly every remand argument attacked the policy behind the changes in federal law. These policy attacks form the most consistent argument in remand cases.

Policy arguments drew heavily on the logic of the US Supreme Court dissenters with secondary reliance on criticism from law reviews and other state courts. The most extreme example of this policy dominance came in *Commonwealth v. Sheppard* (1985), involving the good-faith exception to the exclusionary rule. The claimant argued that *Mapp v. Ohio* (1961) required exclusion of evidence to deter unconstitutional governmental behavior and, relying heavily on Justice Brennan's dissent from recognizing the good-faith exception (United States v. Leon 1984), that such deterrence is required for any abuse of constitutional rights regardless of whether the error was made by the courts or the police. The concern of search and seizure is the protection of the individual's rights and as well as the integrity of the judiciary itself even though "a majority of the current Supreme Court has abandoned the concept of judicial integrity."[32] Brennan's dissenting opinions crop up in a number of other cases, such as People ex rel. *Arcara v. Cloud Books* (1986), where the claimant quoted his dissenting opinion extensively to demonstrate how the SCOTUS doctrine was a "progressive denuding of First Amendment Rights" and how "sexually explicit but non-obscene [speech] has lost all but the surface veneer of its First Amendment Protection."[33] Other dissenting justices received similar attention. On remand in *Pap's A.M. v. City of Erie* (2002), the claimant stressed an earlier dissent from Justice White and stated that "Justice Stevens' dissent [in the SCOTUS reversal] is also extremely well reasoned and appropriately critical of the Supreme Court's plurality opinion" to demonstrate how the Supreme Court's fractured rulings on regulation of nude dancing establishments were flawed and unpersuasive.[34] A claimant in a right to counsel case from Texas similarly utilized Justice Breyer's dissenting opinion from the reversal to show how the Supreme Court's new decision, which the brief described as a "rejection of national consensus of court authority" on the Sixth Amendment, "would emasculate the protections of the guarantee of a 'right to counsel.'"[35]

Two search cases complained of trends in federal search law, but in opposite directions. In one

32. Sheppard, defendant's brief on remand at 22.
33. People ex rel. Arcara v. Cloud Books, 68 N.Y.2d 296 (1986), appellant's brief on remand at 23, 24.
34. Pap's A.M. v. City of Erie, 812 A.2d 591 (Pa. 2002), appellant's brief on remand at 16.
35. Cobb v. State, 85 S.W.2d 258 (Tex. Crim. App. 2002), appellant's brief on remand at 10, 11.

case, the claimant complained that SCOTUS decisions were based on "legal fictions" as opposed to the actual facts of the case "so as to better enable it to draw 'bright lines.'"[36] Another claimant, however, complained that the Supreme Court's flexible totality of the circumstances test simply reinforced abusive practices, that the state court should adopt bright-line tests to correct the disparity of power between police and citizens, and that such a bright-line rule is easier for the police to comply with anyway.[37] In a case on standing to challenge searches, another claimant argued that the state court's original decision would lead to better policing because it would hold police accountable for all illegal searches where SCOTUS had adopted a rule limiting the right to challenge a search to those with a reasonable expectation of privacy, a subjective standard.[38]

Finally, claimants invoked consequentialist arguments about the negative effects of SCOTUS's doctrinal shift. For example, a Florida claimant in *Haliburton v. State* (1987)[39] discussed the structural difference in Florida that gave broad latitude to prosecutors and how the federal rule on when counsel attached would permit prosecutors to time the filing of charges to avoid the presence of counsel during the criminal investigation. After SCOTUS held that statements made to a probation officer were not subject to Miranda warnings, a claimant stressed the danger of this rule, noting that "defense attorneys in Minnesota will understandably tell their probationer clients that whenever they even remotely suspect that information requested by their probation officers may be incriminating they should no longer discuss such information with the probation officer and demand to see their attorney at once."[40] This unfortunate outcome of SCOTUS's decision would undermine the purpose of probation and complicate the duties of probation officers more than necessary, something the state court could easily correct. Thus the warning was that state courts had a duty to correct the negative policy effects of the changing federal doctrine.

Do Courts Respond?

While this chapter is focused on exploring how lawyers argue cases, some attention to outcomes is reasonable. After all, if state courts never accept a state argument on remand, lawyers would be less inclined to offer such claims. Any implication drawn from outcomes is limited, however, by the fact that many variables influence judicial decisions. Of the thirty cases where the claimant asserted a state claim on remand, fourteen (47 percent) were accepted by the state supreme court.

36. People v. Long, 359 N.W.2d 194 (Mich. 1984), defendant's brief on remand at 23.
37. Robinette, appellee's brief on remand at 14–29.
38. Carter, appellant's brief on remand.
39. Haliburton, supplemental brief of appellant on remand at 8.
40. State v. Murphy, 380 N.W.2d 766 (Minn. 1986), appellant's brief on remand at 30–31.

In two other cases, the claimant won on alternative grounds. For the purposes of this study, I treat any decision that did not accept a state claim as a rejection even if it was not fully considered by the court.

Perhaps surprisingly, there was little concern with the failure to raise or preserve a state constitutional claim. The Michigan Supreme Court did express skepticism for the fact that the claimant "did not raise any state constitutional claims until he was before" SCOTUS, implying that it was a transparent attempt to avoid federal jurisdiction (People v. Long 1984, 197n4). Most state supreme court rejections expressed a preference for interpreting the state provision in lockstep with the federal provision, meaning that state law was identical to the federal doctrine. The Illinois Supreme Court engaged in an extended analysis of its history of refusing to interpret state constitutional rights independently, concluding that "we reaffirm our commitment to limited lockstep analysis not only because we feel constrained to do so by the doctrine of stare decisis, but because the limited lockstep approach continues to reflect our understanding of the intent of the framers of the Illinois Constitution of 1970. This court's jurisprudence of state constitutional law cannot be predicated on trends in legal scholarship, the actions of our sister states, a desire to bring about a change in the law, or a sense of deference to the nation's highest court" (People v. Caballes 2006, 44–45). The Minnesota Supreme Court similarly declared that its initial decision was based on the implicit assumption that the federal and state provisions were coextensive, and it saw no reason to alter that decision on remand even though it had specifically ordered briefing on the state constitution (State v. Carter 1999). The Texas Court of Criminal Appeals not only rejected the state argument but criticized the claimant for invoking federal dissenters: "Appellant must do more than merely argue that the Supreme Court majority 'got it wrong,' the dissent 'got it right,' and therefore, Texas courts should follow the dissent rather than the Supreme Court majority on this constitutional issue" (Cobb v. State 2002, 267).

In nearly half of the cases, the state court accepted the state claim and at times appeared to embrace an argument for avoiding federal retrenchment. In siding with George Upton, the Massachusetts Supreme Judicial Court held that the federal totality of the circumstances test "lack[ed] the precision that we believe can and should be articulated in stating a test for determining probable cause" (Commonwealth v. Upton 1985, 556). The Florida Supreme Court directly rejected the policy of a recent SCOTUS decision with primary reliance on Justice John Paul Stevens's dissent in that decision (Haliburton v. State 1987, 1090). Twice the Washington Supreme Court offered a limiting interpretation of the intervening SCOTUS decision but then turned to state law as firmer ground for the decision. In one case involving a recent SCOTUS change in free exercise of religion doctrine, the Washington court admitted it could distinguish this decision but that it would "eschew the 'uncertainty' of [SCOTUS's decision] and rest our decision also on independent" state grounds (First Covenant Church v. City of Seattle 1992, 223). Similarly, in a case involving recent death penalty jurisprudence, the Washington court responded to its own

dissenting justice that if the majority happened to misunderstand federal doctrine, the same result was required under state law (State v. Bartholomew 1984).

This finding suggests that state courts are open, some of the time, to direct avoidance of recent SCOTUS decisions. That occasionally, the policy arguments work. Of course, this is not to argue that state constitutional decisions lack legal legitimacy. Policy-based arguments have always been an element of legal decision-making. Nor do I mean to imply that these decisions rely exclusively on such grounds. For example, the Washington and Minnesota decisions rejecting federal retrenchment in free exercise engaged in an analysis of text, history, and prior judicial experience in addition to any policy objections.

Conclusion

The findings here fit with the expectations. Lawyers rarely offer state constitutional arguments without some strong signal—the strongest signal being the rejection of a federal rights argument by SCOTUS. As this forecloses the area completely, or nearly so, claimants have little choice but to either abandon the issue or turn to state constitutions as a second-best alternative. And that is how lawyers treat state constitutions, as second best. Lawyers on remand discover a state alternative that tends to focus as much or more on the policy critiques of SCOTUS as state legal sources.

This has two broader implications, first for the study of strategies after courtroom defeats. Too often, scholars treat a definitive SCOTUS decision as the end of a dispute. Social movements have found ways to turn courtroom losses into benefits in a variety of ways. Regular claimants, however, have less use for such benefits, and understanding how they react to losses expands our knowledge of strategic legal action after losses. Naturally, scholars focus on the level of decision-making that has the broadest potential policy impact. As federal constitutional law applies nationally, the focus tends to be there. Claimants, however, have a number of legal options available to them, and as this study shows those claims are often viable means of achieving victory. The policy impact will obviously be more limited (to within a single state), but the claimant still wins her narrow goal whether it be reversing an administrative decision, invalidating a state statute, or reversing a criminal conviction. This suggests the value of better understanding the full range of legal claims that a litigant develops to evaluate the broader context of litigation. These strategies may include constitutional ones—whether federal or state—but also statutory, administrative, or even common-law alternatives.

The second implication is for the study of state constitutional law. Studies have long found that state constitutional rights law is underdeveloped. State courts infrequently rely on state rights

provisions, preferring to rely on federal doctrine. One criticism of state constitutionalism is that it is reactive not to state legal concerns but ideological differences with changing federal doctrine. The findings here may modify that criticism in part because courts respond to the arguments presented to them. If lawyers primarily offer state constitutional claims where federal law retrenches, then state courts may be less to blame than the critics suggest. Of course, the failure to raise, brief, and argue state constitutional claims also extended the legal process unnecessarily. In nearly half of the cases studied here, the claimant eventually won on a state claim but only after a SCOTUS appeal that added time and costs to the claimant involved.

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Class Activity

Examine your state constitutional bill of rights. What provisions are most surprising to you? How does it differ from the federal Bill of Rights? What makes those differences meaningful?

Many first-generation constitutions in the 1780s and 1790s have provisions like this one from Vermont (Ch. I Art. 13): "That the people have a right to freedom of speech, and of writing and publishing their sentiments, concerning the transactions of government, and therefore the freedom of the press ought not to be restrained." Why do you think it uses *ought* instead of *shall* as in the First Amendment?

Judges

To what extent is the American bench representative of the US population? And do the lived experiences that women and racial or ethnic minorities bring to the bench make a difference? The bench is a political institution in a democratic republic, so there is a broad interest in ensuring that these agents of government are representative of their principal—the citizens. In this section, we present six chapters that examine the nature and/or effect of the representation of the judges sitting on the American bench. Professor Greg Goelzhauser's chapter explores the connection between state judicial selection systems and the intersectional diversity of their courts. He finds there are systematic patterns—namely, appointive systems are more apt to result in benches with intersectional diversity than are elective systems. Professor Jeanine Kraybill takes up the question of whether women US Supreme Court justices use different principles of legal reasoning (a women's voice) in their written opinions than do their male counterparts. Using computer-assisted text analysis, she finds some differences between female and male justices in the use of legal reasoning, but not of the nature she expected. In the end, she shows there are patterns of differences in the use of legal principles in the justices' written opinions and that the female justices do not have a monolithic writing style. Professor Kraybill continues this focus and examines whether male and female judges perceive their treatment as members of the judiciary and their role and place in the legal profession differently. Using the California state judiciary as her potential subject pool, she surveys judges and finds that male and female judges do indeed have different perceptions and experiences, and this is, indeed, related to their gender. Professors Shane Gleason, Scott Comparato, and Christine Bailey explore whether the citation of precedent from one state to another is affected by the gender of the author and thus whether a different voice inhibits (or not) the diffusion of precedent and its influence on policy beyond immediate state borders. Professor Kristen Renberg examines a similar question at the US Courts of Appeals. Also examining the voluntary citation of precedent, Renberg considers judicial attributes beyond gender and court-level characteristics to determine what factors again influence the flow of precedent across the regional appellate courts. Next, Jeknic et al. examine the judicial selections of President Trump through the lens of diversity and inclusion. They find that Trump's judicial cohort was paler and more testosterone-driven than the cohorts of more recent presidents (Obama, G. W. Bush, and Clinton). In other words, Trump appointed judges as if it was 1980 rather than 2020. Despite the record number of judges placed on the bench, the overall impact was somewhat blunted by the larger number of active and senior-status judges continuing to serve. They discuss the significant implications of this lack of descriptive representation on the legitimacy and support for the courts, as do other authors in this section. Finally, Professor Craig Smith looks at the more toxic side of representation—specifically, those instances when a justice's association with an interest in or party to a case is so close that the justice's objectivity and

impartiality are brought into question. It is under these circumstances that recusal is considered. Using Justice Tom Clark's recusal decisions as a case study, Professor Smith seeks to unpack the set of conditions that moved Justice Clark to recuse himself. In his analysis, Professor Smith shows the recusal decision to be a highly personal one that is affected by the stakes of the case and the justice's preferences. When the stakes are high and justices' preferences are engaged, they will rarely recuse themselves. Once again, then, we see the importance of judicial attitudes coming to the fore.

Goelzhauser, Greg. "Intersectional Representation on State Supreme Courts."

Kraybill, Jeanine. "Women of SCOTUS: An Analysis of the Different Voice Debate."

Kraybill, Jeanine. "In a Different Voice: An Analysis of How California State Judicial Officers View Gender Dynamics on the Bench."

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Renberg, Kristen. "The Transmission of Legal Precedent in the US Court of Appeals."

Jeknic, Petar, Rorie Spill Solberg, Eric N. Waltenburg, and Christopher Stout. "Trump's Judges and Diversity: Regression to the Mean or Remaking the Judiciary?"

Smith, Craig A. "The Appearance of Justice."

4. Intersectional Representation on State Supreme Courts

GREG GOELZHAUSER

The legal profession's history of discrimination against women and people of color is well documented. But women of color face unique hurdles to equal professional treatment (see, e.g., Blackburne-Rigsby 2010; Burleigh 1988; Collins, Dumas and Moyer 2017; Smith 1997). An American Bar Association (2006) survey reports, for example, that lawyers who are women of color are more likely to face workplace harassment, receive insufficient professional mentoring, be denied high-profile client assignments, and receive negative performance evaluations. As one state judge put it, "Women of color in the justice system of our nation, whether judge, attorney, or court staff suffer a double disadvantage—gender discrimination and ethnic bias" (Aranda 1996, 29).

Although the study of state judicial diversification is thriving (e.g., Arrington 2018; Bratton and Spill 2002; Goelzhauser 2016; Graham 1990; Hurwitz and Lanier 2003; Reddick, Nelson, and Caufield 2009), much of it emphasizes single-axis representation, particularly the separate seating of women and people of color. In contrast, intersectionality research "emphasizes the interaction of categories of difference (including but not limited to race, gender, class, and sexual orientation" (Hancock 2007, 63–64). Scholars have noted in other contexts that the double disadvantage women of color experience conditions the relationship between institutions and representation.[1] As Scola concludes in a study of intersectional legislative representation, "The process seems to be more complex than what is captured by race/ethnicity or gender separately" (2013, 344). Thus it is imperative to examine whether institutional design choices differentially impact intersectional representation.

This chapter considers the relationship between judicial selection institutions and the representation of women of color on state supreme courts. It begins with an overview of intersectionality and the law and continues with a theoretical consideration of the connection between selection institutions and diversification. The subsequent empirical analysis offers two contributions. First, I highlight the groundbreaking women of color who diversified state supreme courts—a group of people who have largely not been recognized for their achievement. Second, using data from 1960 through 2016, I examine whether selection institutions are associated with intersectional differences in seating new state supreme court justices. The results suggest that

1. For broader discussions of intersectionality and politics, see Collins and Bilge (2016), Grabham et al. (2008), and Hancock (2016).

women of color are more likely to be seated through appointment mechanisms. The results are similar for men of color, but white men are more likely to be seated through elections. Selection system differences are not associated with changes in the probability of seating white women. These findings contribute to the nascent literature on intersectional judicial representation (see, e.g., Collins and Moyer 2008; Haire and Moyer 2015; Hurwitz and Lanier 2008, 2017; Solberg and Diascro 2019). They also have important policy implications for designing judicial selection institutions.

Diversity, Intersectionality, and the Courts

Understanding judicial diversification is important for several reasons. As an initial matter, the descriptive representation of women and people of color in political institutions can increase trust, engagement, and perceptions of legitimacy (see, e.g., Bobo and Gilliam 1990; Broockman 2014; Gay 2002; Mansbridge 1999; Reingold and Harrell 2010; Wolak 2015).[2] With respect to the courts, for example, support for the judiciary increases among black respondents with the number of black judges (Scherer and Curry 2010). And regarding intersectional judicial representation in particular, scholars have suggested that increasing the number of women of color on the bench will "hold strong symbolic meaning, instill greater confidence in the courts for all the litigants who come before them, and increase general confidence in the system of democracy in the country" (Fricke and Onwuachi-Willig 2012, 1542).

Greater representation can also influence judicial decision-making. Crenshaw's (1989) seminal article on the difficulty of proving intersectional discrimination claims highlights how a lack of perspective can shape legal doctrine. In one case involving alleged employment discrimination brought "on behalf of black women," a federal district court held that plaintiffs were "not . . . allowed to combine [gender- and race-based] statutory remedies to create a new 'super-remedy' which would give them relief beyond what the drafters of the relevant statutes intended" (*DeGraffenreid v. General Motors* 1976, 143). Thus plaintiffs could raise separate gender and race discrimination claims but could not base a cause of action on intersectional discrimination. As a result, evidence of nondiscrimination against women (even if that evidence involved, for example, only white women) could be used to defeat gender discrimination claims, and evidence of

2. Although much of the literature on the effects of descriptive representation focuses on the presence of either women or people of color, studies exploring the consequences of intersectional representation are increasing (see, e.g., Stokes-Brown and Dolan 2010).

nondiscrimination against people of color (even if that evidence involved, for example, only black men) could be used to defeat race discrimination claims.

Empirical evidence also suggests that women of color fare worse in court. One early study of employment discrimination claims in California finds that win rates and damage awards are lower in cases brought by black women than by black men or other women (Oppenheimer 2003, 544–45). Analyzing a national sample of federal equal employment opportunity cases from 1965 through 1999, another study finds that intersectional discrimination claims are increasing but only about half as likely to succeed; moreover, women of color are less likely to win (Best et al. 2011). Furthermore, the results indicate that women of color are the least likely gender-race intersection to win. Although win rates are similar for men and women generally, the "intersectionality penalty" (1009) results in women of color faring worse than expected when examining the data through a single-axis framework.

There is mixed single-axis evidence on whether judges who are women (e.g., Gryski, Main, and Dixon 1986; Martin and Pyle 2005; Songer, Davis, and Haire 1994) or people of color (e.g., Farhang and Wawro 2004; Scherer 2005; Welch, Combs, and Gruhl 1988) decide cases differently. At the federal level, black circuit court judges are more likely to support affirmative action policies, as are white judges assigned to a panel with a black judge (Kastellec 2013). A study exploring the relationship between gender and judicial decision-making on federal circuit courts finds few differences between men and women overall but notes that women are more likely to support plaintiffs in gender discrimination cases, as are white judges assigned to a panel with a woman (Boyd, Epstein, and Martin 2010). At the state level, supreme court justices of color are more likely than white justices to overturn convictions (Bonneau and Rice 2009).

Race and gender differences are also manifest in other aspects of judicial behavior. For example, there are gender-based differences in the types of experience men and women bring to the bench (Martin 1990), state apex court justices who are women or people of color are more likely to dissent in cases that are salient to members of those groups (Szmer, Christensen, and Kaheny 2015), men and women have different opinion-writing styles (Davis 1992), federal circuit court panels that include women or people of color produce opinions with different characteristics regardless of whether a woman or person of color writes the opinion (Gill and Hall 2015), and judges of color are more likely "to adopt a nonmainstream approach" and "experiment with alternative theories" in sentencing guideline cases (Sisk, Heise, and Morriss 1998, 1459). Although much of this literature adopts a single-axis perspective, findings of difference are prominent.

As more women of color join the bench, scholars are increasingly studying the link between intersectionality and substantive judicial representation.[3] One study of judicial behavior in federal

3. Studies of intersectional legislative representation are more prominent (see, e.g., Barrett 1995;

circuit court criminal cases finds that women of color are more likely than judges with other gender-race combinations to vote for defendants (Collins and Moyer 2008). Another study reports that black women exhibit distinct tendencies to dissent from majority dispositions on state high courts (Szmer, Christensen, and Kaheny 2015). And an analysis of opinion content finds that intersectional representation has important implications for how many points of law judicial opinions cover (Haire, Moyer, and Treirer 2013). Furthermore, black women are more likely than white men to vote liberally in gender discrimination cases decided by federal circuit courts (Haire and Moyer 2015).

Selection Institutions and Judicial Diversification

The literature on state court diversification emphasizes the potential importance of judicial selection institutions. While Article III judges are seated by presidential nomination and Senate confirmation, state judicial selection mechanisms vary considerably. The primary selection methods include unilateral gubernatorial or legislative appointment, commission-aided gubernatorial appointment, and contestable nonpartisan or partisan elections. Along with diversity, selectors emphasize characteristics such as experience, temperament, and ideology. Given that selection institutions are designed for myriad reasons, there is no strong a priori theoretical justification for rank ordering them with respect to success in promoting diversity—much less the representation of women of color in particular. The existing empirical evidence on the relationship between selection institutions and diversification offers some a posteriori guidance but is mixed.

Under commission-aided gubernatorial selection, interested lawyers apply to fill a judicial vacancy, a commission typically comprising lawyers and nonlawyers selects a short list of nominees from the applicant pool, and the governor appoints one of the nominees. Early proponents of "merit selection" argued that it would prioritize qualifications over political connections. After President Carter experimented with commissions to help diversify the federal bench, supporters argued that use of the system would enhance representation for historically disadvantaged groups at the state level. The core argument is that emphasizing qualifications over political connections increases opportunities for marginalized groups. Capturing the prevailing sentiment among many merit selection proponents, one scholar argues, "There is no question but that the merit selection system affords greater opportunities for women and minorities to find

Bratton, Haynie, and Reingold 2006; Brown 2014; Darcy, Hadley, and Kirksey 1993; Hardy-Fanta et al. 2006; Hughes 2011, 2013; Scola 2006, 2013).

their way to the bench" (Krivosha 1987, 19). Although arguments concerning merit selection rarely focus on intersectional representation in particular, perhaps the broader emphasis on diversity increases opportunities for women of color.

Proponents of other selection systems are typically less explicit about whether or how their favored mechanisms impact diversity. A possible benefit of unilateral elite appointment systems is that selectors are free to seek out prospective judges from the broader pool of qualified attorneys. Whereas choice is constrained under merit selection by applicant and nominee pools, and in elections by who runs for office, unilateral appointers can reach out to individuals who may not otherwise seek judgeships. This may be particularly important for attracting members of doubly disadvantaged groups. Unilateral appointment systems also facilitate holding stakeholders accountable for a lack of diversity. In merit selection systems, for example, it may be difficult to observe the extent to which a lack of diversity is due to pool imbalance, nomination decisions, or appointment decisions. In election systems, responsibility for a lack of diversification is likely to be more diffuse. Conversely, critics of unilateral elite appointment contend that unconstrained selectors use their power for patronage, in which case women of color may be disfavored due to their historical political underrepresentation.

Numerous arguments have been made for (e.g., Bonneau and Hall 2009) and against (e.g., Geyh 2003) judicial elections. However, this debate typically emphasizes issues such as voter knowledge, campaign dynamics, and legitimacy rather than diversity (see, e.g., Bonneau and Cann 2015; Cann and Yates 2016; Gibson 2012; Hall 2015). Two features of the broader political landscape drive concerns about elections and diversity. First, women and people of color may be more reluctant to run for office (e.g., Fox and Lawless 2005). Second, implicit bias may suppress support for underrepresented candidates (e.g., Weaver 2012). One scholar offered a hypothetical rebuttal to diversity arguments against judicial elections, suggesting that appointments "will often be white-shoe affairs subject to capture and cronyism and liable to scant diversity along any number of dimensions," while "elections, at least, are covered by the Voting Rights Act" (Pozen 2008, 295). More practically, judicial elections may be uniquely suited to generate quick and sizeable increases in diversity. In 2018, for example, seventeen black women were elected to the bench in Harris County, Texas (encompassing Houston), representing an 850 percent increase in the number serving (Schneider 2019).

The existing empirical literature offers insight into the relationship between selection institutions and state court diversification. Using a variety of samples and modeling strategies, numerous studies find no relationship between selection system choice and judicial diversity (e.g., Alozie 1990, 1996; Graham 1990; but see Martin and Pyle 2002). For example, selection system choice is largely unassociated with the pace at which states first diversified their apex courts (Goelzhauser 2011). And there is no consistent relationship between selection institutions and the number of

women or people of color serving on state supreme courts in 1985, 1999, or 2005 (Hurwitz and Lanier 2003, 2008).

The most comprehensive studies leverage decades of data on state supreme court seatings to better understand the relationship between selection institutions and diversification. Examining seatings from 1980 through 1997, Bratton and Spill (2002) find that appointment systems are more likely to produce justices who are women. And data on seatings from 1960 through 2014 suggest that women are more likely to be seated under unilateral elite appointment than merit selection, with no meaningful difference between merit selection or unilateral appointment and elections; furthermore, people of color are more likely to be seated under unilateral elite appointment or merit selection than elections, with no discernable difference between appointment systems (Goelzhauser 2016).

Other research streams yield important insights about specific selection mechanisms and diversity. Under merit selection, for example, there is evidence that commissions are less likely to nominate women (Goelzhauser 2018a). Survey evidence reveals that attorneys who are women express more interest in seeking judgeships under merit selection while there is no race differential (Jensen and Martinek 2009). Evidence from submitted applications, however, finds no gender differential with respect to expressive ambition and no gender or race differential with respect to progressive ambition (Goelzhauser 2019). Furthermore, the extent to which the design of merit selection systems facilitates commission capture is not associated with diversification (Goelzhauser 2019).

Under elections, survey evidence reveals that attorneys who are women express more interest in running for office while there is no race differential (Williams 2008). Evidence from other institutional contexts suggests that members of historically underrepresented groups exhibit more election aversion (e.g., Kanthak and Woon 2015), receive less elite encouragement to run for office (e.g., Lawless and Fox 2010), and suffer from stereotyped perceptions that discourage entry (e.g., Dolan 2010). Contrary to appointers, though, voters are no less likely to support the selection of women with other women in office (Solberg and Stout n.d.; Bratton and Spill 2002). And there is evidence that once on the bench, members of underrepresented groups do not suffer an electoral penalty (Frederick and Streb 2008; Gill and Eugenis 2019; Hall 2001; Solberg and Stout n.d.). Members of marginalized groups do, however, receive biased performance ratings leading up to retention elections (Gill 2014; Gill, Lazos, and Waters 2011).

Empirical Analysis

Are women of color more likely to be seated under certain judicial selection systems? The

empirical analysis proceeds in two steps. First, I provide descriptive information on the first women of color seated on state apex courts. Although the first women of color to serve in the federal judiciary are well known, no systematic information exists about women of color on state courts. As a result, these groundbreaking women have not been collectively recognized, and many of their stories are largely unknown. To recover this history, I gathered information on all state supreme court justices seated from 1960 through 2016 from a variety of sources, including biographies, press releases, and newspaper articles (see Goelzhauser 2016). Second, I analyze the relationship between selection institutions and the seating of women of color on state supreme courts. While emphasizing women of color, the analysis provides comparable results for other gender-race combinations.

The First Women of Color on State Supreme Courts

The history of women of color on the federal bench is comparatively well known. Constance Baker Motley became the first woman of color to hold an Article III judgeship and serve on a district court when she was nominated to the US District Court for the Southern District of New York by President Johnson in 1966—seventeen years after the first woman (Burnita Shelton Matthews) and twenty-nine years after the first person of color (William Henry Hastie Jr., who was also the first person of color to hold an Article III judgeship). Amalya Lyle Kearse was the first woman of color seated on a federal circuit court after being nominated to the US Court of Appeals for the Second Circuit by President Carter in 1979—forty-five years after the first woman (Florence Ellinwood Allen, also the first woman to hold an Article III judgeship) and twenty-nine years after the first person of color (William Henry Hastie Jr.). And Sonia Sotomayor became the first woman of color seated on the US Supreme Court after being nominated by President Obama in 2009—twenty-eight years after the first woman (Sandra Day O'Connor) and forty-two years after the first person of color (Thurgood Marshall). It is notable that in each instance, seating the first woman of color took considerably longer than seating either the first white woman or man of color.

In the states, Dorothy Comstock Riley, who was Hispanic, may have been the first woman of color seated on a state apex court when governor William Milliken appointed her to the Michigan Supreme Court in December 1982. For comparison, Florence Ellinwood Allen, who as noted previously was the first woman to hold an Article III judgeship, was the first woman to serve as a state supreme court justice with her election by Ohio voters in 1922. And Jonathan Jasper Wright, an African American appointed to the South Carolina Supreme Court by the state legislature during Reconstruction in 1870, may have been the first man of color seated on a state apex court. The next black justice was not seated until Otis M. Smith was appointed to the Michigan Supreme

Court in 1961 (see Goelzhauser 2011, 762–763). Thus as with federal firsts, the first woman of color to sit on a state high court did so well after the first white woman and man of color.

Justice Riley spent her career in private practice before serving as a trial and appellate court judge. Riley lost an electoral bid for the Michigan Supreme Court in November 1982, but outgoing Republican governor William Milliken appointed her to an interim position when an incumbent justice named Blair Moody died a few weeks after being reelected. To prevent the incoming Democratic governor James Blanchard from filling the seat, Milliken appointed Riley to serve Moody's new term even though it had not started. After this maneuver was challenged by the Blanchard administration, the Michigan Supreme Court (with Justice Riley recused) ruled that Justice Riley's interim appointment was only valid through the end of Blair's previous term (*Attorney General v. Riley* 1983). As a result, Riley's initial tenure lasted from December 9, 1982, through 12:00 p.m. on January 1, 1983. In 1984, however, Riley was elected to the court for a full term and served until 1997, when she resigned due to the onset of Parkinson's disease.[4] Despite perhaps being the first woman of color seated on a state high court and the only woman of color seated twice during the sample period, her racial identity was seldom mentioned at the time of initial appointment, subsequent election, or death (see, e.g., Associated Press 2004).

Bernette Joshua Johnson was the only other woman of color to be initially seated on a state apex court through election during the sample period. In 1988, the US Court of Appeals for the Fifth Circuit held that Louisiana violated the Voting Rights Act by combining Orleans Parish and its large percentage of black voters with three predominantly white parishes for the purpose of electing two state supreme court justices while other parishes elected a single justice each; the court found it "particularly significant that no black person has ever been elected to the Louisiana Supreme Court" (*Chisholm v. Edwards* 1988, 1058). To remedy black vote dilution in Orleans Parish, Louisiana entered into a consent decree, deferring redistricting but agreeing to create an intermediate appellate court judgeship for Orleans Parish that would immediately be assigned to the state supreme court, thereby increasing the latter's size from seven to eight justices (see *Perschall v. Louisiana* 1997). Johnson, who had been a trial court judge, finished second in a three-way Democratic primary race, which would have resulted in a runoff election except that the white first-round winner withdrew, claiming her presence "threatened to 'permanently scar' race relations in New Orleans" amid arguments by Johnson and another black candidate that the position should be filled by a black judge in light of the reason for its creation (Orlando Sentinel 1994). After redistricting in 2000, Justice Johnson ran unopposed for reelection to a regular seat,

4. For biographical details from the Michigan Supreme Court Historical Society, see http://www.micourthistory.org/justices/dorothy-riley/.

and the court was reduced in size back to seven seats. Johnson was reelected unopposed again in 2010.[5]

Juanita Kidd Stout became the first black woman to sit on a state's highest court when governor Robert Patrick Casey Jr. appointed her to the Pennsylvania Supreme Court in 1988. Stout was a music teacher in her home state of Oklahoma before pursuing a career in law after working as a legal stenographer during World War II (Thomas 1998). Stout's legal experience included private practice and service as an assistant district attorney before receiving an interim appointment to the municipal bench in 1959 (Adams 2015). By retaining her position in a subsequent election, she became the first black woman elected to any court in the United States (Thomas 1998). After Stout's 1988 appointment to the Pennsylvania Supreme Court, she was forced off the bench in 1989 upon reaching the mandatory retirement age. In 1998, Justice Stout died of leukemia.

Joyce Kennard may have been the first Asian American woman to sit on a state's apex court when governor George Deukmejian appointed her to the California Supreme Court in 1989. Kennard was born in Indonesia, where her family was detained in a Japanese internment camp before moving to the Netherlands after World War II (Dolan 2014). With English as a third language, Kennard later immigrated to the United States, where after law school she worked as a deputy attorney general and research attorney for a state appellate court. Her judicial career progressed swiftly; she served as a municipal court judge, superior (trial) court judge, and appellate court judge before joining the California Supreme Court (Kort 1993). In 2014, at the age of seventy-two, Justice Kennard retired on the twenty-fifth anniversary of her appointment to California's high court, declaring, "I'd like to finally make time for my long-neglected friends" (Egelko 2014).

5. For additional details on the aftermath of the consent decree, see Chisom v. Jindal (2012). There is some dispute concerning whether Justice Johnson was first elected to the Louisiana Supreme Court in 1994 or 2000 given that the initial position was a specially created intermediate appellate court seat assigned to the state supreme court. This question resulted in litigation when a disagreement arose as to who was next in line by seniority to become chief justice, Johnson or an individual who was first elected in 1995. In creating the redistricted position Johnson secured in 2000, Louisiana law stipulated that "any tenure on the supreme court gained by [the judge elected to fill this position] while so assigned to the supreme court shall be credited to such judge" (706). Referencing this provision and parts of the consent decree stating that the position would effectively be equivalent to a supreme court seat, a federal district court held that Justice Johnson's time on the state supreme court began in 1994, and she ultimately became chief justice in the disputed contest. As a result of these factors, I classify Justice Johnson as being first seated in 1994.

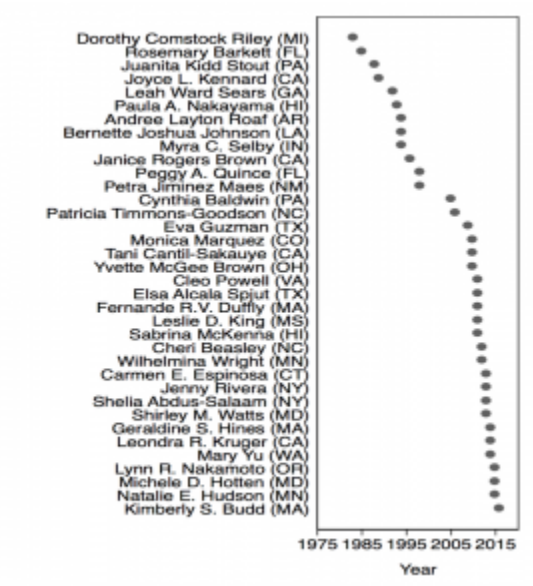

Figure 1: Women of Color Seated on State Supreme Courts, 1960–2016.

Overall, women of color accounted for 2 percent of state supreme court seatings from 1960 through 2016. During the same period, women and men of color, respectively, accounted for 17 percent and 9 percent of seatings. After 1982, when the first woman of color was seated on a state apex court, 4 percent of the seatings through 2016 were women of color compared to 26 percent and 13 percent for women and men of color, respectively. Figure 1 plots the name and year seated for each woman of color to join a state high court during the sample period. In total, twenty-two states seated women of color on their apex courts during this time. Women of color secured 2 percent of seatings in the 1980s, 3 percent in the 1990s, 1 percent in the 2000s, and 11 percent from 2010 through 2016. For comparison, figure 2 plots the percentage of seats obtained by decade for women of color, men of color, white women, and white men. Of the seatings on state supreme courts involving women of color, 57 percent of the justices were black, 24 percent were Hispanic or Latina, 16 percent were Asian or Pacific Islander, and 3 percent were Asian and Latina.

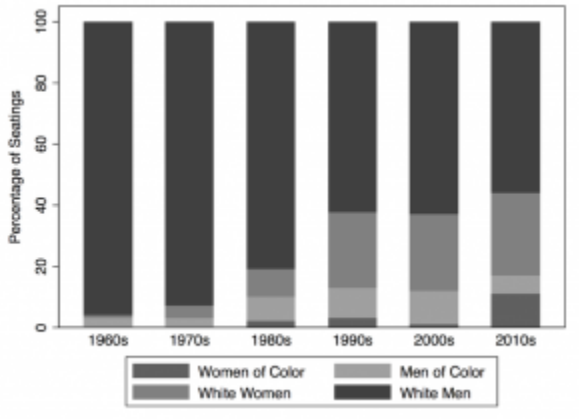

Figure 2: Seatings by Decade

Quantitative Analysis

The quantitative analysis employs justice-level data on all new seatings to state supreme courts from 1960 through 2016. The primary dependent variable is scored 1 when a newly seated justice was a woman of color and 0 otherwise. For comparison, I fit separate models for seating men of color, white men, and white women. Combining women from different race and ethnic categories is inconsistent with the overarching emphasis of intersectionality research on treating members of different disadvantaged statuses separately. However, this approach is necessary at this time due to the few women of color to be seated on state high courts. As Scola explained when combining race and ethnic categories in a study of intersectional legislative representation, "While this justification may not be wholly satisfying (for the reader or the author), collapsing the data was necessary to have a sufficient number of cases to test the model" (2013, 341). The key explanatory variables are indicators for whether justices were seated under unilateral elite appointment (gubernatorial or legislative), merit selection, or contestable elections (partisan or nonpartisan).[6] This categorization reflects core institutional similarities but is also driven by the paucity of women of color seated across more finely delineated classifications.[7]

6. It is notable that women of color are regularly seated through interim appointments. Of the twenty-six women of color appointed to state supreme courts during the sample period, fifteen (58 percent) received interim appointments.
7. Measurement of the key explanatory variables is straightforward with the exception of merit selection (see Goelzhauser 2018b). States are classified as employing merit selection if they have a statute or constitutional provision mandating that a commission winnow applications and nominate a short list of individuals from which the governor makes an appointment.

Omitted variable bias occurs when excluding predictors that are correlated with the dependent variable and key explanatory variables. As a result, the models include several control variables that may be associated with state selection system choice and diversification. Previous research indicates that members of underrepresented groups may be more disadvantaged as position value increases. To capture position value, I include an index of state court professionalism (Squire 2008), term length in years, number of court seats, and an indicator for use of a mandatory retirement rule.[8] While each measure captures position value, having shorter terms, more seats, and mandatory retirement may also induce turnover, thereby increasing opportunities for members of disadvantaged groups. Eligibility pool controls account for the number of attorneys in a state who are women or people of color.[9] Since the effect of pool size may be nonlinear, with increases at the low end in the number of attorneys from underrepresented groups mattering more than at the high end, I take the natural log transformation of the raw counts. Given that women of color are generally more likely to secure political office as state liberalism increases (e.g., Scola 2006), I include a dynamic measure of citizen ideology (Berry et al. 1998). Last, because of changes in the likelihood of seating women of color over time, I account for time dependence by including variables counting the number of years since the start of the sample period, the number of years squared, and the number of years cubed (Carter and Signorino 2010).

Logistic regression can be used to model binary outcomes, such as whether a woman of color is seated on an apex court. Due to the infrequency of seating women of color, which can bias substantive effects downward, the models are fit using a rare event correction for logistic regression (King and Zeng 2001a, 2001b). Standard errors are clustered by state to account for the fact that observations within a state are not independent, which can lead to incorrect standard errors (Primo, Jacobsmeier, and Milyo 2007). Table 1 in the appendix displays the full results. Table 2 in the appendix displays the results using a multinomial choice model as an alternative estimation strategy. The results are consistent across specifications. Focusing on substantive effects, figure 3 plots first differences for pairwise comparisons of gender and race across selection methods. The effects seem small, but this is often the case with rare event data. To better examine substantive impact with rare event data, King and Zeng suggest examining relative risks, which "are typically considered important in rare event studies if they are at least 10–20 percent" (2001a, 152).

8. The term length variable takes a value of thirty in state years with no applicable terms.
9. The attorneys of color variable combines census information on the number of black and Hispanic attorneys in a state. Census data are not as extensive with respect to the number of Asian American attorneys by state.

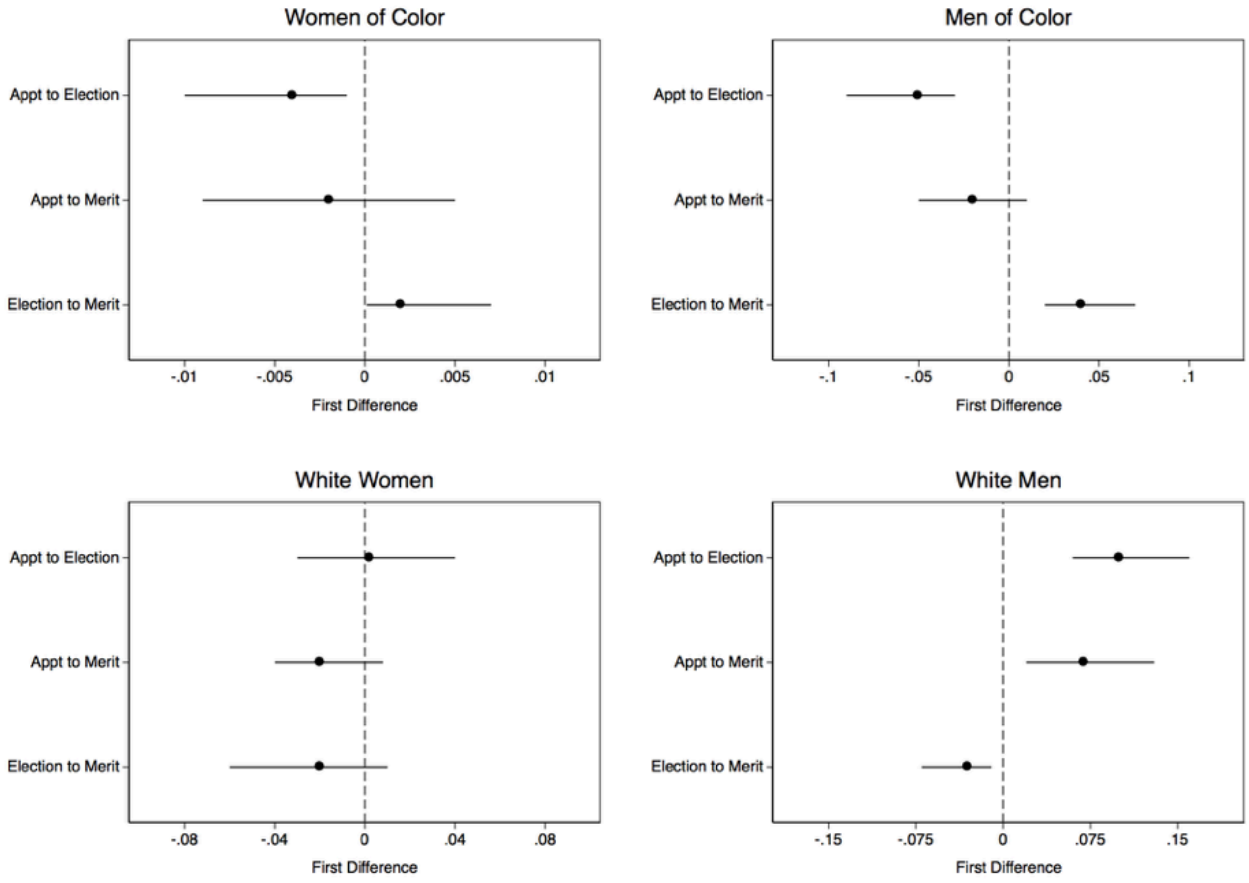

Figure 3: Predicted Probabilities

Overall, the results indicate that selection system choice is associated with the likelihood of seating women of color on state supreme courts. As an initial matter, the difference between elite appointment and merit selection is not statistically distinguishable from zero. However, both appointment systems are more likely than elections to produce justices who are women of color. Moving from elite appointment to election is associated with an −88 percent (−97 percent, −40 percent) decrease in the relative risk of seating a woman of color.[10] Moving from election to merit selection is associated with a 316 percent (5 percent, 1,692 percent) increase in the relative risk of seating a woman of color.

Compared to other gender-race combinations, the results for women of color are most similar to those for men of color. The results are more distinct when compared to white men and women,

10. All quantities of interest are calculated by setting mandatory retirement to its mode (yes) and other variables to their means. Parentheses include 95 percent confidence intervals.

which in turn are distinct from each other. Moving from elite appointment to election is associated with an −82 percent (−92 percent, −65 percent) decrease in the relative risk of seating a man of color. Unlike with women of color, elections are also associated with a change in the likelihood of seating men of color relative to merit selection, with the relative risk increasing by 327 percent (78 percent, 901 percent) moving from the former to the latter. No pairwise selection institution comparison is associated with a statistically significant difference in the likelihood of seating white women. For white men, moving from unilateral elite appointment to election is associated with a 14 percent (7 percent, 22 percent) increase in the relative risk of being seated. Moving from unilateral elite appointment to merit selection is associated with a 9 percent (3 percent, 18 percent) increase in the risk of being seated. While moving from election to merit selection is associated with a −4 percent (−8 percent, 1 percent) decrease, the confidence interval overlaps zero, indicating that we cannot reject the null hypothesis of no relationship.

Pool size and time are the most notable control variables. Increasing the natural log of the number of attorneys of color in a state from its twenty-fifth to seventy-fifth percentile is associated with a 488 percent (55 percent, 1,953 percent) increase in the relative risk of seating a woman of color. However, the same increase in the natural log of the number of attorneys who are women is associated with a −69 percent (−90 percent, −14 percent) decrease in the relative risk of seating a woman of color. The results are similar for men of color. Increasing the natural log of the number of attorneys of color from its twenty-fifth to seventy-fifth percentile is associated with an 860 percent (329 percent, 2,291 percent) increase in the relative risk of seating a man of color. The same increase in the natural log of the number of attorneys who are women, however, is associated with an −82 percent (−92 percent, −61 percent) decrease in the relative risk of seating a man of color. For white women, increasing the natural log of the number of attorneys of color from its twenty-fifth to seventy-fifth percentile is associated with a −34 percent (−50 percent, −11 percent) decrease in the relative risk of being seated. The same increase in the natural log of the number of attorneys who are women is associated with a 47 percent (−1 percent, 109 percent) increase in the relative risk of being seated, though the confidence interval overlaps zero. For white men, increasing the natural log of the number of attorneys of color from its twenty-fifth to seventy-fifth percentile is associated with a −7 percent (−15 percent, 3 percent) decrease in the relative risk of being seated, but this confidence interval also includes zero.

The eligibility pool results have important implications. Consistent with existing research on political institutions and intersectionality, eligibility pools for women and people of color can have disparate effects on representation. Relatedly, there appears to be a tradeoff in seating women and people of color on state apex courts. An increase in the supply of attorneys who are women, for example, decreases the likelihood of seating a person of color. Last, many of the substantive effects are large relative to the effects associated with selection institution choice, suggesting that stakeholders who value diversity should emphasize increasing candidate pools and doing more to encourage and facilitate inclusive access to the bench.

Figure 4 plots the probability of seating justices from various gender-race combinations over time. The probability of seating women of color remains flat and near zero through much of the sample period, with a slight uptick this decade. After remaining relatively flat and near zero through the 1960s, there is a noticeably higher probability of seating men of color and white women beginning in the mid- to late 1970s, corresponding with President Carter's efforts to diversify the federal judiciary. The uptick for white women, however, is more persistent. In recent years, the probability of seating men of color drops below that of seating women of color. White men held a virtual monopoly in obtaining state supreme court positions at the beginning of the sample period with a declining probability of being seated as members of underrepresented groups joined the bench more regularly. Overall, in the sample period's later years the probability of being seating is increasing for women of color and white men but decreasing for men of color and white women.

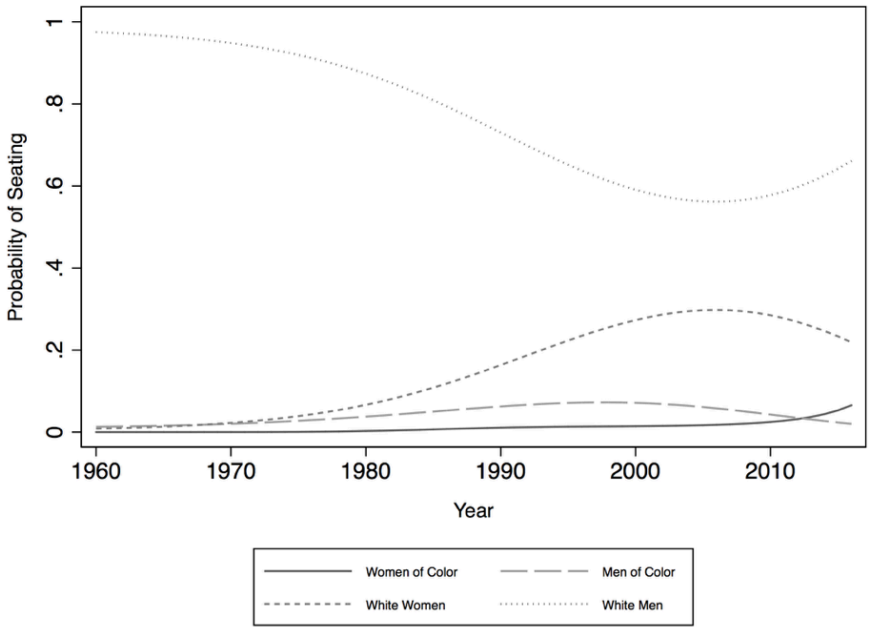

Figure 4: Hazard Rates

Conclusion

Facing the double disadvantage of gender and race bias, women of color endure discrimination in the legal profession, manifested in part by a lack of representation. This chapter makes two contributions to the existing literature on state court diversity. First, it offers a descriptive account of the women of color who have served on state high courts from 1960 through 2016. While historic federal firsts are widely recognized, this group of groundbreaking women has received comparatively little attention. Second, I examine the relationship between selection

mechanism choice and seating women of color. The results indicate that newly seated women of color are less likely to arrive through election than unilateral elite appointment or merit selection. The results are similar for men of color, while newly seated white men are more likely to arrive through election. Selection system choice is not associated with differences in seating white women.

The results have important policy implications. Scholars have amassed a wealth of empirical evidence on the performance of various judicial selection and retention institutions (see, e.g., Bonneau and Cann 2015; Bonneau and Hall 2009, 2017; Cann and Yates 2016; Geyh 2019; Gibson 2012; Goelzhauser 2016, 2019; Hall 2015; Kritzer 2015; Streb 2007). Albeit just one part of the broader debate, the extent to which institutional design choices impact judicial diversification has important consequences for descriptive and substantive representation. With respect to seating women of color in particular, the results presented here suggest that appointment systems outperform elections. While the mechanism is unclear, evidence from a variety of institutional contexts suggests that members of underrepresented groups may be disadvantaged in election systems due to factors such as contest aversion, lack of party support, having fewer political connections, and implicit stakeholder bias. Given increasing evidence that appointment systems tend to outperform elections with respect to diversification, one option for promoting diversity while enjoying the benefits of elections is to increase the use of short-term appointments.

By emphasizing women of color on state supreme courts, this chapter advances our understanding of how marginalized groups secure political representation. But it is important to stress that the broader study of intersectionality is complex, requiring scholars to leverage varied analytical approaches to shed light on the relationship between intersectionality and political action (see, e.g., Cho, Crenshaw, and McCall 2013; Hancock 2013; Holman and Schneider 2018; McCall 2005). These varied approaches are necessary in part because it is important to address other intersections of disadvantage in future research. Discrimination based on marginalized statuses such as religion, sexual orientation, and social class interacts with dimensions such as gender and race in complex ways (see, e.g., Beckwith 2014; Htun and Ossa 2013). One recent study, for example, examined evaluations of political candidates on the basis of gender and sexual orientation (Doan and Haider-Markel 2010). Moving forward, it is imperative to better map this complexity onto theories and empirical tests concerning intersectionality and the study of law and courts.

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Appendix

	Women of Color	Men of Color	White Women	White Men
Election	-2.045*** (0.737)	-1.805*** (0.390)	0.024 (0.194)	0.801*** (0.170)
Merit Selection	-0.601 (0.380)	-0.332 (0.271)	-0.255 (0.169)	0.501*** (0.172)
Court Professionalism	1.970 (1.280)	1.094 (1.017)	0.002 (0.586)	-0.613 (0.669)
Seats	0.100 (0.195)	0.023 (0.156)	0.018 (0.071)	-0.018 (0.074)
Term Years	0.031 (0.031)	-0.055* (0.032)	-0.007 (0.013)	0.023* (0.014)
Mandatory Retirement	0.671* (0.382)	0.114 (0.248)	0.130 (0.145)	-0.156 (0.173)
In(Lawyers: Women)	-0.618** (0.296)	-0.933*** (0.222)	0.221*** (0.110)	0.105 (0.126)
In(Lawyers: People of Color)	0.669***	0.914***	-0.168***	-0.167*
Citizen Liberalism	0.015 (0.014)	0.028** (0.014)	0.004 (0.005)	-0.014** (0.006)
Time	0.807** (0.398)	0.013 (0.073)	0.069 (0.112)	-0.045 (0.062)
$Time^2$	-0.020* (0.011)	0.003 (0.003)	0.002 (0.003)	-0.003 (0.002)
$Time^3$	<0.001** (<0.000) (4.788)	<-0.001 (<0.001) (1.675)	<-0.001 (<0.001) (1.206)	<-0.001 (<0.001) (1.197)
Observations	**1,609**	**1,609**	**1,609**	**1,609**

Table 1: State Supreme Court Seatings, 1960-2016.

*** p<.01, ** p<.05, ** p<.10. Standard errors clustered by state are in parentheses. Unilateral elite appointment is the excluded selection system baseline.

	Men of Color	**White Women**	**White Men**
Election	1.772 (1.493)	10.149*** (7.112)	13.069*** (10.060)
Merit Selection	1.419 (0.520)	1.549 (0.650)	2.281** (0.916)
Court Professionalism	0.356 (0.330)	0.123 (0.186)	0.100 (0.149)
Seats	0.920 (0.170)	0.912 (0.185)	0.895 (0.191)
Term Years	0.922*** (0.026)	0.968 (0.031)	0.982 (0.033)
Mandatory Retirement	0.516* (0.178)	0.495* (0.206)	0.423** (0.174)
In(Lawyers: Women)	0.811 (0.288)	2.441*** (0.745)	2.087** (0.663)
In(Lawyers: People of Color)	1.141 (0.327)	0.407*** (0.102)	0.444*** 0.119
Citizen Liberalism	1.010 (0.013)	0.986 (0.016)	0.979 (0.015)
Time	0.351*** (0.142)	0.381*** (0.153)	0.351*** (0.141)
$Time^2$	1.029*** (0.011)	1.027** (1.011)	1.025** (0.011)
$Time^3$	1.000*** (<0.001)	1.000*** (<0.001)	1.000*** (<0.001)
Observations	**1,609**	**1,609**	**1,609**

Table 2: Multinomial Choice Model of State Supreme Court Seatings, 1960-2016.

***p<.01, ** p<.05, ** p<.10. The results display relative risk ratios. Standards errors clustered by state are in parentheses. Unilateral elite appointment is the excluded selection system baseline. Women of color is the excluded reference category.

Class Activity

Assume the role of a policy maker and consider the following questions:

1. What characteristics should judges possess?
2. How should we design judicial selection institutions to facilitate the selection of individuals with these characteristics?
3. How might these institutional design choices impact diversification and the selection of women of color in particular?

Select a state and research the history of its supreme court diversity. When and how was the first woman, woman of color, and man of color seated?

5. Women of SCOTUS

An Analysis of the Different Voice Debate

JEANINE E. KRAYBILL

A Different Voice

As more women in the 1980s and 1990s attained judicial positions on federal and state courts, some social scientists and feminist scholars began to question if female judicial officers would adjudicate differently than their male counterparts (Kenney 2013). This potential difference spurs a series of important research questions whose answers provide valuable insight into judicial decision-making. For example, would gender diversity on the bench lead to differences in case outcomes, legal reasoning, and the judicial decision-making process? Drawing on the work of Carol Gilligan (1982), would women judges rule in a different voice than their male counterparts? Would women judges employ an ethics of care, prioritizing social relationships and context? Would male judges use more of an ethics of justice, focusing on competing rights, choice, and individual autonomy? Or would there be little difference between male and female judges because they operate under principles of judicial independence and impartiality and employ well-established legal norms (Hunter 2015)?

These unsettled questions continue to be examined by scholars via interviews, case rulings, and outcomes, with much attention given to the lower levels of federal and state courts, where diversity is increasing at a faster clip and there are larger number of judges overall, leaving the Supreme Court of the United States (SCOTUS) in need of further exploration. Therefore, I raise the question of whether there is evidence of Gilligan's (1982) different voice among the women of SCOTUS and if their "voice" in legal opinions varies from their male counterparts. In particular, do female justices employ particular language characteristics associated with the ethics of care and the ethics of justice, as suggested by Gilligan (1982)? While ideally, all SCOTUS cases would be examined, this is beyond the scope of this study. Therefore, I focus on cases where issues relating to gender matter and/or may be a factor and where a different voice is most likely to manifest. To that end, this study centers on court opinions pertaining to gender, health care, LGBTQ+ issues, and religious liberty over the course of thirty-six years, beginning with the October term 1981 (and the appointment of the first female justice) through October term 2017, using a computer-assisted text analysis (CATA) program called Linguistic Inquiry and Word Count (LIWC). The findings from this study suggest some evidence of the different voice debate on the Supreme Court—but

not necessarily in the expected direction. Overall, this research provides more insight into the different voice debate at the highest level of power and justice and finds that the parameters of the debate as spelled out by Gilligan (1982) do not seem to apply to the High Court.

Issues of Gender and Justice

Symbolic Influence and the Judiciary

Some advocates for an increase in the number of female jurists center their arguments on the power of symbolism. For example, Kenney (2013) argues that the presence of women judges fosters a sense of democratic legitimacy in legal institutions because by including women, the courts are more representative of the wider fabric of society and the populations they serve. Similarly, Hunter (2015) argues that women should be represented in equal numbers on the bench, as this would better reflect their portion in terms of the general population and also among law school graduates. George and Yoon (2018) argue that judges' backgrounds not only have important internal implications for the inner workings of the courts but also impact external perceptions of legal institutions. George and Yoon pay particular attention to this dynamic at the state court level, since these courts hear over 90 percent of all court cases. They refer to this symbolic underrepresentation as the "gavel gap," which is measured by the proportional difference between the number of women and minorities serving as judges and the number of women and minorities in the general population. These scholars argue that as a way to cultivate trust and legitimacy in the courts and legal system, judges must be more demographically representative in terms of gender, race, and ethnicity.

Additionally, Kenney (2013) argues that an increase of female judges signals a sense of equal opportunity for women lawyers who are looking to become judicial officers, demonstrating the process of becoming a judge is what it purports to be: merit based, nondiscriminatory, and impartial. The law, like many institutions, has been designed by men and has worked to promote a male leadership and mentorship model. Therefore, having more female judges not only provides a sense of encouragement to other women who aspire to become lawyers and judges but facilitates mentorship between and among women already serving on the bench. Moreover, an increased presence of women judges can build mentorship opportunities with female law students as well as younger women and girls who are looking to become judges (Hunter 2015).

In addition to the symbolic arguments advocating for more female judges, scholars also argue for increased representation on practical grounds. For example, some argue that women judges may

have a heightened empathy for female litigants, witnesses, and victims; therefore, they cultivate a more positive courtroom experience for them. Moreover, women judges may bring a sense of "gendered sensibility" to judicial decision-making by considering their unique perspectives as women and mothers, balancing work and family responsibilities, and dealing with various forms of sexism and discrimination (Hunter 2015; Hale and Hunter 2008). Gendered sensibility is also in line with feminist standpoint theory (FST), which Martin, Reynolds, and Keith (2002) use to advocate for more women judges. Stemming from Marxism, FST is the idea that one's social location and experience matter, and hence women as a minority are aware of how the world (or in this case, the law) can be structured to favor some groups and disfavor others, producing a female consciousness in some judicial officers. This is also in line with Gilligan's (1982) different voice argument, as she emphasizes that an ethics of care places a premium on relationships, stressing the importance of everyone having a voice.

Gender Differences and Judicial Outcomes

As women began to enter the judiciary in more appreciable numbers, scholars began to ask if their gender would impact their decision-making and if their presence would influence their male colleagues on the bench. Thus far, studies report mixed findings regarding if having women on the bench results in different judicial outcomes. For example, in looking at trial proceedings in urban areas, studies found differences in rulings between male and female judges (Gruhl, Sophn, and Welch 1981; Kritzer and Uhlman 1977). Yet at the federal level, Gottschall (1983) found little effect of gender among appellate judges, and Segal (2000) found that female Clinton appointees in district courts were less likely than their male counterparts to rule in favor of female plaintiffs making sexual discrimination claims. However, Peresie (2005) finds that the presence of women on three judge panels affects the collegial decision-making process and that male judges are more likely to find for the plaintiff when there is at least one female judge on the panel. And still other scholars find and argue that differences between male and female judges appear to be most pronounced in cases where gender is a salient factor, such as those involving discrimination and harassment (Allen and Wall 1987; Boyd, Epstein, and Mark 2010; Peresie 2005).

There are several factors that scholars argue may explain the mixed findings regarding gender differences and judicial outcomes. First, earlier work focused on a small sample of female judges that was not large enough to allow scholars to pick up differences between them and their male counterparts. Second, because female judges were once viewed as "novelties" or "tokens," they felt pressure to rule in cases the way their male counterparts did (Davis 1986). This also speaks to the literature that argues that regardless of a judges' background, he or she is superseded by long-standing norms of judicial behavior and reasoning and that exhibiting differences is inimical to the role of the judiciary; therefore, the law is impervious to a feminist judicial decision-making

approach (Hunter 2015; Thornton 1996). Third, previous studies examined a range of issues, some of which did not include disputes where gender was a primary factor, which may have caused differences among male and female judges (Davis 1986; Walker and Barrow 1985). Fourth, former analyses did not include proper controls that may impact judicial outcomes, such as the ideology, previous careers, and experience of judges (Rhode 2001).

The Different Voice Debate

Beyond symbolism, it has been argued that more female judges will improve the judicial system by bringing a different voice to the bench and changing the position of women in the law more generally. Up until the 1990s, there had been little attempt to work through this argument. As previously noted, an unresolved debate has ensued on whether women make a qualitative difference in court case outcomes and if they rule from a different perspective then their male counterparts (Feenan 2008). In part, this debate gained more attention when Bertha Wilson, the first female justice of the Supreme Court of Canada, wrote her 1990 piece "Will Women Judges Really Make a Difference?" Wilson argues that if one holds to the tenants of judicial independence and impartiality, then the increased number of women judges should not make a difference. However, Wilson also calls attention to Carol Gilligan's (1982) argument that women and men think differently about ethical and moral dilemmas and that women view themselves as connected to a community, whereas men see themselves as more autonomous. Wilson notes that Gilligan (1982) lays out the possibility that these differing perspectives may be a result of the childhood socialization process, arguing that female children are more attached to their mothers and hence prioritize relationships, whereas male children may be less connected and hence are defined through separation and individualism. Paralleling this to court cases, for women, it is not about winning or losing but about preserving relationships and developing an ethics of care that takes into account circumstance and context. Wilson (1990) argues that there is merit in the ethics of care perspective, as it helps explain the reluctance of courts (whose judicial officers are predominately male) to consider the circumstances of cases along with the courts' propensity to reduce disputes to their essential components and rules. Here, Wilson emphasizes Gilligan's ethics of justice perspective, which argues that men see moral dilemmas as arising from competing rights, welcome the adversarial process, and view disputes in terms of winners and losers, whereas women are more likely to reconcile competing obligations and hence view cases in a broader context. Therefore, Wilson concludes that from their different perspectives, women judges have the potential to bring a "new humanity" to court decisions and can make a difference by viewing and ruling on cases in terms of a larger societal picture and impact.

In looking at gender as a variable in order to determine if women adjudicate differently than men, scholars have examined whether the judge being a feminist makes an impact, with some studies

showing feminism among male and female jurists as an important factor (Martin, Reynolds, and Keith 2002). In looking at cases of paired men and women on the Ninth Circuit Court of Appeals, Davis (1992) finds minimal evidence of gender differences. However, in another study, Songer, Davis, and Haire (1994) do find evidence of gender differences in sex discrimination cases, which is consistent with some of the research previously addressed. In looking at divorce cases, Martin and Pyle (2005) find that women judges were more supportive of female litigants. Moreover, when serving alongside one other female, male judges were also more supportive of women litigants.

Overall, the studies that examine gender differences among judges and their impact on court cases tend to focus on their outcomes and have yielded mixed results. To my knowledge, previous research has not examined the language style of court opinions in the specific context of the difference voice debate. In order to more effectively examine this difference, one must analyze the words and rhetorical style that male and female judges use. Moreover, the work noted above has not examined this debate among the women and men of the Supreme Court of the United States, adding a new avenue of research to explore if male and female judicial officers adjudicate in a different voice.

Research Questions and Expectations

Are women of the Supreme Court more likely to employ language in their opinions that is associated with an ethics of care and men with an ethics of justice? Most research on court opinions has focused on liberal or conservative ideological outcomes; however, Lupu and Fowler (2010) argue that the content of opinions is more important than the holding (decision) of the court case. Rhode and Spaeth (1976) note that it is not the ideological dimension of the opinion but the content of it that makes policy. Citations of Supreme Court opinions have also been analyzed in terms of positive and negative treatment, finding that once a particular case is positively cited, it gains vitality and tends to be cited more frequently in subsequent cases (Hansford and Spriggs 2006). As Cross and Pennebaker (2014) and Tiller and Cross (2006) note, in contrast to social and political scientists, legal scholars analyze the particular details of a case with little attention to the overall meaning of language in the opinion, and they do not employ statistical analysis to find relationships, patterns, or associations, which provide broader and more general understanding of the content of court opinions.

Therefore, the analysis I present in this chapter is poised to make a meaningful contribution to this unsettled debate by directly testing if men and women of the High Court employ different language styles and hence speak with a different voice. Overall, I expect that they do—that there will be differences in the language men and women of the High Court use in their opinions,

with female justices of the Supreme Court employing language associated with an ethics of care and male justices using language that is more affiliated with an ethics of justice. For example, as previously noted, words associated with an ethics of care is more collective and contextual and prioritizes relationships, and some scholars in political and social science have suggested that this type of rhetoric can be associated with women legislators and leaders (Dodson and Carroll 1991; Kathlene 1994; Rosenthal 1998; Thomas 1997).

Examining the Language of Court Opinions

Since we need to look at the context of opinions, I use the CATA program LIWC, which examines language by reading and analyzing text for characteristics such as, but not limited to, emotion, tone, and affect. It consists of approximately ninety output variables and is designed with a preformulated dictionary composed of over six thousand words, word stems, and emoticons (LIWC 2015). The language and content of court opinions are at the core of what the law is and have an impact on both society and the legal system (Cross and Pennebaker 2015). For example, scholars argue that the formulation of an opinion is at the center of appellate adjudication and that what judges say can be even more consequential than how they vote, as a case's legal reasoning can have a wide-ranging impact by altering legal policy and hence structuring the outcome of future disputes (Coffin 1994; Shapiro and Stone Sweet 2002; Hansford and Spriggs 2006). Overall, it is the rhetoric of judges that is persuasive in legal opinions, and it is the style of their language that can assist in understanding the court's work; therefore, it is imperative that it be more systematically studied (Murphy 1964; Chemerinsky 2002).

Methodology

As briefly noted in the introduction, in order to conduct an analysis testing the different voice theory via Supreme Court opinions, I examine cases dealing with gender, health care, religious liberty, and LGBTQ+ issues from the 1981–82 session through the 2017–18 session. This is consistent with previous scholars who have analyzed differences of opinion between male and female justices using cases relating to gender—that is, cases where gender is more pronounced or a salient factor (Allen and Wall 1987; Boyd, Epstein, and Martin 2010; Peresie 2005). These four categories of cases are employed because issues of gender can and do get intertwined with these topics. The time period was chosen in order to include and analyze opinions across the four

selected topics by women who have served on the US Supreme Court, with Sandra Day O'Connor being the first in 1981. In total, the sample consisted of 649 opinions (see table 1).[1]

Category	Number of Cases	Number of Opinions	Number of Lead Female Authored Opinions	Number of Lead Male Authored Opinions	Number of Per Curiam Opinions
Gender	35	90	24	64	2
Health Care	122	277	51	217	9
LGBTQ+	12	34	1	30	3
Religious Liberty	73	248	46	200	2
Total	**242**	**649**	**122**	**511**	**16**

Table 1: Overview of Sample

After gathering the descriptive data captured in table 1, all opinions were separated into individual Microsoft Word files and labeled by the lead author. Each file consisted only of the text of the opinion. Majority, dissenting, concurring, and per curiam opinions were analyzed.[2] For example, in the case of *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), Justice Harry Blackum's dissent was stored in its own Word file and was cleared of any additional words, citations, or symbols that were not included in the actual text of the opinion, and Sandra Day O'Connor's majority opinion on this case was handled the same way. This file preparation was done for easy upload into the LIWC program and so that only the text of each opinion was analyzed.

LIWC is equipped with word variables that help capture the frequency and percentage of certain words and related phrases. LIWC's program analyzes over six thousand common words and word stems. LIWC is an appropriate tool to use to study court opinions, as they often employ ordinary language so that they are understood. Moreover, LIWC is one of the most common language tools used to study large bodies of text and has been used in previous research examining court decisions (Cross and Pennebaker 2015). Word variables in LIWC that were associated with the characteristics of an ethics of care and an ethics of justice were combined in order to create

1. I would like to thank my former research assistant at CSU, Bakersfield, Nicole Mirkazemi, for her coordination and efforts with collecting and organizing this data set/sample of cases.
2. Although per curiam opinions refer to decisions from an appellate court that does not identify a specific judge as authoring the opinion (Legal Information Institute 2018), they were not dropped from the analysis in order to have a complete sample of opinions for the time period specified. Moreover, per curiam opinions represented a small portion of the sample (2.4 percent) and hence would not have significantly impacted the results.

each respective category. For example, the category "ethics of care" was devised by combining the LIWC word variables social, family, friend, and we. The "ethics of justice" category was devised by combining the word variables power, achieve, and I.

Once the sample of court opinions were run through the LIWC program, t-tests were conducted to compare the use of language associated with the ethics of justice and ethics of care categories among the women of the Supreme Court in order to determine if they employed more of the latter. A t-test is a form of inferential statistics used to assess if there is a significant difference between the means (averages) of two different groups (Siegel 2018). This allows the researcher to make predictions from the data about the groups he or she is comparing. T-tests were also performed to see if the women varied in their use of either category when compared to the total number of male-authored opinions. When comparing the use of language associated with the ethics of care and the ethics of justice frameworks among and between only the women of the Supreme Court, Sandra Day O'Connor is used as the baseline. For example, in looking at the cases involving gender, t-tests were done to compare Sandra Day O'Connor versus Ruth Bader Ginsburg, Sandra Day O'Connor versus Sonia Sotomayor, and Sandra Day O'Connor versus Elena Kagan across the various case types. Since O'Connor was the first woman to serve on the High Court and has been arguably the most critical of the different voice debate among the four female justices examined, she is the logical candidate to serve as the baseline female justice.

Findings

The study yields interesting results and shows that men and women of the Supreme Court can employ a different voice. However, the findings run counter to expectations and Gilligan's (1982), as they demonstrate that the female justices overall tend to employ more language associated with an ethics of justice and that the male justices utilize language that is more aligned with an ethics of care. Furthermore, there are times when Sandra Day O'Connor (who again referred to this debate as "dangerous and unanswerable") employs more language associated with an ethics of care compared to her female counterparts. The discussion of the findings below highlights the key takeaways from this analysis.[3]

3. Note that only one opinion for the category of LGBTQ+ cases was female-authored. Therefore, individual t-tests between the women in this category of cases were not done; however, the LGBTQ+ cases are still part of the aggregate analysis when comparing male and female justices and the language associated with the ethics of care and the ethics of justice across the entire sample.

Male and Female Comparison across the Entire Sample

When looking at the entire sample of opinions across the four types of cases over the period analyzed, the results show that male justices of the Supreme Court significantly employed slightly more language associated with an ethics of care (5.53 percent to 5.13 percent), and the female justices significantly utilized slightly more language aligned with an ethics of justice (6.52 percent to 6.14 percent), which is not in line with expectations (see figure 1).

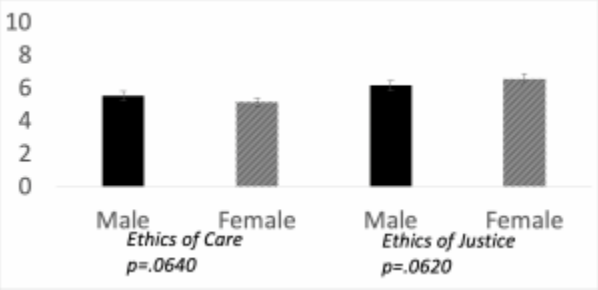

Figure 1: "Ethics of Care and Ethics of Justice" Language Camparison Between Male and Female Justices Across Entire Sample of Cases

Gender

In looking at cases only involving gender, we see that the women of the High Court employed a slightly higher percentage of language associated with the ethics of justice category (focusing on individual rights) compared to the total group of male justices (6.58 percent to 6.42 percent, respectively); however, the results were not significant. Yet counter to expectations, when looking at language associated with the ethics of care category (placing a premium on relationships), the men of the Supreme Court used this language at a higher percentage than their female counterparts (6.49 percent to 5.58 percent, respectively), with a suggestive significance level of p = 0.1453 (see figure 2).

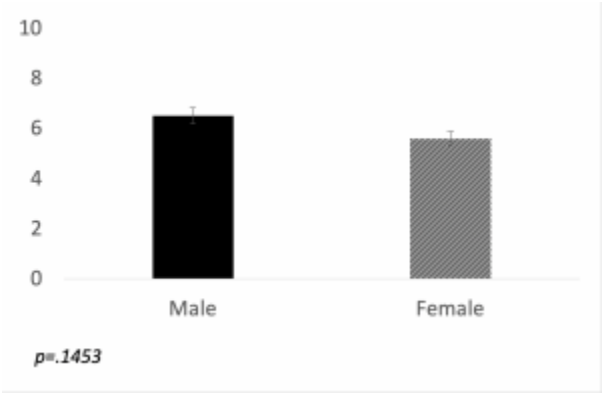

Figure 2: "Ethics of Care" Language Comparison Between Male and Female Justices Across Gender Related Cases

This trend can be seen in cases such as *Tuan Anh Nguyen v. INS*, 533 U.S. 53 (2001), which dealt with gender-based distinctions of parents to fulfill citizenship requirements of children born out of wedlock and abroad to a citizen father and noncitizen mother. The Court's majority opinion, authored by Kennedy, focused not only on DNA proof to claim paternity of the father but also on the relationship between the male parent and child, arguing that making sure there was an opportunity for such a relationship helped further an important government interest. Kennedy argued, "To ensure that the child and the citizen parent have some demonstrated opportunity or potential to develop not just a relationship that is recognized as a formal matter, by law, but one that consists of the real, everyday ties that provide a connection between child and citizen parent" (*Tuan Anh Nguyen v. INS*, 533 U.S. 53 [2001]). The majority acknowledge that the DNA requirement was met by the father in this case, who was also the citizen parent. The opinion focused more on the relationship opportunity standard; citizen fathers must show that there was, at the very least, the opportunity for a parental bond between the citizen parent and the child. The lack of contact in this case allowed the Court to deny citizenship to the child. In her dissent (to which Ginsburg concurred), O'Connor argued that sex-based classifications impede on individual rights and "deny individuals opportunity" (*Tuan Anh Nguyen v. INS*, 533 U.S. 53 [2001]). In refuting the relationship opportunity standard, O'Connor argued that "children who have an opportunity for such a tie with a parent, of course, may never develop and actual relationship with that parent" (*Tuan Anh Nguyen v. INS*, 533 U.S. 53 [2001]). The language of O'Connor's dissent is more consistent with the ethics of justice framework because it focuses on Tuan's individual ability to seek citizenship on the basis of his father being a US citizen rather than on the opportunity for a father-son relationship to exist and develop between them. Overall, O'Connor argued that different requirements for children's acquisition of citizenship depending on whether the citizen parent was a mother or father denied Tuan equal opportunity and protection.

Now, in turning our attention specifically to the women of the Supreme Court and cases involving gender, I find that O'Connor was more likely to employ language associated with both an ethics of care and an ethics of justice compared to her female counterparts. For example, as figure 3 shows, when compared with Sonia Sotomayor, O'Connor significantly used more language associated with an ethics of care (6.28 percent compared to 2.6 percent).

Figure 3 also shows that O'Connor significantly employed more language associated with an ethics of justice than Ruth Bader Ginsburg (7.37 percent compared to 5.49 percent). These results are somewhat counter to expectations, as I argue that women of the Court (including O'Connor) would be more likely to employ language associated with an ethics of care. However, I found that O'Connor used both types of language more so than her female counterparts. In some ways, these findings echo back to O'Connor's criticism of the different voice debate—that women are not a monolith. It may also signal that at times when dealing with issues of gender, O'Connor felt she could not differ from traditional norms of the Court, which have been established under male paradigms.

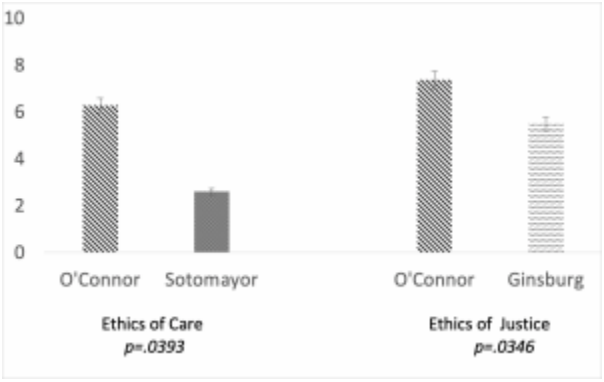

Figure 3: "Ethics of Care and Ethics of Justice" Language Comparison Among the Women of SCOTUS Across Gender Related Cases

Health Care

All male and female court opinions on cases involving health care were also compared via the ethics of care and ethics of justice categories. Similarly to the cases involving gender, the male justices of the Supreme Court employed more language associated with an ethics of care (5.19 percent compared to 4.72 percent, respectively), with a p-value of .1377, which is not highly significant but suggests a close probability for the use of this type of language. Involving these types of cases, the results also show that the women of the Supreme Court employed significantly

more language associated with the ethics of justice framework than their male counterparts (6.76 percent to 5.97 percent, respectively; see figure 4).

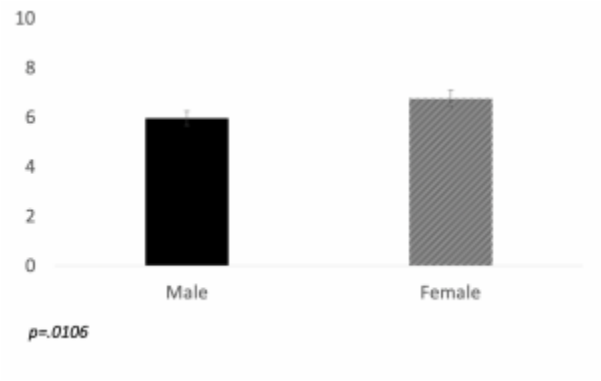

Figure 4: "Ethics of Justice" Language Comparison Between Male and Female Justices Across Health Care Related Cases

This trend can be seen in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 83 (1992), which dealt with required health care procedures and provisions before a female could seek and obtain an abortion in the state. The provisions enacted by the state legislature required informed consent, a twenty-four-hour waiting period prior to the procedure, parental consent, clinic reporting procedures, and spousal consent. The Court agreed the first four regulations were constitutionally admissible but were divided on spousal consent, which was ultimately ruled to create an "undue burden" on a women's right to terminate her pregnancy. Counter to expectations, Sandra Day O'Connor, who authored the Court's decision, framed her opinion within the context of an ethics of justice by discussing women's personal liberty and the health-related issue of reproductive rights, arguing for women's autonomy in these decisions. In so doing, O'Connor stated,

Though abortion is conduct, it does not follow that the State is entitled to proscribe it in all instances. That is because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.

O'Connor's reference to women's "liberty" being at stake, her discussion of women in an individual context—emphasizing consequences that "only she must bear" with the realities of bringing a child to full term—her mention of women's suffering as "personal," and her assertion that women should have the ability to construct their "destiny" on their "own conception" are all associated with the concept of the ethics of justice framework.

On the other hand, in their dissent, William Rehnquist, Byron White, Antonin Scalia, and Clearance Thomas put a premium on the spousal relationship, which is more aligned with an ethics of care, arguing that the state had "legitimate interests" in protecting the "interests of the father and in protecting the potential life of the fetus . . . and promoting the integrity of the marital relationship."

In looking at the women of the Supreme Court and their opinions on health care, the findings show that O'Connor employed more language associated with an ethics of care when compared to Ginsburg and Sotomayor (see figures 5). However, when compared to Kagan, O'Connor employed less language relating to an ethics of care (5.54 percent compared to 6.50 percent, respectively), though the results are not significant. When comparing the opinions on health care via the ethics of justice overall, O'Connor employed slightly less language associated with this concept compared to Ginsburg, Sotomayor, and Kagan (6.51 percent compared to 7.08 percent, 6.6 percent, and 6.6 percent, respectively); however, none of the results were significant.

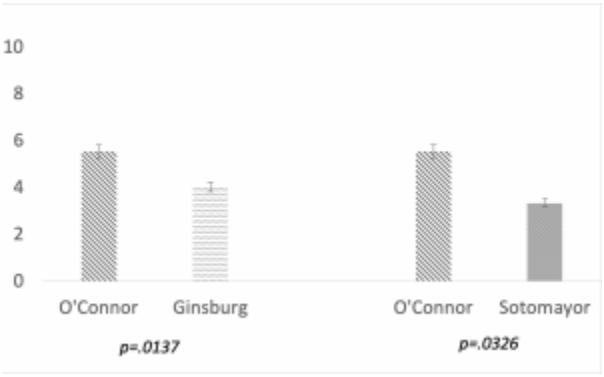

Figure 5: "Ethics of Care Language Comparison Among the Women of SCOTUS Across Health Care Related Cases

Religious Liberty

Regarding the results for the total of male- and female-authored opinions on religious liberty, there are negligible differences between the two groups regarding language associated with the ethics of care and ethics of justice categories. For example, the male justices employed 5.39

percent of language associated with an ethics of care and the women 5.37 percent. A similar pattern continues with an ethics of justice, with the men using 6.29 percent of this language in their opinions on religious liberty and the women 6.17 percent.

However, the results are a mixed bag across religious liberty opinions authored by the female justices of the Supreme Court. For example, O'Connor employed slightly less language associated with the ethics of care framework when compared to Ginsburg (5.27 percent to 5.85 percent, respectively), although the results are not significant. Yet O'Connor did employ more of this type of language compared to Sotomayor (5.27 percent to 4.21 percent, respectively), though again, the results are not significant. However, similarly to the findings on health care, Kagan employed more language associated with an ethics of care compared to O'Connor (6.86 percent to 5.27 percent, respectively), and the results are hovering around significance with a p-value of 0.1067. In looking at the results among the women of the Supreme Court regarding opinions on religious liberty and the use of language associated with an ethics of justice, O'Connor employed more of this language than any of her female counterparts (6.40 percent compared to 5.96 percent for Ginsburg and 6.11 percent for Sotomayor); however, this was only significant when examining the use of this language between O'Connor and Kagan (see figure 6).

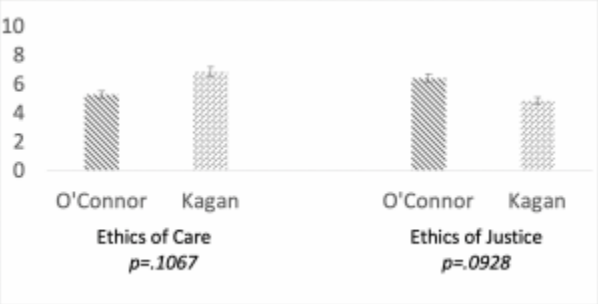

Figure 6: "Ethics of Care and Ethics of Justice" Language Comparison Among the Women SCOTUS Across Religious Liberty Related Cases

Implications and Future Research

This analysis of gender-related cases and their opinions yields further insight into the different voice debate. First, the findings show that when looking at the women of the Supreme Court, they are not a monolith. Unlike what some of the political science scholarship noted above has found regarding women in legislative bodies, this study finds that there is not a particular language style the women of SCOTUS use—at least in terms of language associated more with women and men. For example, the findings in this analysis show that female justices do not uniformly rule using

language associated with an ethics of care or ethics of justice. For instance, in opinions on gender and health care, Sandra Day O'Connor employed both styles of language and more so than Ruth Bader Ginsburg and Sonia Sotomayor but not necessarily Elena Kagan. Although the women of the Supreme Court did not uniformly issue opinions associated with the ethics of care, we see that women among and between themselves can rule in a different voice.

The results also show interesting differences between the male- and female-authored opinions. For example, in cases on gender and health care, we see that the male justices in total tended to employ language associated more with an ethics of care and women with an ethics of justice. We see this same pattern when comparing the total amount of male- versus female-authored opinions across the entire sample. This pattern challenges Gilligan's (1982) argument that the ethics of care perspective is more associated with women than men, giving further insight into the different voice debate. Some scholars may again chalk this up to women of the High Court conforming to the male norms of their profession or not wanting to appear to rule in a way that has been traditionally associated with women. Or in the cases relating to gender and health care, one may argue that the women employ more language associated with the ethics of justice category because of their feminist consciousness and are hence more likely to put a premium on women's autonomous individual rights over women's connections to their society, family, and so on. These potential explanations, though, do not address the findings regarding male justices and their use of language associated with an ethics of care. Regardless, the results show that women on the bench do employ language in their opinions that is not always consistent with an ethics of care and that there is diversity among women (at least on the High Court) in terms of the language style.

The next step in this type of study would be to more directly examine whether utilizing language associated with an ethics of care or ethics of justice adds to actual differences of opinion among and between the female justices and then among the male versus female justices. Surveying and/or interviewing judges to assess their positions on the different voice debate would help shed light on whether female and male judicial officers feel there is merit in this debate and how it may impact the courts and legal system overall.

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Class Activity

Please thoughtfully consider and respond to the questions below. You may need to pull up information online to assist you in your response.

1. The term *judicial independence* refers to keeping the judiciary away from encroachments by the political branches of government, meaning the executive and the legislature (US Legal Definitions 2019). The term *judicial impartiality* refers to judges' respect and compliance with the law and their acting in a manner that supports and promotes public confidence (United States Courts 2019). Bearing these definitions in mind, if all judges are tasked to act with independence and impartiality, does gender diversity matter in the Court? Why or why not?
2. As the results of the chapter discussion, women judges do not always rule from an ethics of care perspective, and there is diversity among the female justices of the Supreme Court in terms of the language style they use. Would you expect to find a similar pattern for female legislators? Would you expect female legislators to legislate in a different voice than their male counterparts? Why or why not?
3. The analysis presented in this chapter looks at particular types of cases (gender, LGBTQ+,

health care, and religious liberty). Would you expect to find similar findings in different issue areas? What might those other categories of cases be? What it would mean if the pattern of results with different case areas were the same as discussed in this chapter?

6. In a Different Voice

An Analysis of How California State Judicial Officers View Gender Dynamics on the Bench

JEANINE E. KRAYBILL

Although there has been appreciable growth in the number of women attending law school, with the American Bar Association (ABA) reporting in 2018 that women outnumbered men in law programs for the third year in a row (52.4 percent compared to 47.6 percent, respectively), the number of women holding leadership positions in the field has not kept pace. For example, women make up less than a third of all federal- and state-level judicial officers (Pisarcik 2019). These numbers are even lower regarding women of color, with less than 10 percent serving as judges on both the state and federal level (Jawando and Anderson 2016; National Women's Law Center Fact Sheet 2016). Having disproportionately fewer female jurists can have severe implications in terms of cultivating a sense of democratic legitimacy in the judiciary, creating leadership opportunities for female judges and attorneys, and fostering occasions for mentoring and networking (Kenney 2013). A lack of women on the judiciary can also impact case outcomes. For example, Harding (1991) argues marginalized groups, such as women, can help create a more objective account of the world by pointing out patterns of behavior that the majority group does not recognize. All of these issues speak to why studying women in the legal profession, particularly the judiciary is still of significant importance.

Examining whether female judges adjudicate and behave differently than their male counterparts, and what impact (if any) this has on the legal system and society is still in need of further investigation. For example, Hunter (2015) notes that some anticipate little difference between male and female judges because they employ principles of judicial independence and impartiality, as well as gravitate to well-established legal norms. However, Boyd, Epstein, and Martin (2010) show that a presence of a female judge on a mostly male panel can be influential in rulings on sex discrimination cases due to their expertise, experience, or information on such a topic. It is important to continue to evaluate if there are any qualitative differences between male and female judges in order to more fully assess the value and perspective women jurists bring to the court system. An element that helps to assess this is related to what Carol Gilligan (1982) referred to as the "different voice," and what has grown to be known as the "different voice debate." This debate is rooted in the idea that women may be more likely to speak and respond from an "ethics of care," and men from an "ethics of justice." An ethics of care stems from prioritizing relationships, societal connections, and context. An ethics of justice focuses more on individual autonomy, choice, and competing individual rights (Botes 2000; French and Weis 2000; Gilligan

1982). However, building on Gilligan's theory, Kraybill (2020) finds that female justices of the US Supreme Court use language associated with both an ethics of care and ethics of justice.

To give some additional context to the debate and how it frames this study, it is worthwhile to briefly highlight some of Gilligan's (1982) work on the different voice, which included three interview studies: a college student population study focusing on self and identity, an abortion decision study, and a rights and responsibilities study with respondents ranging from ages six to sixty. Through her interviews, Gilligan states she observed two distinct voices in relation to judgment and action, with women's voices being distinct and hence having a different style or tone. The disparities between women's and men's different experiences became apparent, largely due to the lack of women's representation in theories of psychological development at the time and also because of the prevailing idea that male life is the norm and the default lens by which female development is viewed. Gilligan argues that this leads some to try to fit women into a more male conception of relationships or thinking, yet in her observations she finds that some women are more likely to consider moral problems in terms of care and responsibility to relationships as opposed to a more masculine outlook of prioritizing rights and rules. Of course, these arguments are not without critics: some have accused Gilligan's work of reinforcing stereotypes about gender differences (Auerbach, Blum, and Williams 1985). However, this is despite Gilligan (1982) arguing that the different voice is "characterized not by gender but theme" and that "its association with women" is based on her observations and therefore is not "absolute" and that "the contrasts between male and female voices" are designed "to highlight a distinction between two modes of thought and to focus a problem of interpretation rather than to represent a generalization about either sex" (p. 2).

Over the last several decades, Gilligan's framework of the different voice has been used to examine women in male-dominated professions, including the judiciary. This being said, some female judicial officers have critiqued the concept, including Sandra Day O'Connor, the first female justice of the US Supreme Court, who referred to the different voice debate as "dangerous and unanswerable," arguing it not only treated women as a monolith but further dichotomized female and male virtues. Kenney (2013) also finds that women judges tend to reject this essentialist framing. As this debate continues today in examining male and female judges, most attention has been given to case outcomes. Though these analyses are insightful, they are missing information about how this debate and related issues might be viewed by judicial officers themselves. Therefore, this project looks to build on and expand the different voice debate by applying elements of the ethics of care and ethics of justice to how judges adjudicate and how they view various workplace experiences, and to issues of bias, via a survey analysis of California state judicial officers. This survey was conducted at various stages through 2019–20. Findings show that women have a heightened awareness regarding the different treatment that some females experience as judicial officers compared to their male counterparts. The results also suggest that female judges are more open to conducting a self-check on gender bias when adjudicating cases,

are more likely to take into account an individual's life circumstances, and agree that having more women and people of color on the bench is important for society.

The Importance of Gender and Justice

The Importance of Examining Issues of Gender and Diversity on the Bench

As Kenney (2013) discusses, courts are powerful institutions of government, entangled and weighing in on a variety of issues important to the public. Chief Justice John Roberts of the US Supreme Court echoed these sentiments when commenting on how the courts are seemingly "getting more and more involved in every aspect of society" (Bump 2019). In looking at the types of cases the federal and state court systems hear, it is apparent that many gender-relevant public policy issues such as reproductive rights, health care, and discrimination are inevitably judicialized. This judicialization of gender-related issues can become even more pronounced when looking at state-level courts, which exclusively deal with issues of family law such as custody and divorce and in terms of criminal law cases involving battery and rape (Kenney 2013; Silverman 2016). Thus as the power of the courts grows, and with the cases judicial officers adjudicate touching so many aspects of everyday life, who sits on the bench and how they adjudicate matters. This is of particular importance when looking at state courts, which deal with more than 95 percent of the nation's legal cases and continue to be benched by primarily White male judicial officers. This gavel gap,[1] which notes the disparity between those who sit on the bench and the makeup of the communities they serve, can foster a sense of distrust among the public toward the courts. Research shows that the lack of diversity on the bench can impact decision-making, since only a majority viewpoint is predominately represented (Chew and Kelley 2009; Florida State Courts 2008; Jawando and Anderson 2016). For example, regarding the decision of whether to incarcerate, Welch, Combs, and Gruhl (1988) find the presence of Black judges is likely to increase more equal treatment between Black and White defendants. Regarding the lack of well-

1. The *gavel gap* refers to the symbolic underrepresentation between judicial officers and the communities they serve. The gavel gap is measured by the proportional difference between the number of women and minorities serving as judges and the number of women and minorities in the general population. Scholars argue that as a way to cultivate trust and legitimacy in the courts/legal system, judges must be more demographically representative in terms of gender, race, and ethnicity (George and Yoon 2018).

represented women and minority judges in our court system, Navarro (2019) and Segal (2000) argue that in order to promote the public's faith in the courts, the bench must be more reflective and understanding of the circumstances of the communities they work in.

The Different Voice Debate

As previously noted, scholars began to apply the different voice theory to male and female judicial officers, in order to assess if there were differences between them in terms of court case outcomes. As Kenney (2013) discusses, consistent differences between male and female judges have not been found. However, she does note that some studies find women appellate judges are more likely to rule for the plaintiff in sex discrimination cases and are also more likely to persuade their male colleagues on panels to vote with them. Songer, Davis, and Haire (1994) also find evidence of gender differences in sex discrimination cases. Moyer and Haire (2015) find that female judges who attended law school during a time of extreme gender inequality are more likely than their male counterparts to support plaintiffs in sexual discrimination cases. In examining divorce cases, Martin and Pyle (2005) discover that female judicial officers were more supportive of female litigants. They also found that when serving alongside one other female, male judges were more supportive of female litigants. Martin (1987) found that female judges were hesitant to embrace different voice arguments, although they were supportive of an increase in women judges, arguing that including them on the judiciary better reflects the fabric of society and that a woman and/or a feminist perspective can contribute to better decision-making. Again, in looking at how the different voice debate applies to opinions of the Supreme Court, Kraybill (2020) finds that male and female justices do employ different language styles and though female justices use rhetoric associated with the ethics of care, they were overall more likely to use words related to the ethics of justice compared to their male counterparts, thus varying from Gilligan's thesis.

The work presented in this chapter builds on the existing scholarship by directly surveying judges on elements and additions of the different voice debate. Judges wield a lot of discretion over cases and the individual parties before them, which inevitably involves moral and ethical dilemmas, concepts central to Gilligan's (1982) theory. As judges' influence (particularly at the state level) grows, it is important to continue to evaluate how they may think and respond to related facets of the different voice theory. In doing so, we are able to gain more insight into how judges utilized their own experiences in adjudicating cases, as well as if male and female judges employ different ethical reasoning while rendering decisions. By examining a sample of judges in this context from the most populous and heterogeneous state court system in the country, California (California Courts 2020a), this chapter gives additional and new insight into the different voice and how this theory relates to issues of judicial behavior and diversity.

Research Questions and Expectations

In building on the scholarship noted above, this chapter puts forth several questions. The first question asks if female judicial officers are more likely than their male counterparts to feel that the legal profession is less welcoming to them. I expect female judges will express that the legal profession is less welcoming to them compared to their male counterparts. For example, previous studies have captured female judicial officers expressing how the legal profession is still dominated by male norms (Navarro 2019; Kenney 2013). Gilligan's (1982) theory discusses how various fields of study have been primarily examined from a male perspective, perpetuating the exclusion of women. This question builds on the different voice theory by evaluating how women may feel upon entering a male-dominated profession, such as the judiciary.

The second question asks if female judicial officers are more likely to state that their life experience as women leads them to have a different perspective on the bench than their male counterparts. This question stems not only from Gilligan's (1982) work, which identified some women having a different perspective due to their position as females in society and the socialization process, but also feminist standpoint theory (FST), which argues that one's location and experience in society play a formative role in developing positions, opinions, and outlooks (Martin, Reynolds, and Keith 2002). Therefore, I expect female judicial officers will be more likely than their male counterparts to express that their experiences as women (i.e., mother, wife, and/or daughter) have given them a different perspective on the bench.

The third research question asks if female judicial officers are more likely to experience different treatment by other judges, attorneys, court staff, and the public than their male counterparts. Again, this expands Gilligan's theory concerning the idea that if some women have a different perspective than their male counterparts when it comes to reasoning over ethical and moral dilemmas, that it is intuitive that they may also have a heightened awareness for when and if they are experiencing different treatment. Again, this is also connected to FST, which argues that women (and other marginalized groups) can experience different treatment than the majority group (Martin, Reynolds, and Keith 2002). Overall, I expect female judges will express that they have not been treated as well as their male counterparts on the bench—whether by the public, staff, other judges, and/or attorneys.

The fourth research question asks if female judicial officers are more likely to administer a self-check on bias compared to their male counterparts. Again, building on Gilligan's (1982) theory that women can approach moral and ethical dilemmas differently from their male counterparts, along with her discussion on how women have been excluded from various professions and fields of study, I argue that this can create an increased awareness about discrimination among female judicial officers, causing them to more regularly administer a self-check on their bias when

adjudicating cases compared with male judges. Issues of unconscious bias (social stereotypes individuals hold about certain groups of people that can form outside of their conscious awareness: see the University of California San Francisco Office of Diversity and Outreach) have been raised across a variety of professions and systems of government. Regarding the courts, some argue that the risk of not addressing unconscious bias is at the heart of why women or men may be treated differently in court proceedings, as well as harsher sentences being imposed on people of color as opposed to Whites (Mitchell and MacKenzie 2004).

Finally, the fifth question asks if female judicial officers are more likely to express that it is important to have more women and people of color serving on the bench. Like the questions above, this point builds on Gilligan's (1982) theory because it centers on how individuals, due to their different backgrounds, may represent and work through moral and ethical dilemmas differently. Again, since women (as a nonmajority group on the bench) may have more awareness of this, I expect that they will have a deeper appreciation for greater racial and gender diversity on the bench than their male counterparts.

These questions also relate to and build on the different voice debate as they touch on key elements connected to the ethics of care and ethics of justice. For example, some female judicial officers have expressed that when running for the bench they are viewed as more honest, fair, and nurturing than their male counterparts (characteristics related to the ethics of care). However, upon entering their judicial positions, some women express having their credentials questioned, along with commenting on the competitiveness and resentfulness they feel by some male judges (Navarro 2019). These questions also point to how female judges may take a more societal context in their behavior and reasoning than their male counterparts, which is in line with Gilligan's discussion on the ethics of care and justice.

Methodology

The California state court system serves a population of over 39.5 million people, or 12 percent of the country's total population (California Courts 2020a). Therefore, California judicial officers were chosen as the unit of analysis in an effort to draw responses from a wide pool of subjects who interact with one of the most diverse populations in the country (World Population Review 2020). In order to examine the research questions noted above, a survey was designed and first launched in February 2019 via an online link and available through the California Judges Association's website, and subsequently the organization's newsletter and magazine, the *Voice*. To ensure enough responses, a mailing list of California judicial officers was also compiled to administer the survey statewide. The mailing list was based on available judicial rosters throughout the superior

courts in California. The hard-copy mailing went out to 1,904 available addresses in June of 2019 and responses were mailed back through January 2020. The total number of surveys received was 215 for a response rate of 11.29 percent.[2]

Survey questions were designed based on a review of prior literature regarding the different voice debate, issues of gender and justice, the gavel gap, feedback from presentations given by the researcher on the topic, and discussions with retired judicial officers (not featured in the study). Survey questions related to the five research questions noted above, along with those that captured demographic data such as sex, age, race and ethnicity, religious background, political party identification, type of legal education, judicial appointment type, years of experience, primary area of practice, and years of legal experience. A table of descriptive statistics can be found in the appendix; this provides an overview of the sample, along with a coding scheme. In order to test the research questions and expectations laid out above, differences of means tests were conducted in order to compare male versus female judicial officers' responses.[3] Survey data results are usually considered significant when the probability (p-value) is at one of three levels: (1) $p < .001$***; (2) $p < .01$**; (3) $p < .10$*, with the first p-value range listed being the highest level of significance. These are the p-value levels/standards utilized in this chapter to assess levels of significance.

2. It is important to note that a representative sample is not always guaranteed by the large response rate and that lower response rates can occur with postal surveys (Millar and Dillman 2011). Additionally, judicial officers are considered a hard-to-reach population. Scholars point out several factors that make gaining access to judicial officers challenging. One, it can be difficult to navigate staff or gatekeepers who facilitate communication to judicial officers. Two, a judicial officer's view on social and behavioral science research may influence their likelihood of participation. And three, judges deal with a heavy calendar of cases and may not have time or find a survey important enough to respond to (Roach Anleu and Mack 2017; Cowan et al. 2006; Dobbin et al. 2001). Regarding this particular study, postal surveys were mailed to judicial rosters that were available online and may not have been immediately up to date. Overall, the response rate and therefore sample obtained here is higher than several other scholars who have performed other studies with judicial officers. For example, Dobbin et al. (2001) conducted a national study of state trial judges with a sampling frame of 9,715 and ended up with a sample of 400 for their nationwide study, which was considered acceptable to obtain reasonable levels of confidence in their findings.
3. A difference of means test is utilized to show the statistical difference when comparing categories or groups. Specifically, a difference of means test compares the mean of a variable in one group to the mean of the same variable in another group (Pollock 2016).

Findings

Sample Overview

As noted above, the sample consisted of 215 California state judicial officers, 90 percent of whom are superior court trial judges. The majority of respondents identified as male (60 percent) and female (40 percent). Most in the sample were White (73.95 percent), with only 10.23 percent identifying as Hispanic, 5.58 percent as Black, 6.51 percent as Asian, .93 percent as Native American, and 2.79 percent as other. These sex, race, and ethnicity demographics are fairly in line with the state's most recent reports (California Courts 2020b). A majority of the respondents were over the age of 45, with 6.51 percent ranging from 35 to 45; 30.23 percent from 46 to 55; 34.88 percent from 56 to 65; and 28.37 percent over the age of 65. Most (92.52 percent) received their legal education through an American Bar Accredited (ABA) law school, with an average of 20.65 years of practicing law before serving on the bench (again, please see the appendix for a complete overview of the sample).

Difference of Means

How Welcoming Is the Legal Profession to Female Attorneys and Judicial Officers?

As noted above, the first research question examines how welcoming the legal profession is to female attorneys and judicial officers. This particular question was coded 0 = no (it is not welcoming), 1 = yes (it is welcoming), and 2 = no opinion (note, this latter option was coded as missing). Overall, 82.17 percent of respondents stated that the legal profession was welcoming to female attorneys and judicial officers, compared to 14.49 percent who responded "no," and 2.80 percent who had no opinion on the question. The results of the difference of means test in figure 1 below show in a comparison of male and female judicial officers, that female respondents are slightly less likely to agree that the legal profession is welcoming to them (.8255 compared to men at .9218) and the results are significant at p = .08. These findings are consistent with expectations.

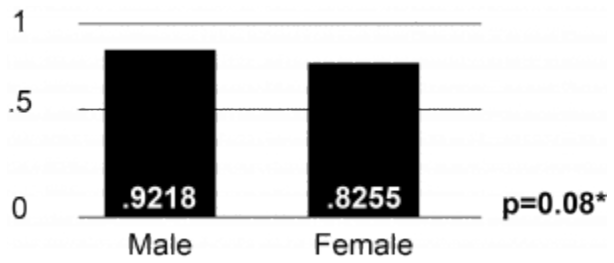

Figure 1. *Difference of means test: Male versus female comparison- is the legal profession welcoming to female attorneys and judicial officers?*

Building on this first question, a related issue in the study examines if respondents felt that women's experience as wife, mother, and/or daughter led them to bring a different perspective to court cases and legal proceedings (coded 1 = yes and 0 = no). Overall, 91.47 percent of respondents stated "yes," that a women's experience does bring a different perspective to court cases and legal proceedings. However, counter to expectations, the difference of means tests show that there is not a significant difference between the judicial officers in the study regarding this question/issue (with a mean score of .9055 for men and .9285 for women and a p-value of .5594).

Again, though the difference of means tests was not significant with regard to this question, the narrative responses provide some interesting insight and implications to consider. For example, some respondents shared sentiments such as "women's responsibility for child-rearing gives female judges and attorneys more patience and compassion," "women bring intuition and a willingness to listen to all sides before reaching a decision," "females have a better perception of gender-based issues," "some female judges hear different things from criminal defendants," "women have a broader concept of justice," or "women round out the proceedings, bringing a perspective that men, and older men, do not have." However, some respondents did express feelings such as "everyone brings a different perspective," or "women do handle cases differently, but I do not think it's based on being a wife, mother, or daughter," and "each person regardless of gender brings their own experience to the bench." Responses and comments indicating that a woman's life experience brings a unique and different perspective are consistent with some who argue that women can bring a sense of "gendered sensibility" to judicial decision-making by considering their unique perspective as women and mothers, balancing work and family responsibilities, as well as dealing with sexism and discrimination (Hunter 2015; Hale and Hunter 2008).

Different Treatment of Female Judges and Attorneys

The third research question asked respondents if they have witnessed female judges and/or female attorneys being treated differently from their male counterparts, either by colleagues (i.e., other judges or attorneys), witnesses, members of the jury/jury pool, court staff, and so on (coded 1 = yes and 0 = no). Overall, 68.54 percent of respondents stated that "yes," they had witnessed female judges or attorneys being treated differently from their male counterparts. In line with expectations, the difference of means tests in figure 2 shows that female judicial officers, in particular, were significantly more likely to state they had witnessed or experienced different treatment. For example, some shared that they have had their rulings questioned by fellow judges and attorneys, and overall they are not treated with the same level of respect as their male counterparts (with female respondents showing a mean score of .872 compared to .559 for males at a p-value of .000).

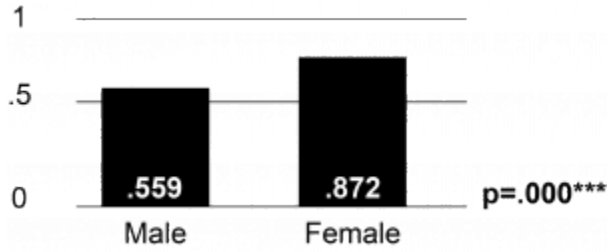

Figure 2. *Difference of means test: Male versus female comparison- different treatment of female judicial officers and/or attorneys*

The difference of means tests above also suggests interesting implications. One theme that arises is that women tend to be more aware of different treatment based on gender and have a heightened sense of gender dynamics in their role as judge. When providing examples of the type of different treatment witnessed, 33 percent of respondents noted that either they themselves, or other female judicial officers, have had their professional title omitted, with attorneys, plaintiffs, defendants, and/or staff sometimes referring to them as "Miss" as opposed to "Judge" or "Your Honor." Along similar lines, some female respondents stated, "men automatically receive more deference and are rarely misidentified." Some discussed the reason for different treatment of male and female judicial officers can be related to "society not accepting female authority" and that "strict female judges can be viewed as aggressive or bitchy." Other female respondents shared sentiments such as, "female attorneys treat female judges with less respect than they would a male judge." A male judge echoed these comments by stating, "Female judges do not get the same respect as their male counterparts by other bench officers, attorneys, and staff. Female attorneys and staff have issues with a female being in a superior position." However, some male respondents

shared that they've seen bad treatment "happen to all genders," or that treatment of women judges "improved in recent years," or that they worked in "diverse communities and had seen males and females treated alike."

Self-Check on Gender Bias

The fourth research question asked respondents if they administer a self-check on their own gender bias when making a ruling in a court case (coded 1 = yes and 0 = no). Overall, 77 percent of respondents stated "yes," they do administer a self-check on bias, while 23 percent said they did not. The difference of means tests in figure 3 below show that female judicial officers were significantly more likely to state that they make an effort or have a self-check gender bias process when making a court ruling, with female respondents reporting a mean score of .853 and .685 at an overall p-value of .003.

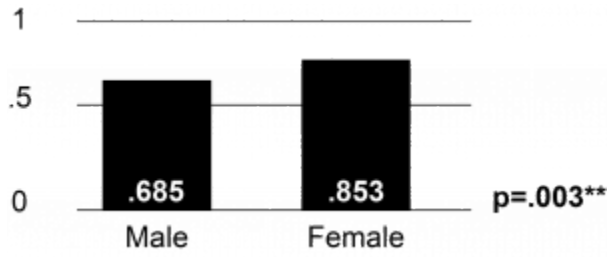

Figure 3. *Difference of means test: Male versus female comparison on gender bias self-checks*

It is also important to note that overall, 34 percent of the total respondents described their self-check bias process as "reversing genders and/or race" of the parties in a case. However, as the difference of means tests show, female judicial officers also responded at a higher rate that "yes," they administered a regular self-check on potential bias, and these results were significant. Some female judges who also provided a narrative response to the question shared that they reverse the genders in family law and/or domestic violence cases so that they are not favoring the mother or woman by default. However, one female judge stated, "I check to make sure I am not biased against other women, in my experience women often can create more barriers for other women." Others expressed that as mothers themselves, they can be harder on female defendants either in criminal court or in family law disputes. Although the results show more female judicial officers administered a self-check on bias, some women stated they did not, with one in particular sharing, "I don't believe I have a gender bias, but this question alone makes me think maybe I should self-check anyway." Several male judges also shared they did not conduct such a process, explaining that they "rely on the evidence to dictate the outcome" or that they "saw no reason for doing so."

Is It Important to Have More Women and People of Color Serving as Judicial Officers?

The final research questions asked respondents if it is important to have more women and people of color serving as judicial officers. Regarding the issue of having more women serving as judicial officers, 89.57 percent of participants responded "yes." Again, coded as 1 for "yes" and 0 for "no," the results in figure 4 show that female respondents were slightly and significantly more likely to state it is important to have more women serving as judicial officers (.941 compared to .865 with a p-value of .0767), which is in line with expectations.

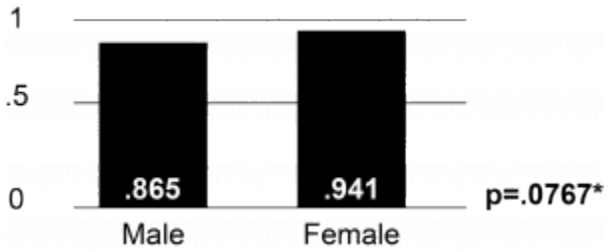

Figure 4. *Difference of means test: Male versus female comparison- importance of more women serving as judicial officers*

Regarding the question of whether it is important to have more people of color serving as judicial officers, 91.08 percent of respondents stated "yes." Again, in line with expectations, the results of the difference of means tests show in figure 5 that female respondents were again slightly and significantly more likely to affirm this than their male counterparts (.9634 to .8828 with a p-value of .10).

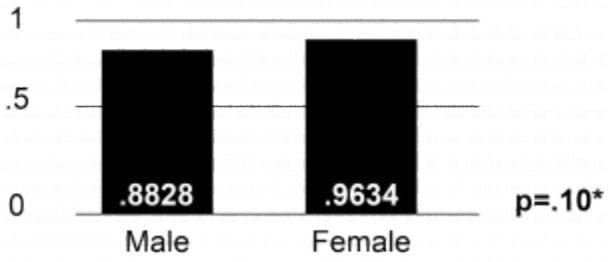

Figure 5. *Difference of means test: Male versus female comparison- importance of more people of color serving as judicial officers*

In discussing why it is important to have a diverse bench in terms of sex, race, and ethnicity, a majority of respondents (60.46 percent) indicated that it promotes public trust in the judiciary

and legitimacy in institutions of government, that women and people of color bring a different perspective to the bench, and that it is generally more representative of society. However, some respondents did add that "qualified" judges are what is needed, making comments such as, "These are all important considerations but of significantly less importance than intellectual capabilities, experience, and temperament; none of the latter qualities are gender- or race-based." Others said what mattered most was that the "best person for the job" was appointed, elected, or hired. Some respondents expressed that it mattered more on a court-by-court basis, sharing, "You don't necessarily need more women or people of color as judicial officers, it depends on the current make-up of the judicial district."

Discussion and Implications

Overall, the findings demonstrate that some female judicial officers have different experiences on the bench compared to their male counterparts and that these differences can be related to gender dynamics within the institution and society and hence extended elements of the different voice debate. The results demonstrate that female judicial officers can contextualize their experiences differently due to their position as women, which gives them the potential to have a broader scope and style of jurisprudence; as some respondents stated, "women help to give form to the human, non-legal part of the job," "have a more holistic viewpoint," and may be "more flexible" and "sensitive" in dealing with parties in a case. Therefore, the results suggest some female judges can bring forth dynamics of the ethics of care as it relates to the different voice debate in court proceedings. As the first female Supreme Court Justice of Canada, Bertha Wilson, argued, women judges have the potential to bring a "new humanity" to court proceedings and can make a difference by viewing cases in terms of a larger societal picture and impact (Wilson 1990).

Furthermore, female judges were more likely to respond that having more women and people of color on the bench is important, compared to their male counterparts; both results were significant. Again, these findings demonstrate a pattern that may suggest that female judicial officers have not only faced experiences different from their male counterparts on the bench but that some of those experiences have been steeped in gender and racial dynamics. For example, Patricia Hill Collins (2000) discusses how Black women's experiences as an oppressed group can shape their position in society and impact their professional opportunities. Due to the level of systemic oppression women of color have faced (professionally and politically), they can be routinely denied opportunities that are available to Whites. These results also suggest an element in line with Gilligan's (1982) theory on the different voice with regard to women operating and assessing moral and social dilemmas from an ethics of care perspective, which again argues that

some women are more likely to take notice of, experience, and/or consider a variety of contextual factors, such as sensitivity to bias, race, male-dominated environments, and so on.

To conclude, future research should continue to build on and expand Gilligan's (1982) work by evaluating whether patterns relating to the different voice exist across judicial officers, paying closer attention to race and sexual orientation of judges in order to examine the theory in a broader, less binary fashion. Moreover, though the findings presented here show evidence of the different voice theory at play with judicial behavior and perspectives, future studies should examine if differences between male and female judicial officers lessen with the amount of time they spend on the bench; that is, do judges, regardless of background, eventually comport and converge to professional norms and focus more intently on key principles, such as judicial independence?

Activity: The Different Voice Debate, Gender Diversity, and Bias

More recently, states such as California, Connecticut, New Jersey, and Washington have either created task forces to study issues of bias in the courts or called for judges to give consideration to issues of implicit bias as a way to combat discrimination (Schwartzapfel 2020). Several initiatives are specifically unfolding in California regarding the courts and issues of implicit bias. For example, California is one of the first states to implement antibias practices via statutory mandate, with the passage of Assembly Bill 242 on October 2, 2019, authorizing the state's Judicial Council to develop, implement, and require training on implicit bias for all court employees (judges and staff) effective January 1, 2021, and compliance by licensed state attorneys by January 31, 2023. On July 1, 2020, the California State Supreme Court issued a revised "rule of court" (an order governing a policy, procedure, and/or regulation of the court) prohibiting bias of any kind in the state's judicial system. The rule also requires the creation of committees that include members of courts' local bar associations to assist in maintaining bias-free environments, educational programs, and the development of procedures for receiving complaints related to issues of bias (California Rules of Court 2020).

Bearing the above discussion on bias in mind, along with the findings in this chapter, you are asked to engage in the following activities:

1. Visit Harvard University's Project Implicit. Designed in the early 1990s to help address issues of unconscious bias, this test has been used by judicial officers to bring awareness to their own potential for bias. Take the Gender-Career, Gender-Science, and Skin-tone Implicit Association Tests. What were your results? Did you have a high or low level of

bias regarding these categories? Note, there is a debate over how effective taking these tests is in actually combatting bias (Oswald et al. 2013). Do you think they help, particularly with regard to judges addressing issues of gender and/or racial discrimination in the courtroom? Why or why not? Recalling the findings presented in this chapter on the different voice debate, do you think female judicial officers are better at recognizing bias in the courtroom than their male counterparts? Why or why not?

2. Does your state's court system have any current or pending initiatives to address implicit bias in legal proceedings? You may want to visit your state court's website or search your state legislature's bill docket. If so, what are the purposes and requirements of these initiatives? Do you agree or disagree with these efforts? Why or why not?
3. Each state has a trial court system. Sometimes they are called "superior courts," as is the case in California, or "circuit courts," as is the case in Oregon. Local trial courts have judicial officer rosters that provide the names of the judges serving on the bench for that particular court. Visit your local trial court website and search for the court's judicial roster. At first glance, are you able to detect how many male versus female judicial officers are seated on the bench? Does the proportion mimic the greater population they serve or is there a gavel gap? How might the gender makeup of your local court impact local issues in your community, as well as case experiences for legal parties and/or outcomes?
4. Building on question 2, contact the clerk of your local trial court and ask if you can please interview one of the judicial officers for this exercise and/or class. Note that the interview will take approximately 15 to 30 minutes of the judge's time. Depending on your local court's visiting procedures you can conduct the interview (for class purposes only) via phone, over Zoom, or in person. During the interview, you may want to ask the judge the following questions:

    a. How and why did they become a judicial officer?
    b. What are the types of trials they oversee?
    c. Have they heard of the different voice debate (if not, explain using the information presented in this chapter)? Do they agree or disagree with its major premise(s)?
    d. Have they have experienced men or women being treated differently in the legal system?
    e. Are they are required to complete or participate in ongoing unconscious bias training?
    f. Do they think male and female judges bring different perspectives to the bench based on their life experiences?
    g. Does diversity on the bench in terms of race, ethnicity, and sex help to promote greater public trust in and legitimacy of the judicial system?

Reflect. Were you surprised by any of their responses? With the judge's permission, ask your professor if you can share their responses with the class in a short presentation.

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Appendix

Sex	**Male: 60.5%** **Female: 40%**
Appointment Type	Governor: 71.16% Elected: 14.88% Hired: 13.02% Other: 0.93%
Type of Judicial Officer	Trial: 89.3% Appellate Judge: 1.4% Commissioner: 8.37% Something Else: 0.93%
Age	35 to 45: 6.51% 46 to 55: 30.23% 56 to 65: 28.37% Above 65: 2.85%
Race and Ethnicity	White: 73.95% Black: 5.58% Hispanic: 10.23% Native American: 0.93%
Religion	Protestant: 21.86% Catholic: 26.05% Orthodox: 1.40% Jewish: 15.35% Muslim: 0.93% Buddhist: 0.93% Hindu: 0.93% Atheist: 3.26% Agnostic: 9.30% Nothing in particular: 15.81% Something else: 4.19%
Party Identification	Democratic Party: 62.26% Republican Party: 15.57% Libertarian Party: 0.94% No Party Preference: 21.23%
Type of Legal Education	American Bar Association: 92.52% State Bar Accredited: 6.54% Other: 0.93%
Average Number of Years Practicing	20.65
Average Number of Years on the Bench	11.22

Sample Descriptive Statistics

Survey question coding scheme:

1. In your opinion, is the legal profession welcoming to female attorneys and judicial officers?
   1 = Yes

0 = No

2 = No opinion (note: coded as missing in analysis)

2. Do you think that some women's experiences as a wife, mother, and daughter lead them to bring a different perspective to court cases and legal proceedings?
   1 = Yes
   0 = No
3. Have you witnessed female judges and/or female attorneys being treated differently from their male counterparts, either by colleagues (other judges and/or attorneys), witnesses, members of the jury/jury pool, court staff, or others? For example, not addressed with their honorific or proper professional title, treated with a different level of respect, and so on?
   1 = Yes
   0 = No
4. Do you make an effort or have a process to self-check your own gender bias when making court rulings?
   1 = Yes
   0 = No
5. Is it important to have more women serving as judicial officers?
   1 = Yes
   0 = No
6. Is it important to have more people of color serving as judicial officers?
   1 = Yes
   0 = No

7. Walking on Broken Glass

Justice Gender in State Supreme Court Citations

SHANE A. GLEASON, SCOTT A. COMPARATO, AND CHRISTINE M. BAILEY

State supreme courts sit at the apex of the state judiciary. While their decisions can be reviewed by the US Supreme Court in some issue areas, the decisions of state supreme courts are often final. State supreme courts' importance has grown over the past forty years because of transformations of the social, legal, and political landscape resulting in tangible changes in the operation and perception of state supreme courts (Calderone, Canes-Wrone, and Clark 2009; Cann and Yates 2008; 2016). Interest groups are increasingly turning to state courts to pursue their policy goals (Kane 2017; 2018). Judicial elections are becoming more contentious and expensive (Bonneau and Hall 2009; Gibson 2012; Hall 2001; Kritzer 2007; Nelson, Caulfield, and Martin 2013). There has also been a precipitous rise in the professionalism—an aggregate measure of the salary and resources available—of many state courts, with changes in how they are organized and administered (Squire 2008). However, one of the most important differences is with the ability to alter the very content of case law is the identity of the jurists staffing state supreme courts.

In an era of rapid transformation on state supreme courts, one of the most visible shifts is to the immutable characteristics of the judges sitting on the bench. Far from the days when Florence Allen made history as the first female state supreme court justice in 1922 (Norgren 2018), women now constitute the majority of justices on ten state supreme courts (Ritter 2019). Particularly as scholars note that women bring a distinct perspective to judicial decision-making under certain conditions (e.g., Boyd, Epstein, and Martin 2010; Gleason, Jones, and McBean 2017; Haire and Moyer 2015), the inclusion of women on the bench could alter the substantive content of opinions. This could result in then judge Sonia Sotomayor's suggestion that "a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life" (Sotomayor 2002). In essence, Sotomayor suggests that lived experiences bring a distinct understanding to the law (see also: Boyd, Epstein, and Martin 2010; Glynn and Sen 2015). In this instance, that means an increasing number of women on a state supreme court results in a different kind of case law than that developed by a male justice.

While scholars hold that women bring a distinct voice to the legal process, the question then becomes, Where can we observe a distinct female voice in state supreme court opinions? Scholars have explored the role of judge gender in judicial behavior, albeit mostly at the federal level, in a number of different ways. Many scholars explore this through vote direction (e.g., Collins, Manning, and Carp 2010; Songer, Davis, and Haire 1994; Scheurer 2014; Boyd, Epstein, and Martin

2010; Gleason 2019; Szmer, Christensen, and Kaheny 2015). However, by focusing on the judge vote, these studies limit their analysis to the immediate case. This is problematic since we often care about decisions because of their impact beyond the case at hand. For instance, Roe v. Wade is often in the news because the core finding of that decision—namely, that the constitutional right to reproductive privacy is inclusive of abortion—shapes many subsequent decisions and the policy space available to legislatures. In other words, we care about Roe not because the Court split five to four, with Justice Brennan supporting Jane Roe and Justice Rehnquist supporting the State of Texas, but because it is a controlling precedent that shapes later decisions. To this end, had subsequent courts ignored Roe in the years after it was decided, we would likely not care very much about the decision today. Thus it makes sense for us to explore judicial impact through an analysis of how future courts respond to precedent.

Precedent can often be observed through citations. When an opinion is cited, it gives the author influence well beyond the immediate parties of the case at hand (Fowler and Jeon 2008) and shapes the options available to later courts deciding similar cases (Hansford and Spriggs 2006). It is important to distinguish that on state supreme courts, citations can come in two distinct forms: vertical and horizontal. When a justice writes an opinion, there are certain opinions that must be included. It would be exceptionally strange, for instance, for the Massachusetts Supreme Judicial Court to issue a ruling on marriage equality that does not reference *Goodridge v. Department of Public Health*, the case that made Massachusetts the first state to legalize same-sex marriage. In this instance, *Goodridge* is a vertical citation. It was decided by the Massachusetts court and is therefore a binding precedent for the state supreme court and its inferior courts. But the need to cite *Goodridge* changes if we shift our focus to the Illinois Supreme Court. For Illinois, *Goodridge* is not a binding precedent; any decision to cite it is entirely at the discretion of the Illinois court. These latter citations, termed horizontal citations because they occur between coequal courts, are where we focus for the rest of the chapter. Citing a decision horizontally is not legally required and thus represents the cited court choosing to allow the decision of the cited court to shape its own case law. We now turn to an overview of previous work on horizontal citations. We then develop expectations about how opinion author gender might shape horizontal citations before subsequently testing our expectations.

Explaining Citations

Citations spread between state supreme courts in much the same way that ideas about legislation spread between state legislatures. When Colorado and Washington implemented legalized recreational marijuana in 2012, several other state legislatures soon "copied" their approach. In brief, legislators learn from the experiences of other states and seek to emulate successful policies

(Walker 1969; Berry and Berry 1990). State supreme courts likewise often turn to decisions made by peer courts rather than writing an opinion from scratch. Simply put, if another state supreme court has previously dealt with a legal issue, it makes little sense to "reinvent the wheel" when a court can draw on a persuasive and successful framework developed by a peer court (Shapiro 1965; 1970). Of course, state supreme courts will not copy just any legal argument. A number of scholars note that state supreme courts utilize citations from courts that resemble them in some way and those with reputations for producing high-quality opinions. To use the language of citation scholars, courts often horizontally cite proximate and prestigious peer courts. It is important to note that proximity and prestige have predicted horizontal citations for nearly a century, from Mott's (1936) first study to the most contemporary update (Hinkle and Nelson 2016), despite considerable changes in the legal, political, and societal landscape (e.g., Fronk 2010). We now discuss proximity and prestige in turn.

Proximity follows the homophily principle; "birds of a feather flock together," and courts cite courts that resemble them either ideologically or spatially. For instance, it is likely that the New York Court of Appeals and the California Supreme Court will cite each other, as they are both relatively liberal states. Indeed, Merryman (1954) notes that California cites New York the most of any of its peers. By the same logic, it is unlikely that Utah and Oregon will cite each other, as there is a large ideological gap between the two. States that are spatially proximate or in the same legal reporter region are also more likely to cite each other. In terms of geographic proximity, we would expect Ohio and Pennsylvania to cite each other often, as they are physically close to each other and likely deal with many of the same legal issues (Caldeira 1985). The decisions of state supreme courts are also published in legal reporting volumes that group states by region rather than reporting the decisions of each individual state in their own volume. As a result, courts that are in the same legal reporter region historically cite each other if only because they almost surely had each other's opinions included in their law libraries. Of course, most legal research now takes place digitally rather than in physical books. While we might expect this effect to dampen the impact of reporter regions, they are still powerful predictors of horizontal citations in the twenty-first century (Hinkle and Nelson 2016).

Prestige also predicts horizontal citations. A prestigious court is one that other legal actors (courts) see as authoritative (e.g., Corley, Collins, and Calvin 2011). Importantly, as Mott puts it, "It is axiomatic that some supreme courts are more influential than others" (1936, 295). While all state supreme courts are technically equal, some states are seen as more prestigious by their peers and are thus cited more frequently. The reasons for prestige differences may be attributed to the nature of the cases that the courts hear, the expertise of the court, or the resources available.

Hearing diverse or novel cases can increase a court's prestige. Caldeira (1983; 1985) finds that courts with more running feet of case law, higher state GDPs, and greater populations are more likely to be cited. Simply put, having more decisions results in a greater number of cases that can

be cited horizontally. Hearing novel cases allows a court to increase its expertise in complicated areas of law that will then become attractive to other courts when they deal with these issues for the first time. For instance, the New Jersey Supreme Court is a leader in education finance decisions, partially because New Jersey was one of the first state supreme courts to deal with education finance and did so repeatedly. By necessity, New Jersey became a leader. When other courts were faced with education finance decisions of their own, it made sense to draw on the prestige New Jersey had developed in the area rather than creating a new decision from the ground up (e.g., Gleason and Howard 2015). Of course, if a court has a large body of case law and hears novel cases, it must still produce quality opinions that other courts want to cite. If a court has few resources, it will be hard-pressed to produce nuanced and persuasive opinions that other courts find attractive. A court with few resources likely has a heavy docket and little administrative support staff. As such, the opinions it produces generally lack nuanced legal reasoning. Those opinions will not be attractive to peers in other states. Conversely, one of the reasons the California Supreme Court is a network leader is because it has a discretionary docket and ample law clerk support to produce nuanced opinions (Hinkle and Nelson 2016; Squire 2008).

The literature on state supreme court citations demonstrates that citations are often the product of proximity and prestige. Importantly, however, this literature focuses on the primacy of courts over judges. This is problematic, as a core assumption of judicial behavior is that the identity of the judge shapes outcomes. For instance, the reason Justice Thomas often votes conservatively is because he is conservative (e.g., Segal and Spaeth 2002). By the same token, Justice Ginsburg is such an ardent supporter of women's rights because of her lived experience as a female attorney who entered the legal profession in the 1950s (Haire and Moyer 2015; Norgren 2018). Likewise, the reason opinions by Chief Justice Marshall hold such sway two centuries after he wrote them is because of his stature as a jurist rather than the fact that the opinions were issued by the Supreme Court. Indeed, opinions written by Justice Washington, which we rarely see discussed, were also issued by the Supreme Court in the same era Chief Justice Marshall served.

While these are, to us, excellent reasons to add a judge-centric component to models of citation activity, the court-centric approach in state supreme court citation literature is likely driven by the sheer difficulty involved in obtaining information about state supreme court opinions in general and the justices who author them in particular. However, recent work by Hinkle and Nelson (2016) and Hall and Windett (2013) has ushered in a virtual treasure trove of data on state supreme court decisions and the justices who author them. In particular, Hinkle and Nelson (2016) provide information on every citation made by state supreme court justices in 2010, and Hall and Windett (2013) obtain case-level information, including the identity of the justice who authors the opinion, from 1994 to 2010. These data make it possible for scholars to move from exploring court-level explanations for horizontal citations to individual-level factors. However, in order to properly utilize these data, we need to formulate expectations about how justice-level factors shape citations.

Toward a More Identity-Based Account of Horizontal Citations

There is no existing work on how justice-level factors drive horizontal citations on state supreme courts, but there is literature on horizontal citations between federal appellate court judges. Just as state supreme courts often cite each other horizontally, so too do federal courts of appeals judges. Precedent handed down by the Seventh Circuit Court of Appeals is binding on federal district courts within the Seventh Circuit (for instance, the Southern District of Illinois) and on the Seventh Circuit itself. It is often the case, though, that federal appellate court judges will cite their colleagues on other circuits. Importantly, this is a horizontal citation that is akin to a state supreme court citing a decision issued by a peer court in another state. Much like on state supreme courts, horizontal citations between federal appellate court judges are driven by proximity and prestige (Choi and Gulati, 2008; Landes, Lessig, and Solimine 1998; Anderson, 2011; Klein and Morrisroe, 1999; Cross, 2010). This literature typically looks at proximity and prestige in a manner that is fairly consistent with the literature on state supreme courts. Judges who are ideologically similar are more likely to cite each other. Indeed, the most ideologically extreme judges are less likely to be cited—likely because they are ideologically proximate to so few of their peers (Landes, Lessig, and Solimine 1998). Likewise, judges who have built up an extensive body of case law are more likely to be cited than freshman judges for the simple fact that the former have a larger body of work with which to build a prestigious reputation (Cross 2010). While this provides a dynamic foothold for extending state supreme court citation studies, we draw on recent work on diversity in the political realm generally and the legal sphere specifically, suggesting that immutable characteristics might drive the way judges evaluate their peers.

There are a number of different angles from which scholars could explore citations between state supreme court justices, including their lived experiences (Glynn and Sen 2015) and social contacts (Heinz et al. 1993). However, we choose to focus on immutable characteristics. Whereas life experiences can change with time and chance encounters or a faux pas can alter social interactions, immutable characteristics are more permanent. In particular, we focus on the role of opinion author gender in horizontal citations. Ample literature suggests that women experience the legal profession differently than their male peers (Haire and Moyer 2015; Gleason 2019; Gleason, Jones, and McBean 2017; Norgren 2018), and these experiences can determine which women ascend to the top of the legal profession (Baker 2003). Examining gender is all the more attractive considering the growing gender diversity of state judiciaries.

At a time when some of the earliest studies of citation patterns were appearing (see Mott 1936), female judges were exceptionally rare on state supreme courts. This would remain the case well into the late 20th century when others revisited the topic (see Caldeira 1983, 1985) but by the

time the work of Hinkle and Nelson (2016) appeared, the state judiciary had become remarkably diverse. Female judges are now common on both state and federal benches (Szmer, Christensen, and Kaheny 2015; Slotnick, Schiavoni, and Goldman 2017). Indeed, they hold the majority in nearly 20 percent of all state supreme courts (Ritter 2019). Importantly, at all levels of the judiciary, female judges and bring a distinct voice that shapes case law and judicial behavior in subtle ways. For instance, Boyd (2016) finds that female judges are more likely to grant motions than their male counterparts. More germane to appellate court work, Songer, Haire, and Davis (1994) note that female judges decide more liberally in some issue areas. Importantly, Scheurer (2014) notes that female federal appellate court judges are more likely to take on a "different voice" after they reach a critical mass on a given bench (see also Collins, Manning, and Carp 2010). That is to say, when there are more women on a court, it is more likely that women's distinct perspective will appear in decisions (e.g., Kenney 2002). This perspective can translate into the language used in the opinion (Gleason, Jones, and McBean 2017) and thus shape the range of options available to future courts adjudicating similar cases (Hansford and Spriggs 2006).

Scholars are increasingly cognizant of the role gender plays in political and legal outcomes. However, this literature presents somewhat mixed findings. While women are held to a double standard in political and social roles (Szmer, Sarver, and Kaheny 2010; Rhode 1994; Jones 2016; Gleason, Jones, and McBean 2017), women who ascend to the bench are generally seen as more qualified (Gill and Eugenis 2019; Pearson and McGhee 2013). This is perhaps because, in order to reach this level of the judiciary, female attorneys must truly excel in order to succeed in a male-dominated profession (Norgren 2018). Accounts of early female judges, both memoir based and scholarly, stress that women had a considerable uphill climb. By definition, those who did succeed were among the best justices (e.g., Abramson et al. 1977). Thus it is reasonable to expect that an opinion written by a female justice should be seen as more prestigious than one authored by a male justice.

Our proposition finds support in previous work on voters' preferences for both male and female candidates. Voters do not hold female candidates to a different standard than male candidates or exhibit outright sexism. However, the traits that voters find desirable in candidates are less common among women (Teele et al 2018). Not surprisingly, then, women are less likely to run for office (Fox and Lawless 2005), but the average woman who does run is more qualified than the average male candidate (see Anzia and Berry 2011). Moreover, female candidates tend to be more sophisticated than their male counterparts (Niven et al 2019). However, women who run typically do so against more qualified candidates (Milyo and Schosberg 2000). Thus women are less likely to run for office, and those who do are more qualified and face stiffer competition. As such, women who make it into office are likely extremely qualified (e.g., Pearson and McGhee 2013). Voters appear to be aware of this, tending to prefer female state supreme court candidates under certain circumstances (Gill and Eugenis 2019).

Given that women face a more difficult path to office relative to their male counterparts (Teele, Kalaa, and Rosenbluth 2018), and those women who do become state supreme court justices are likely more qualified than their male counterparts (Pearson and McGhee 2013), it is possible that female justices' peers see the opinions they author as more persuasive than those written by men. This would then increase the probability that their peers will view opinions written by female state supreme court justices as attractive horizontal citations. Accordingly, we expect that opinions authored by female state supreme court justices will be cited more frequently than those written by men.

Data and Methods

In order to explore the extent to which opinion author gender shapes the citation of state supreme court precedent, we combine two unique databases to measure the total number of times each justice who served between 1995 and 2010 is cited in 2010. Of course, with just one year of data, we are limited by how much we can generalize our findings. However, we feel that since there is no work on this topic, our work here represents an important first snapshot. We do so by drawing on previous data sets created by Hinkle and Nelson (2016) and Hall and Windett (2013). Hinkle and Nelson (2016) provide data on all citations made in the 2010 term, and Hall and Windett (2013) provide case-level information on all state supreme court decisions from 1994 to 2010. Importantly for our purposes, this includes the name of the opinion author. We augment these two databases with our own original research into the gender of all 727 justices who served on state supreme courts between 1995 and 2010.

Hinkle and Nelson (2016) use text-scraping software to extract every citation state supreme courts made in the 2010 term. Of course, the vast majority of these citations are vertical citations to a court's own case law or that of its inferior courts. We drop these vertical citations and instead focus on just the horizontal citations for the reasons stated above. There are 1,897 horizontal citations made across all state supreme court opinions in 2010. But then the question becomes, Which justices are getting horizontally cited? Hinkle and Nelson's (2016) data give us the citation information for each cited decision, but they do not tell us who wrote the opinion. Fortunately, we can use Hall and Windett's (2013) data to supply the identity of the justice who wrote the cited opinion.

Hall and Windett's (2013) data provide information on all 115,067 signed state supreme court decisions from 1995 to 2010. Using the case citation, which is common to both Hinkle and Nelson (2016) and Hall and Windett (2013), we are able to create a count for the total number of times each decision is cited. Of course, since we are primarily interested in the opinion author rather than the

opinion itself, we then use the justice name variable in Hall and Windett (2013) to count the total number of times each of the 727 justices who served from 1995 to 2010 are cited in 2010.

The total number of citations received by each justice constitutes our dependent variable. This count variable ranges from 0 to 15. Looking at the distribution of citations displayed in figure 1, it is clear that most judges receive no citations, whereas a relatively small number of justices receive a disproportionate share of horizontal citations. But since we are interested in knowing whether women are more likely to be cited, it is necessary to construct our primary dependent variable, which notes whether a given justice is male or female.

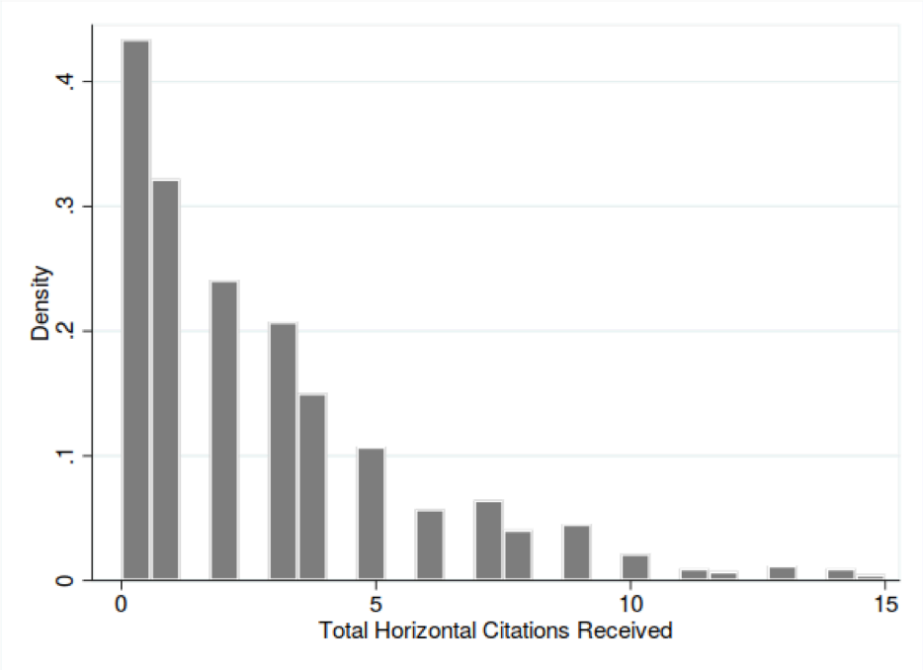

Figure 1: Total Horizontal Citations Received by Justices

Our main independent variable is a binary measure of whether a given justice is male or female. To create this measure, we first use the Hall and Windett's (2013) data to create a list of all state supreme court justices who served from 1995 to 2010. We then examine state supreme court websites and news accounts to determine whether a justice is male or female. We do so by looking for pronouns (e.g., "Justice X served on the law review during her time in law school" or "Justice Y and his family enjoy hiking"). The variable is coded 1 if a justice is female and 0 if a justice is male. After creating this measure, we rerun our histogram from figure 1, but this time we differentiate between male and female justices. This is displayed in figure 2. The left panel depicts citations to male justices; the right panel depicts citations to female justices. It appears that female justices are perhaps more likely to be cited than male justices. However, a visual inspection of a histogram can be deceiving. It could be that female justices in our data are cited more frequently by random

chance. We address this possibility by running a t-test that measures whether a relationship (in this case, our observed propensity for female justices to be cited more than male justices) is due to random chance or a statistically significant difference. Our t-test confirms that female justices are more likely to be cited than male justices ($p = 0.00$).

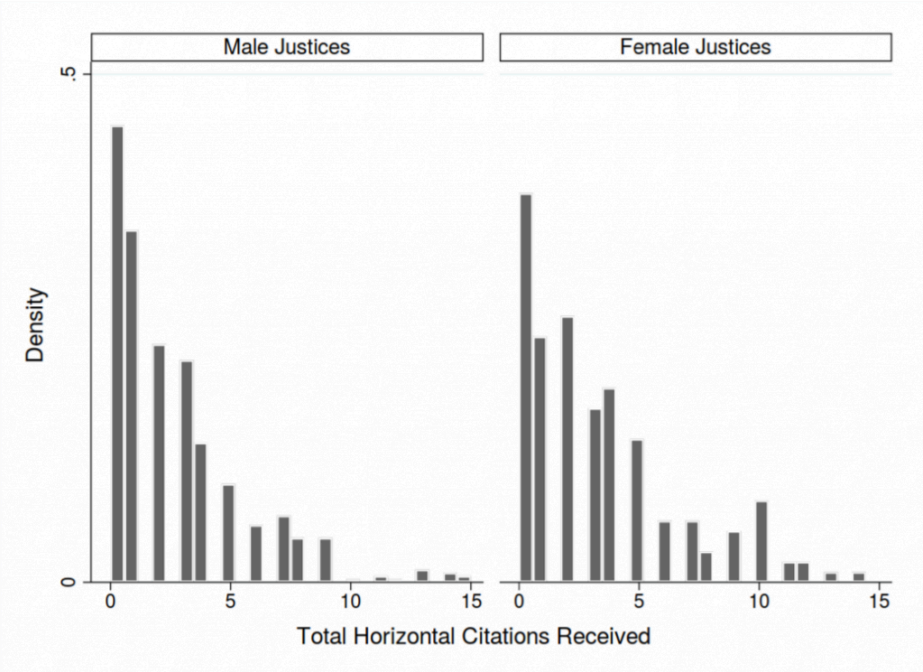

Figure 2: Total Horizontal Citations Received by Justices by Gender

While the histograms and t-test seem to support our contention that female justices are more likely to be cited horizontally than male justices, we must still account for existing explanations of proximity and prestige. A histogram merely models the distribution of data, and a t-test assesses for statistical significance between just two variables. Could it be that female justices are just more likely to serve on ideologically moderate courts? Or that male justices tend to be on courts with low resources? If either of those propositions is true, then the conclusions we drew are spurious, and the relationship we attributed to justice gender is actually a function of ideological proximity and professionalism prestige. Fortunately, we can follow the lead of Hinkle and Nelson (2016) and utilize a negative binomial regression model to explore whether female justices are more likely to be cited while accounting for existing explanations of proximity and prestige.

A negative binomial model resembles an ordinary least squares regression model, but it allows for the dependent variable to be a count (e.g., zero citations, one citation, eight citations) rather than a continuous measure as required by ordinary least squares models (e.g., –$20.03 in the bank, $115.67 in the bank). Of course, in order to run the negative binomial model, we need to specify control variables that account for the proximity and prestige explanations suggested by previous research.

By including control variables, we ensure that we account for how proximity and prestige shape horizontal citations to state supreme court justices at the same time we test for whether female justices are cited more frequently than male justices.

We note proximity via a measure of state political ideology. That is to say, we expect state supreme courts to cite justices on courts that resemble their own ideologically. So we would expect Massachusetts to cite Illinois (both liberal states). We would not expect Illinois to cite Texas much (a conservative state). We create this measure via the Berry et al. (1998) state ideology scores. These scores create a measure from 0 (most conservative) to 100 (most liberal) at the state level. This allows us to move beyond simply calling a state liberal or conservative. This is a good thing, because while both Texas and Wyoming are conservative, Wyoming is a fair deal more conservative than Texas. Importantly, Berry et al. (1998) create scores for both the general public and government institutions. To illustrate this, in 2000 Illinois' voters have a score of 54, which indicates that they lean slightly liberal. Illinois government institutions have a score of 40 in 2000, which demonstrates that they are considerably more conservative than the voters. Since state supreme court justices likely want to retain their jobs, we use the ideology score for the actor most responsible for the justices' continued tenure. In states where justices are elected in some form, this is public ideology. For states where justices are appointed, this is elite ideology. We then calculate the state's ideological distance from a purely moderate position (which would be 50 in the Berry et al. scores) by taking the absolute value of the state's Berry et al. (1998) score for the state supreme court's primary principal in the year the opinion was written. We expect that when the state issuing a decision is in a more ideologically extreme state, it will be less likely to receive citations, as it will be ideologically proximate to fewer peers (e.g., Cross 2010).

We include several measures of prestige. Chief among these is court professionalism. Simply put, a court that has ample resources will be able to produce nuanced opinions that are attractive to other state supreme courts. Much like Hinkle and Nelson (2016), we measure this with the index developed by Squire (2008). Prestige also comes from having specialized case law. Since hearing a diversity of cases enhances specialization, we note this in much the same way as Caldeira (1985) via the log of the state GDP and the population for the issuing court. The logic here is that states with higher GDPs will experience growth in their business sector, which leads to new and diverse litigation. Take, for instance, New York. Since New York is the home of Wall Street, it often hears new and innovative cases. So if New York hears a novel intellectual property case, other states will likely turn to that decision when they deal with similar topics later on. Much the same logic applies when a state's population grows, as new questions about zoning, government services, and social interactions are likely to arise. Since numerous scholars note selection mechanism impacts eventual citation, as different selection mechanisms may attract different kinds of candidates (Fox and Lawless 2005) and thus perhaps change the way opinions are written (Caldeira 1985; Hinkle and Nelson 2016), we include a dichotomous measure noting whether the issuing court seats its members via popular election. This measure is set to 1 for elected courts and 0 otherwise. Since

opinions have more opportunities to be cited over time, we include a count of a total number of years in which a judge's decisions existed in the universe of cases. We do so by subtracting the first year a judge authored an opinion between 1995 and 2010 from 2010.

Results

Our results, presented in table 1, indicate that decisions written by women are more likely to be cited than decisions written by men. This provides support for our primary expectations. Additionally, some of our prestige control variables are significant. This demonstrates that while previous work utilizes proximity and prestige to explain horizontal citations, scholars must account for the gender of the justices being cited as well if they wish to arrive at a more complete understanding. We now turn to a detailed discussion of our results. Since negative binomial results are unintuitive, we discuss our results in terms of incident rate ratios.

Variable	**Coefficient**	**Standard Error**
Female Justice	0.221*	0.081
Court Ideology	-0/003	0/006
Logged GDP	1.320*	0.249
Logged Population	-1.426*	0.284
Court Professionalism	0.100	0.492
Elected Justice	-0.207***	0.111
Years in Data	0.102*	0.009
Contant	-4.052*	1.094
Alpha Coefficient	0.597	
Observations	727	
Chi 2	213.34	

Table 1. Standard errors clustered on state supreme court

*:p=0.01, **: p=0.05, ***: p=0.10

Decisions written by women are more likely to be cited than those written by male justices. When a justice is female, the incident rate that she will be cited horizontally increases by 1.25, all else being equal. We also find that a one standard deviation increase in the state GDP increases the incident rate ratio for citation by 1.730, from 3.743 to 4.073. We note that as the population of the

state increases, the probability that its decisions will be cited actually decreases. A one standard deviation increase in logged population decreases the incident rate of horizontal citation by 0.280, from 0.268 to 0.240. We also note that justices serving on elected courts are more likely to be cited. Serving on an elected court increases the incident rate of citation by 0.813 relative to appointed courts. Finally, each additional year a justice has opinions in our data set increases the incident rate of citation by 1.108.

Discussion

The stereotypical image of a judge is male. When women first entered the legal profession, they faced fierce pushback (Norgren 2018), and those who did ascend to the bench, by definition, had to be among the best (e.g., Abramson et al 1977; Haire and Moyer 2015). Now, slightly less than a century after Florence Allen became the first female state supreme court justice when she joined the Ohio Supreme Court in 1922, women increasingly occupy seats on state courts of last resort, and their opinions are cited horizontally more frequently than those authored by their male counterparts. This indicates that women are seen as more prestigious in the citation network. The literature from trailblazer women judges and women on the campaign trail suggests that this is because of the adversity female justices have to overcome to reach the bench (e.g., Norgren 2018; Haire and Moyer 2015). While we have answered the question we set out with, our results give rise to a number of new questions that should be explored more fully by future studies. We now turn to a brief overview of our findings and how future scholars might expand them.

We focus on horizontal citations because of their purely discretionary nature. Much of the literature on horizontal citations over the past eighty years finds that horizontal citations are the product of proximity and prestige. Importantly, however, we only find that prestige-based explanations are significant; ideology is not. Of course, we could argue that opinion author gender is a form of prestige. Still, the reasons why ideology is not significant are not entirely clear. It is possible, for instance, that the role of ideology is based not on the relative moderateness of the cited justice's court but on the distance between the citing court and the cited court. By changing the specification of our model, future studies may be able to present a more nuanced explanation of how gender and ideology impact horizontal citations.

A key contribution of our approach is that unlike existing state supreme court horizontal citation studies, we include an individual-level factor in our model. Previous studies have relied almost exclusively on court-level factors, such as state ideology and professionalism. We include one judge-level factor, gender, and find that female justices are more likely to be cited than their male counterparts. What, though, of other individual-level factors, such as ideology, race, and

accumulated body of case law? We opt to focus on just gender in this initial foray in order to keep our argument conceptually simple, but it stands to reason that if gender shapes citations, it is likely that other individual-level factors influence citations just as they do on federal appellate courts. Indeed, we think a comprehensive account of horizontal citations needs to consider the full range of court- and individual-level factors at the same time. We encourage future scholars to take up this project.

Perhaps one of the greatest limitations of our study here is that we do not know who is doing the citing because our dependent variable is a count of the total number of times each judge is cited. While we think this choice was justified in order to establish that female justices are cited more frequently than their male counterparts, there are reasons to believe that who cites is perhaps as important as who gets cited. To this end, Hinkle and Nelson (2016) note that federal appellate court judges tend to cite others from their in-groups. Could it be the case that most of the citations going to female justices are from other female justices? Particularly as evidence from the US Supreme Court indicates that women rely on a different calculus when evaluating legal information (Gleason, Jones, and McBean 2017), it is worth exploring what both ends of the citation dyad look like. This could be addressed with a dyadic model, as has often been the case in citation studies (e.g., Hinkle and Nelson 2016; Howard, Roch, and Schorpp 2017). This approach would also allow us to analyze characteristics of the case at hand, such as its salience or issue area.

Perhaps one of the greatest limits to our approach is the short time frame we employ. We explore horizontal citations made in 2010 to decisions authored between 1995 and 2009. While this approach is necessitated by the availability of data, it is important to recall the scope of available data is ever expanding, as are the statistical techniques available to researchers to explore the data. It was, after all, not that long ago that most state supreme court studies relied on the Brace, Langer, and Hall (2000) data, which in turn relied on a subsample of state supreme court cases decided between 1995 and 1999. As more data become available, we encourage future scholars to revisit this study with information from other years. In particular, it is worthwhile to look at a contemporary term such as 2019, where women hold majorities on nearly 20 percent of state supreme courts, alongside an earlier term from the 1980s or 1990s, where female justices were still relatively rare. Since a number of scholars note that female judges take on a different voice once they reach a critical mass in a given institutional context (Collins, Manning, and Carp 2010; Scheurer 2014), we suspect that the gendered context of state high courts will shape citation practices (e.g., Szmer, Christensen, and Kaheny 2015). Presumably as women occupy an increasing number of seats on a given court, the overall culture of the legal profession will become more inclusive (e.g., Kanter 1977; Kaheny, Szmer, and Sarver 2011; Kenney 2002). As such, the prestige of opinions written by women may dissipate. Of course, we leave it to future scholars to more fully explore this topic.

Finally, future scholars may gain leverage by looking at the role of gender in the opinion-writing

process writ large. Murphy (1964) and Maltzman, Spriggs, and Wahlbeck (2000) note that opinion writing is the product of compromise and strategic behavior by the justices on the US Supreme Court. While we know the level of collegiality varies from one state supreme court to the next (Kritzer 2015), it is possible that a greater number of women on a given bench alters the extent to which bargaining and negotiating happens; this could extend to the horizontal citations chosen (e.g., Szmer, Christensen, and Kaheny 2015; Kaheny, Szmer, and Sarver 2011).

In this chapter, we explore horizontal citations on state supreme courts. While little has changed in scholarly accounts of horizontal citations over the past eighty years, we discuss how a relatively new feature of state benches, gender diversity, shapes horizontal citations. We find that female justices are more likely than their male peers to be cited horizontally. This is consistent with existing work that reveals that women who secure high political offices are often more qualified than men in those institutions. While our results here are exciting, they pose a number of new questions for future scholars to explore more fully.

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Class Activity

1. What is precedent? How is precedent transferred throughout the court system? How do justices choose which precedent to use and which precedent to ignore when crafting opinions?
2. What is the relative merit of horizontal citations? Are there any problems with a state supreme court turning to a court or justice that is in no way accountable to the voters in the citing state? Why should any state turn to another state for citations when the only court that has legal authority over them is the US Supreme Court?
3. The authors find that women are cited more frequently because of the difficult path to the bench they experience. Can you think of any other institutions (political or otherwise) or social interactions where this might be the case? Might this effect manifest with different identities beyond gender?
4. The chapter discusses gender-based differences (in both experience and treatment) of women in legal and political professions. Provide an example of a gender-based difference of a female attorney. Provide an example of a gender-based difference of a female politician.
5. What is judicial prestige? What factors contribute to judicial prestige? How might this effect horizontal citations?
6. What is judicial proximity? Why might a court or a judge want to cite someone "like them" in horizontal citations? Where else might we see this in judicial behavior or political science writ large?
7. Analysis of the data revealed that very few of the cases that are generated by the courts every year eventually become horizontal citations. Does gender play a role when a justice decides to use a horizontal citation? Do you suppose the justices are intentionally choosing to cite opinions crafted by women or might this operate at a more subconscious level?
8. The authors used male and female pronouns on state websites in order to code for the justice's gender. Is this the best way to establish the gender of a state supreme court judge? Are there any potential problems with coding a justice's gender in this manner? Why do you suppose the authors opted for this approach?
9. What are Berry et al. scores? How did the authors use these scores in their analysis? Is this the most effective way to measure state political ideology? Can you think of other ways to measure state political ideology?
10. While the results of statistical models are the same no matter who puts them together, the structure of the model may be different based on who is building it. Two of the three authors are men. Both Gleason and Comparato are men. Bailey is a woman. Is it possible that the authors' lived experiences of gender shaped the research question and the structure of the chapter? How might this chapter have been different if all three authors were men? If two of the three authors were women? If all of the authors were women? Gleason, a male,

specializes in gender-based court research. Does this change your evaluation of the study?

8. The Transmission of Legal Precedent in the U.S. Court of Appeals

KRISTEN M. RENBERG

The published opinions by a US Court of Appeals are replete with citations to legal precedents—precedents from the US Supreme Court, from within their own circuit, and from the court of appeals in their sister circuits. The first two types of citation are easy to explain, as precedents from the US Supreme Court and from their circuit are binding. However, precedents from other appellate courts in other jurisdictions are not. How does a judge choose whether to cite such nonbinding precedents when authoring an opinion? Will a judge cite precedents published by courts that are institutionally similar to hers? Alternatively, does a judge prefer to cite precedents that were authored by other judges with whom they share similar characteristics? This chapter seeks to answer these questions by identifying the judge-level characteristics (race, gender, and partisanship) along with court-level characteristics (internal procedural rules) in these cases to understand under what conditions we observe the transmission of precedent from one court of appeals to another.

It is critical to understand how and why precedents travel from one circuit to another. In most cases, the court of appeals will make the final decision in a case and on an issue of law. The finality of these decisions has increased as the US Supreme Court has decreased its caseload over the past few decades. On average, the current Supreme Court now resolves around seventy-five cases a year, whereas the courts of appeals resolve more than fifty thousand cases a year. The Supreme Court hears less than 2 percent of the cases appealed to it, and less than 15 percent of the cases resolved by the courts of appeals are appealed to the Supreme Court (Cross 2007, 2). Given this, a large proportion of the cases resolved by courts of appeals as well as the precedents they produce are left untouched by the Supreme Court and are deserving of rigorous study in judicial politics.

Following in the path of several scholars (Walker 1969; Canon and Baum 1981; Landes and Posner 1976; Caldeira 1985; Fowler and Jeon 2008; Landes, Lessig, and Solimine 1998), I rely on network analysis to understand interdependent relationships in the judiciary. There are many reasons why treating citations as a network makes sense. The main reason is that citations within opinions do not occur independently. For example, a judge can observe which precedents were previously cited, and this may influence her decision to cite a given precedent. Likewise, we may expect that a judge is more likely to cite a precedent if she has previously cited the precedent. Further, some judges have cultivated prominent reputations; therefore, the opinions they author are cited more frequently as compared to other judges. For these reasons, network analysis is an appropriate methodological approach for understanding and modeling who cites precedents from whom.

Courts of Appeals

Sitting directly below the US Supreme Court, the court of appeals are usually considered the second-highest tier of federal courts in the United States. There are thirteen federal judicial circuits within the United States. Eleven of the circuits are characterized as regional, since their jurisdictions often cover multiple states. The District of Columbia (DC) Circuit has jurisdiction over the United States' capital, which makes it somewhat different from its sister circuits in terms of caseload and jurisdiction. While the DC Circuit is unusual when compared to the other eleven regional circuits, the Court of Appeals for the Federal Circuit (FED) is really a different animal—this court has nationwide jurisdiction to hear appeals in specialized cases.

Each federal circuit has a single appellate court and multiple district courts. These courts of appeals have mandatory and appellate jurisdiction. As such, the courts of appeals do not have to review every decision made by the district courts in its circuit; however, it does mean a court of appeals must review if an appeal is submitted. Losing parties at the courts of appeals have two options: they can seek a hearing from the US Supreme Court or they can request an en banc review. An en banc review is when all or a majority of active judges from the circuit hear the appeal. Requests for en banc review are rare and infrequently granted. Figure 1 displays a map of the geographic boundaries of the federal judicial circuits.

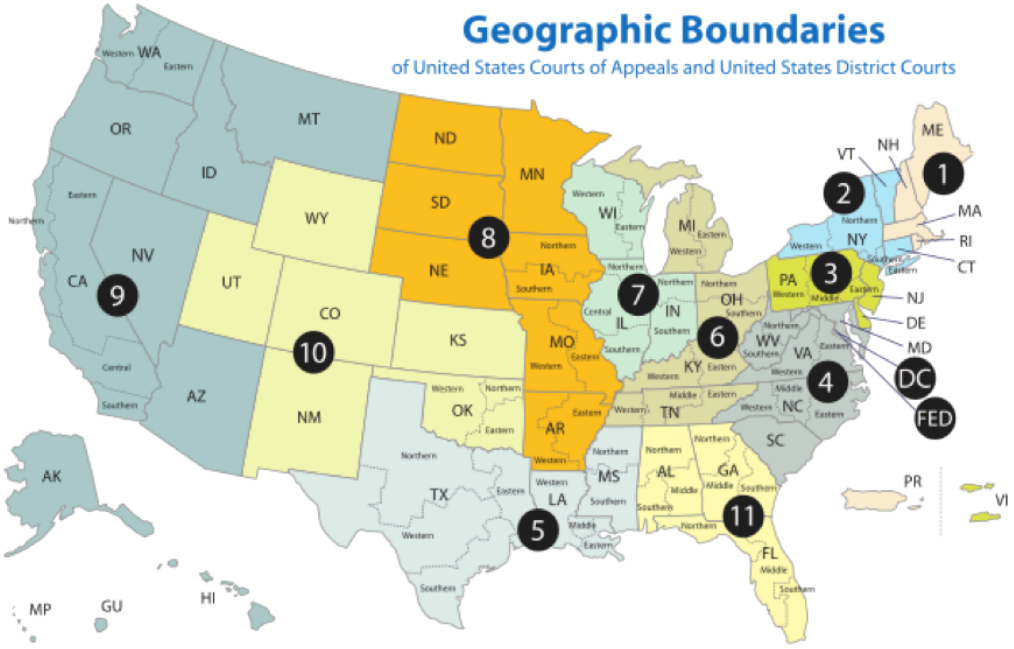

Figure 1: *Boundaries of Federal Judicial Circuits*

Legal Precedent

Courts of appeals resolve cases through panels composed of three randomly assigned judges. If the judges decide to issue an opinion, one of the three judges is tasked with authoring the majority coalition's opinion. If that opinion is published, it becomes a binding precedent and guides future legal decisions by appellate and district judges within the circuit (Aldisert 1989, 632; Hinkle 2017; Caminker 1994). Precedents are born out of legal opinions and establish either a principle or rule. Opinions published by one court of appeals are not binding over decisions in other courts of appeals, and not all opinions are published. An unpublished opinion resolves only the specific legal issue in the case before the court. The decision to publish an opinion is highly relevant for the judge who authored the opinion and judges from her circuit, as the choice to publish is also a de facto decision to establish a precedent and constrain future decisions.

Again, precedents are meant to guide future decision-making. This legal norm is known as stare decisis, which translates from Latin into "to stand by things decided." Judges are expected to rely on previous binding decisions when crafting their opinion in a similar case. Epstein and Knight describe this process: "If judges want to establish a legal rule of behavior that will govern the future activity of the members of the society in which the court exists, they will be constrained to choose from a set of rules that the members of the society will recognize and accept" (1998, 164). As such, reliance on precedents provides many institutional benefits. The norm of stare decisis leads to reasonable expectations and stability in decisions made by different judges (Lee 1999; Caminker 1994; Rasmusen 1994). Stare decisis does not limit the law from evolving as society changes; however, it does lead to law evolving incrementally on a case-by-case basis (Kozel 2012). From an outsider's perspective, having a precedent guide a judge's decision makes the verdict appear more legitimate. Finally, and most importantly for the operation of courts, stare decisis promotes efficiency by expediting the decision-making and opinion-writing processes for judges (Lee 1999; Caminker 1994).

Within the judiciary, we observe two forms of stare decisis: vertical and horizontal. Vertical stare decisis is based on the hierarchy of the judiciary, where precedents by higher courts supersede precedents by lower courts. Horizontal stare decisis occurs when a precedent transmits across courts that are on the same tier of the judicial hierarchy. For example, a federal district court in California is in the Ninth Circuit. Due to the norm of vertical stare decisis, the district court needs to adhere to precedents established by the Court of Appeals for the Ninth Circuit. Likewise, the Court of Appeals for the Ninth Circuit and the federal district court in California must adhere to precedents established by the US Supreme Court. Under the norm of horizontal stare decisis, the Court of Appeals for the Sixth Circuit, for example, needs to adhere to precedents previously established on the Court of Appeals for the Sixth Circuit.

Judicial politics research has traditionally focused on vertical stare decisis, arguing that lower courts will almost always be compliant with Supreme Court precedents (Klein 2002; Songer, Segal, and Cameron 1994; Songer and Sheehan 1990; Caminker 1994; and Westerland et al. 2010). Benesh and Reddick (2002), for example, conducted an event-history analysis and observed that following the overruling of a precedent by the Supreme Court, lower courts quickly adopted the new precedent and stopped relying on the overruled precedent.

This chapter focuses on horizontal stare decisis, specifically the transmission of precedent from one court of appeals to another. When a court of appeals relies on a precedent that was determined in a separate appellate court, the transmitted precedent is influencing a case outside of its jurisdiction through persuasion rather than normative binding influence. Some scholars have argued that these citations are evidence of strategic considerations by the judge who authored the opinion (e.g., Calderia 1985). This vein of the literature postulates that when a judge cites a precedent that was published outside of her jurisdiction, she is attempting to provide evidence that her argument is widely supported and intellectually grounded (Hume 2009). Others have suggested that these transmitted citations are a product of the different reservoirs of precedents among the courts of appeals. In other words, some courts may have more experience and therefore a more extensive stock of precedents relating to a specific legal issue than other courts (Solberg, Emrey, and Haire 2006).

Empirically, some scholars have viewed the act of transmitting precedents across courts as a signal of prestige, suggesting that the more often a precedent is cited in opinions by other courts, the more influential the judge who authored the precedent is. Landes, Lessig, and Solimine (1998) created a total influence measure based on the number of citations a judge's opinion received from her colleagues and concluded that the gender, race, and political affiliation of a judge can predict her level of influence.

Nevertheless, there is no clear prediction as to when published opinions from one court of appeals will be cited in an opinion from another court of appeals. This chapter argues that institutional differences and individual-level characteristics of judges across courts influence the transmission of precedents and can be used to formulate such predictions.

Institutions, Judge Characteristics, and Predicted Citation Behavior

The court of appeals in each judicial circuit operates under its own set of local procedural rules. I consider the differences in publishing rules to be one of the most critical procedures for

predicting the transmission of precedent. These rules determine whether an opinion is published and has precedential value. To use this variable, I must classify each circuit by its publishing rules. The least ambiguous publication rule was used to classify the courts—this rule outlines the number of judges from a panel needed to agree in order for the majority opinion to be published. In some courts, the rule states that the three-member panel must unanimously agree to the publication of the opinion. In other courts, the rule states that only the judge who authors the opinion faces the decision to publish her opinion. The type of publication rule for each court of appeals is shown in table 1.

Circuit	**Rule**	**Circuit**	**Rule**	**Circuit**	**Rule**
1st	Unanimous	5th	Unanimous	9th	Author-Only
2nd	Author-Only	6th	Author-Only	10th	Unanimous
3rd	Unanimous	7th	Unanimous	11th	Unanimous
4th	Author-Only	8th	Unanimous	DC	Unanimous

Table 1: Court of Appeals Publication Rules by Circuit

Four of the twelve courts of appeals operate under the author-only publication rule, which leaves two-thirds of the courts operating under the unanimous-agreement publication rule. There is no apparent geographic or political reason for this variation.

There are many opinion-writing strategies a judge may take on while operating under the unanimous-agreement publication rule. One strategy the authoring judge can adopt is devising a well-researched and well-written initial draft that potentially can shield her opinion from criticism and veto threats from the two other panel members (Hume 2009). Another strategy available for the authoring judge is to seek out amendments from the other panel members and incorporate this additional language into her opinion. I expect that the unanimous-agreement rule places institutional constraints on the judge who is authoring the majority coalition's opinion. In turn, the judge will author a high-quality opinion. High-quality opinions are not cheap to produce, as they are generally longer and well researched and contain many citations. A judge and her clerks must devote more time and more resources when crafting a high-quality opinion.

In turn, the different publication rules are expected to influence the broader network of precedents transmitting across the courts. When judges are researching precedents to cite in their own opinion, they will most likely prefer to cite precedents that are likewise grounded in research and add to the credibility of their opinions. For this reason, I expect precedents published by courts that have the unanimous-agreement publication rule will be transmitted through citations more frequently than precedents published by courts with the author-only publication rule.

I also predict that judges who share similar backgrounds, such as their legal education, are more likely to cite each other's opinions. Those who have received similar legal training are expected to be more receptive and therefore more likely to cite the others' opinions. Other immutable characteristics, such as the race and gender of judges, may also influence their citation behaviors. Likewise, judges with similar partisanship are expected to be more likely to cite each other's opinions because the judges will share similar views about legal issues. Prior research in judicial politics has demonstrated that partisan ideology is one of the most influential predictors for explaining judicial behavior (Segal and Spaeth 2008); however, ideology does not explain all judicial behavior (Epstein and Knight 2013).

Data and Network Methodology

An original data set of over 300,000 majority opinions published by the US Courts of Appeals between 1970 and 2010 was developed in order to explore citation patterns and the transmission of precedent. The author, date of publication, and all citations were parsed from the text of each opinion. Citations were limited to opinions listed in either the Second or Third Series Federal Reporter. Further, citations to precedents that originated in the same court of appeals as the opinion were not included in the citation analysis. Altogether, there were 575,224 citations available to study.

Next, a series of variables related to features of the judge who authored the citing opinion and the judge who authored the cited opinion were developed using biographical data from the Federal Judicial Center (FJC). The law school attended by each judge was identified as either an elite law school or not; this allows us to observe whether a judge's legal education impacts his opinion-writing behavior. Two binary variables, citing judge elite law and cited judge elite law, were created. Next, the race and gender of the citing judge and cited judge were identified. If the two judges shared the same gender, the variable same gender was valued at 1 and was otherwise valued at 0. If the two judges shared the same race, the variable same race was valued at 1 and was otherwise 0. Within the citation data set, the citing and cited judges were the same gender 82.3 percent of the time and were the same race 85.1 percent of the time. These judge-level characteristic variables likely have high values, since diversity in the form of race and gender was largely missing from the federal judiciary up until the 1980s.

Network Methodology

A network is a group or system of interconnected people or things. When people think of networks, they often think of social media—who follows whom online. By analyzing these connections, we can gain more nuanced insights into relationships among connected people. In this chapter, I study how judges are connected to other judges through citations to precedents. If a judge cites an opinion authored by another judge, they are connected in the legal network. Figure 2 depicts the legal network in this study. Each judge in the legal network is a node in the network, and each judge is represented with a circle. The citation from one judge to another is referred to as the edge in the network and is represented with a line that connects two circles. Figure 2A presents a network of judges citing each other's opinions. Figure 2B zooms in to a specific part of figure 2A to highlight and identify some of the most connected judges in the network.

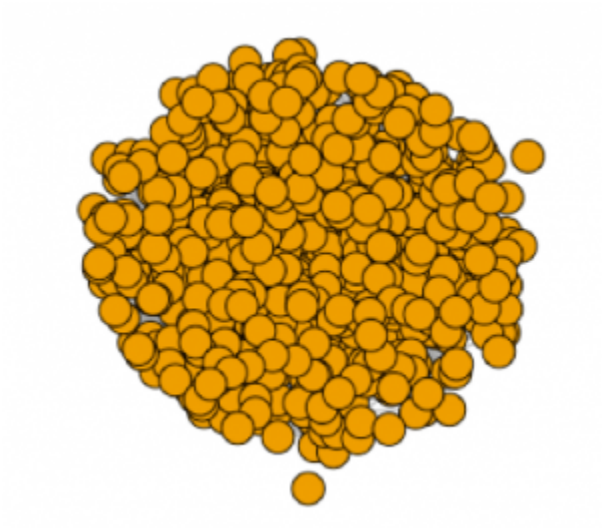

Figure 2A: *Judges in Citation Network*

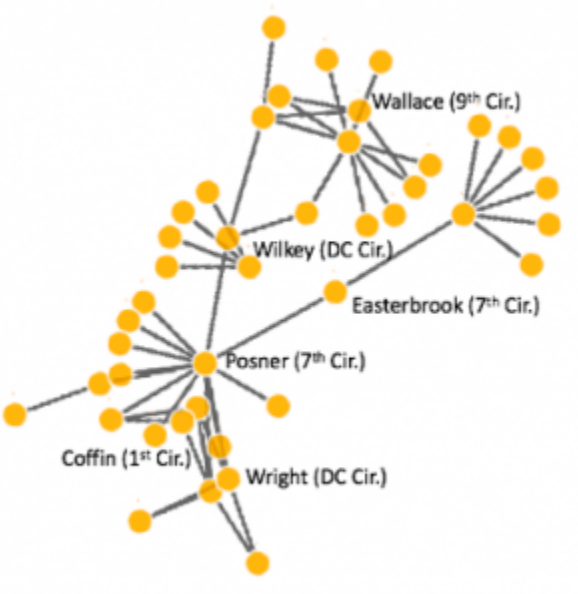

Figure 2B: *Prominent Judges Citation Network*

There are many reasons to believe that the reputation of a judge will impact how other judges cite her opinions. As one judge's opinions are cited more frequently, other judges can observe this citation trend and, in turn, begin also citing opinions authored by the judge. For this reason, we need to account for how central each judge's opinions are within the citation network. Observing whose opinions are being cited by whom will give us a great deal of insight into the transmission of precedents. Harris (1979) and other scholars have argued that the degree to which other judges cite a precedent is the single best indicator of how influential a precedent is and how influential the judge who authored the precedent is. Based on this logic, three network centrality measures were calculated to account for the reputation of each judge in the legal network.

The first network measure is strength; this is a measure of the number of citations a judge has received and accounts for the total number of other judges who are issuing those citations. The next network measure is centrality, which essentially measures how often a judge is cited by other highly cited judges in the network. The final network measure is known as authority; here judges are given a higher authority score if they are frequently cited by judges that are also very well cited. Figure 3 depicts examples of each of the network measures calculated in the citation network. Note that judges are represented as nodes (circles) in the network, and citations between two judges are represented as edges (lines). The number of citations between two judges is also indicated in the visualizations. Each example in figure 3 depicts how a network measure for one judge, highlighted in blue, is conceptualized.

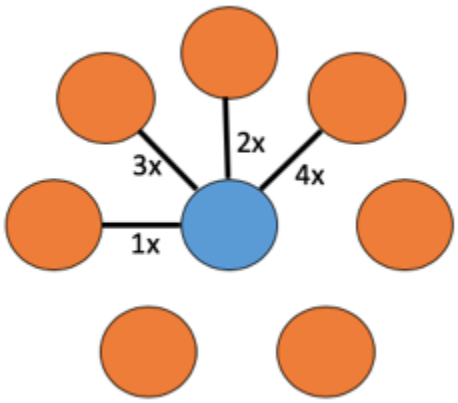

Figure 3A: *Strength*

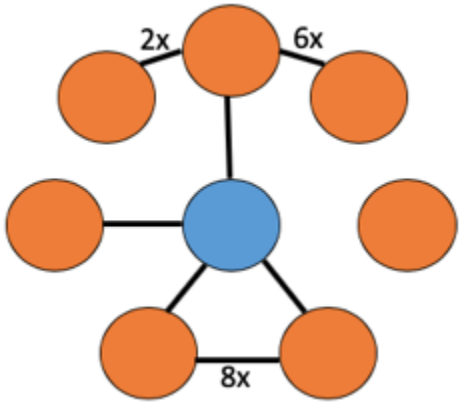

Figure 3B: *Centrality*

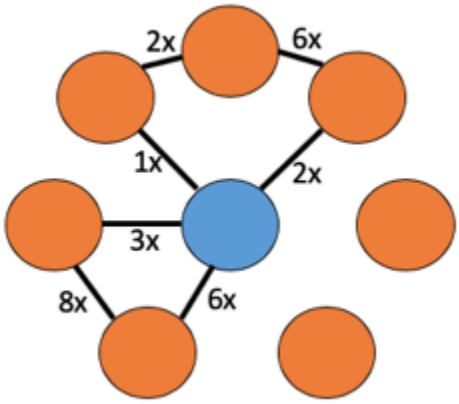

Figure 3C: *Authority*

While the three network measures all relate to a cited judges' reputation in the legal citation network, each is estimated differently. It is important to note that all three network measures are positively correlated. This positive correlation implies that when we observe one network centrality measure increasing, we can expect the other two measures will also increase in value. In turn, the network methodology has provided us with important variables for modeling citation behavior. Without these variables, the statistical test in the following section would likely suffer from omitted variable bias.

Results

In order to understand how judge-level attributes impact the transmission of precedents across the courts of appeals, the data are structured so that the unit of analysis is the number of times one judge (Ji) cites another judge (Jj) for each year (Ti). This procedure resulted in 7,868,474 observations and provided us with a count dependent variable that ranged from 0 to 38. The most common transmission pattern observed was judges from the Court of Appeals for the Ninth Circuit citing precedents published by the Second Circuit. Female judges from the Court of Appeals in the Ninth Circuit are the most frequently cited female judges within the citation network.

Given that the dependent variable is a count of the number of times one judge cites another judge's opinions in a year, a negative binomial regression is estimated. When a dependent variable is a count variable, a Poisson regression model is also an option; however, a Poisson regression model is not an appropriate choice here because the variance of the dependent variable, the count of citations, is greater than its mean. When the variance of a count variable is greater than the mean, it is a sign that the variable is overdispersed. If a Poisson model were to be employed with an overdispersed dependent variable, we would observe consistent but inefficient estimates along with downwardly biased standard errors (Long 2011). In other words, we could not trust the results of the analysis. For this reason, a negative binomial regression model was implemented, since it accounts for overdispersion by allowing "the conditional variance of y to exceed its conditional mean" (Long 2011, 230). Or to be blunt, this model fits the data better and produces more reliable results.

Given that the data capture forty years (1970–2010), fixed effects for each year and circuit were included in the analysis to control for unobserved heterogeneity in the courts (Beck and Katz 1995). This method is employed to make the results reliable and ensure the model best fits the data. Table 2 presents the estimated results. The percent change column represents how the number of citations is expected to change when there is a one-unit increase in a covariate or variable in the model while holding all other covariates constant. For example, if a dyad of judges

changes from being different races to being the same race, we expect the number of citations to increase by 38.4 percent.

		Number of Citations	**Percent Change**
Unanimous Agreement Publication Rule	Citing Court of Appeals	0.076** (0.004)	7.9%
	Cited Court of Appeals	0.092*** (0.004)	9.6%
Judge Characteristics	Same Gender	-0.731 (2.908)	-107.7%
	Same Race	0.325*** (0.064)	38.4%
	Same Political Party	0.012 (0.002)	1.2%
	Citing Judge Elite Law School	0.032** (0.002)	3.2%
	Cited Judge Elite Law School	0.059*** (0.000)	6.1%
Network Measures	Cited Judge Strength	-2.277 (6.1554)	-874.7%
	Cited Judge Centrality	-1.364 (6.556)	291.1%
	Cited Judge Authority	0.424** (0.050)	52.8%
	Intercept	1.001*** (0.000)	
	N Year Fixed Effects	**7,868,474** YES	

Table 2: Results of Negative Binomial Estimation

Note: *p<0.10; **p<0.05; ***p<0.01d

The results concerning the publication rule in each circuit confirm prior expectations. When a

judge is on a court that has the unanimous-agreement publication rule, their opinions are cited at a higher rate than judges from courts that have the author-only publication rule. Likewise, judges from courts with the unanimous-agreement publication rule are more likely to cite others—almost 8 percent more opinions from other circuits than judges from courts with the author-only publication rule. Substantively, judges from courts of appeals with the unanimous-agreement publication rule (found in the First, Third, Fifth, Seventh, Eighth, Tenth, Eleventh, and DC Circuits) are more likely to cite precedents that were established in other judicial circuits and are more likely to have their own precedents cited by judges in other judicial circuits. This result implies that the rules that dictate how an opinion is published have long-term implications for how other judges in the future might cite the opinion.

With regards to judge characteristics, the results indicate that when the citing judge and the cited judge share the same partisanship, the number of citations between these judges is expected to increase by 1.2 percent while holding the other covariates in the model constant. This finding suggests that judges who share the same partisan ideology are more likely to cite each other than judges with different partisan ideologies. Likewise, if the citing and cited judges are the same race, we are more likely to observe them citing each other than if the two judges were of different races. The results related to the gender of the citing and cited judges are not statistically significant, and thus this analysis cannot confirm whether there is a meaningful statistical relationship between the gender of a judge and how other judges cite her opinions. The findings in table 2 also suggest that if a judge attended an elite law school, she is cited more frequently by judges from other circuits as compared to judges who did not attend an elite law school. Likewise, judges who attended an elite law school are observed to cite about 3 percent more opinions from other circuits as compared to judges who did not attend an elite law school.

Only one of the three network measures was estimated to have a statistically significant relationship with the number of citations observed between two judges. The results indicate that as the cited judge's authority within the network increases, we should expect to observe more citations to the opinion they author. Given that the authority score of judges in the network is based on how well connected one judge is to other frequently cited judges, it suggests that as a judge becomes more central and more popular with judges who are already popular, we are more likely to observe judges from other circuits citing her opinions. Interestingly, the authority network measure incorporates more information from the citation network as compared to the two other network measures (see figure 3).

Altogether, the results in table 2 have important implications for the transmission of precedents across courts of appeals. First, table 2 found a statistically significant relationship between the publication rule in the citing and cited judges' courts and the number of citations connecting these judges. Other internal rules within each court of appeals may need to be studied in the future in order to fully unpack the relationship between these rules and the decision to import a

precedent from another circuit. The results in table 2 also uncovered important nuances of judge-level characteristics, such as race and legal education. Up until the mid-1980s, most of the federal bench was composed of white male judges; it will be interesting to observe how the relationship between judge characteristics and citation behavior is impacted as the federal bench becomes more diverse. Finally, the results lead us to think about the role of reputations among judges and how a network of judicial relationships may impact law.

Conclusion

There is very little prior research concerning how variations in the publishing rules within a court of appeals' local rules may impact the transmission of its precedents. Procedural rules have been extensively studied on the Supreme Court and shown to affect the decisions produced and how opinions are written. From the importance of opinion assignment (Maltzman and Walhbeck 1996; 2005; Lax and Cameron 2007; Segal and Spaeth 2002) to the voting rules in conference (Calderia, Wright, and Zorn 1999; Epstein, Landes, and Posner 2013), it is surprising that this area of research has yet to spill over to other, very salient, appellate courts.

This chapter found that institutional features do impact the citation network, the transmission of precedents across courts, and by implication, prestige. Further, individual-level characteristics of judges, such as race and legal education, were also shown to impact the transmission of precedents. Future research may also want to explore how judge characteristics impact the transmission of precedents within a court of appeals over time. This type of research question would have important implications for understanding the longevity of precedents.

The courts of appeals resolve many important legal questions each year. As the docket of the Supreme Court continues to shrink, the finality of decisions and the legal resolutions produced by each US Court of Appeals is expected to grow. As this trend continues, it becomes more important to understand the behaviors and development of precedent in the courts of appeals.

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Class Activity

R is a powerful open source program for statistics and graphics. RStudio is an integrated development environment (IDE) for R. It is essentially a nice front-end for R. Rstudio provides a console, a scripting window, a graphics window, and an R workspace.

For information on installing R and Rstudio in Windows or in Mac OS X please see one of the following links:

- https://www.andrewheiss.com/blog/2012/04/17/install-r-rstudio-r-commander-windows-osx/
- https://owi.usgs.gov/R/training-curriculum/installr/
- https://cran.r-project.org/doc/manuals/r-release/R-admin.html

Once R and Rstudio is installed on your computer, please open the .R file for in class exercise in Rstudio. Please note that the R file and accompanying data files should be saved in the same folder on your computer.

You will need to set the working directory of your Rstudio session to the folder where the script and data is saved. From Rstudio, use the menu to change your working directory under Session > Set Working Directory > Choose Directory.

Once the working directory is set, you can click and highlight sections of the code in the scripting window and click the ‘run’ button in the top left section of the window.

9. Trump's Judges and Diversity

Regression to the Mean or Remaking the Judiciary?

PETAR JEKNIC, RORIE SPILL SOLBERG, ERIC WALTENBURG, AND CHRISTOPHER STOUT

At the beginning of the Trump presidency, there was a great deal of commentary and handwringing focused on how unusual this president was and would be.[1] Norm-breaking became the watchword, as President Trump ignored the typical or standard patterns of presidential behavior. Examples of shattered norms include President Trump's refusal to release his income taxes, his denigration of military service, and his willingness to side with foreign adversaries over the conclusions of his own intelligence community.[2] Now norms have developed over time in the realm of judicial nominations as well. Presidents since Clinton had been increasing the diversity of their judicial slates regardless of party. While some presidents certainly focused strongly on ideology, diversity was also a major component of their judicial selection strategy (Solberg and Diascro 2018, 2009; Solberg 2005; Spill and Bratton 2001). Based on President Trump's comments and his Supreme Court short list, it was hypothesized that the ideology of his nominees would be a touchstone for his selection process—a hypothesis confirmed when Leonard Leo, cochairman of the Federalist Society, took a central role in the judicial selection process for the administration. Early in the Trump presidency, though, it also seemed clear that he would not take the same two-pronged approach as did his more recent predecessors and also consider diversity. Indeed, he looked to be the first president in over two decades that would reduce the diversity of the federal bench.[3] With the conclusion of the Trump presidency, it is time to take stock and investigate the effects of Trump's cohort of judges on the demographics of the federal judiciary.

As several other articles in this volume attest, assessing the diversity of a political institution, particularly the judiciary, is an important exercise. The judiciary, be it federal or state, in the US system is an odd duck. The system is set up for the judiciary to act as umpire over conflicts between the government and its citizens, between citizens, and between institutions of government. (For example, the Supreme Court determined that Congress did not have the power to subpoena President Trump's tax returns as part of its oversight and legislative power in *Trump*

1. *Washington Post* (2017); Goldsmith (2017); Wright (2017).
2. Grant (2019); *Washington Post* (2020); Garrett (2018). Indeed, one blog (Just Security) set up a regular tracking series ("Norms Watch") to monitor President Trump's relationship to democratic norms. See Wright (2017).
3. The Conversation (2018); Solberg and Waltenburg (2017).

et al. v. Mazars USA, LLP No. 19-715.) Yet the judiciary is generally selected via appointment (federal system and some states) or via merit selection (appointment combined with retention elections). Even in systems where judges are elected directly, the elections tend to be low-information and low-participation events (Klein and Baum 2001). Therefore, judges and justices have little to no direct connection to the electorate and generally serve no constituency.[4] Compounding this indirect link to the public is the lack of enforcement power inherent in the structure of US courts. Judges and justices can make decisions; however, in a separation of powers government, it is up to the executive branch to enforce or implement those decisions. Thus as Hamilton so aptly put it over two hundred years ago, the judiciary has "no influence over either the sword or the purse….It may truly be said to have neither Force nor Will, but merely judgment." To remain consequential and relevant in such a system, then, the judiciary must remain legitimate in the eyes of the public so that those with the power of purse and sword feel compelled to enact and abide by the judiciary's ruling. In other words, the judiciary must maintain trust and approval to fulfill its critical role in our system.

While there may be many reasons the public supports and approves of the federal judiciary (and approves more heartily of the judiciary than other national institutions), research shows that one important component of this approval is diversity. We trust institutions that mirror society. Women and people of color are more likely to support and legitimate institutions where they feel welcome. They also tend to believe that the institution is fairer when the panoply of decision-makers is diverse (Ulbig 2007). It is not about whether women or people of color make decisions differently than White and male judges; it is not a question of substantive diversity. It is the result of symbolic diversity. The mere presence of a diverse bench yields tangible benefits for an institution that relies solely on its legitimacy for its power. For example, Lee et al. (2021) show that women viewing a woman in the role of Chief Justice of a state Supreme Court have greater overall support for the court as an institution. This finding follows a long literature that shows that a reasonable representation of the demographic characteristics of the general population is required for fair outcomes (Easton 1965; Pitkin 1967; Mansbridge 1999; Gay 2002).[5]

Besides the boon for legitimating the judiciary and its use of its power, a diverse judiciary is also important for substantive representation as well. First, studies of diversity writ large show that

4. Though some research suggests that elected judges do respond more directly to public opinion the closer they are to reelection (Bonneau and Hall 2009) or consider certain audiences when deciding cases (Baum 2009).
5. The election of Kamala Harris as vice president of the United States provided plenty of anecdotal evidence for this claim. Witness the reports of women and girls noting that seeing a woman and a woman of color in this role made them feel that they could do anything—be anything. See Janes (2020); Hernandez (2020); Epstein (2020).

more diverse groups make better decisions (see, for example, Herring 2009). More varied points and possible solutions are considered when groups are heterogeneous rather than homogeneous. And while the studies are mixed, it does seem that the lived experiences of women and judges of color can lead to different decisions. Even if the decision or the final outcome does not change, the shape of the policy and the consideration of the issues can be affected by the diversity of the group (see the excellent review in Boyd et al. 2010). The effect might be more obvious at the appellate courts where judges make decisions in small groups (three, nine, or *en banc*); however, research shows that there are also similar effects at the trial courts. Although each judge decides cases on his or her own, the presence of diverse colleagues still creates the same effects. The benefits of diversity are compounded as judges work to diversify their staffs, especially the clerks they hire (Mauro 2014; Benson 2007).

Given the benefits of diversity for the institution as a whole and for its overall legitimacy, assessing the diversity of each president's judicial nominees is a worthy scholarly endeavor. While the early narratives on the Trump presidency suggested that his administration's laser focus on ideology would yield a judiciary that appreciably reverses the steps taken toward a more diverse federal judiciary, this is, in fact, an assumption that can be put to empirical tests. Accordingly, we examine Trump's federal judges overall and then separately at the district and appellate level to see if and how the demographics of the bench have changed over the course of Trump's tenure.

Trump's Judicial Cohort

The federal judiciary is staffed by a multitude of judges—Article III judges, bankruptcy judges, and magistrates. In this study, we focus on Article III judges—judges appointed for life tenure by the president to seats created under Congress's Article III power to create inferior courts. There are two types of Article III judges—active judges and senior status judges. Active judges are full-time Article III judges. Senior status judges are judges who have reached at least the age of sixty-five and have served the number of years on the bench that, when added to their age, equals eighty. These judges serve in a reduced capacity, depending on their court; their "active" seat is considered open and available for replacement. Thus senior status judges serve alongside the active judiciary.[6]

When examining any presidential judicial legacy in terms of diversity, we argue that one must

6. For example, there are 179 active judgeships on the US courts of appeals and, at the time of this writing, there were 117 senior status judges still serving. Thus the total number of courts of appeals judges working on cases is 298.

consider the entire judiciary, including the senior status judges, and you must examine the entire federal structure both as a whole and by its constituent parts. In other words, just examining the judicial cohort of any president does not provide a good lens for understanding the diversity of the full domain of the federal judiciary. Additionally, the judiciary is more than the sum of its parts. If there are some courts that are highly diverse and others that remain homogeneous, then the judiciary as a whole may not reap the benefits of diversity. Therefore, we examine President Trump's judicial cohort overall, in comparison to the entire judiciary, and then look at how his nominees have affected the demographic profile of the district and appellate courts as a whole and on individual courts. This broader view provides a complete picture of the demographic impact of Trump's judges.

The Overall Picture

President Trump's judicial cohort is 85 percent White and 76 percent male. This is a modest improvement from earlier in his presidency in terms of racial diversity. Solberg and Waltenburg (2018) report that after the first seventeen months of the Trump presidency his judicial cohort was 75 percent male and 90 percent White. About three-quarters of his nominees (72 percent) filled seats on the district courts, and 27 percent filled appellate vacancies.

In terms of overall nominations, President Trump easily outpaced President Obama, confirming a total of 200 judges by July 2020[7] compared to President Obama's 153. This comparison, however, may not be fully appropriate inasmuch as President Obama was considered to be slow off the mark in terms of judicial nominations.[8] Additionally, Obama faced a recalcitrant Senate majority for the second half of his first term, whereas Trump had a significant ally on judicial nominations in Leader McConnell (R-KY). If we compare President Trump's first term to the first terms of G. W. Bush, Clinton, or even G. H. W. Bush, we see that his overall confirmation rate is still higher than that of his predecessors (169, 182, and 193 respectively).[9] In other words, President Trump's administration clearly prioritized judicial confirmations and was highly successful in making them.

7. Our data collection ended on June 24, 2020, after Trump's two hundredth judge was confirmed.
8. See Wheeler (2012).
9. While H. W. Bush comes the closest to matching Trump, the comparison is not a particularly good one. First, the polarization that characterizes the current judicial nomination process, and indeed, Congress in general, was not fully developed at the time. Second, H. W. Bush faced a Democrat majority for the entirety of his presidency. Third, the filibuster was still in place for the Bush presidency.

We now turn to examine how Trump's judicial nominations have altered (if they altered) the demographic profile of the lower federal courts. We begin with the courts of appeals and then turn to the more numerous district courts.

Courts of Appeals

President Trump clearly had a plan when it came to the judiciary. The plan went beyond "appoint conservative judges." His administration recognized the substantial power that sits at the federal courts of appeals. These appellate courts, the middle tier of the federal judiciary, make an incredible amount of law and hear thousands of cases per year compared to the paltry seventy-five the US Supreme Court hears in the current era. Thus the Trump administration focused a great deal on the appellate courts and appointed more appellate judges in the first two years than most other presidents (see Solberg and Waltenburg 2018a, b, and c). By the end of his term, the courts of appeals were fully staffed and there were no vacancies.[10]

Also, by the end of the Trump presidency, the complexion of the US courts of appeals was paler and there was more testosterone—in other words, the courts were whiter and more male. The direction of this change bucks the trend established during the Clinton administration of increasing diversity. Since Clinton, each president, regardless of party, has increased the diversity on the judiciary as a whole and on the courts of appeals. While President Trump's appointments have not contributed to this trend, the effect of his appointments overall is not particularly extreme. As table 1 shows, when you include active and senior status judges, the change in terms of gender is barely perceptible. Once Trump's extremely homogenous pool of nominees is added to the larger pool, their impact was diluted.[11] The percentage of seats held by Whites only increased by about 1 percent. This increase came mostly at the expense of African American and Latinx representation. President Trump increased the share of seats held by Asian Americans, continuing an outreach to this community that began under President Obama (Solberg and Diascro 2020).

10. President Trump and his administration, with the assistance of the Republican majority in the Senate, did their utmost to ensure that there were few vacancies overall across the judiciary. As of this writing, there are currently seventy-eight vacancies with forty-eight pending nominations and three future vacancies. Given the total number of district court judges (N = 667 with an additional ten temporary judgeships), there are always vacancies on these courts. For comparison, when President Obama left office, there were eighty-six vacancies on the district courts, seventeen on the courts of appeals, and one on the US Supreme Court.
11. We make no comment or judgment about whether the Trump cohort is changing the partisan or ideological profile of the courts. We leave that work to others.

Though the overall numbers are still small, Trump nearly tripled the number of Asian American judges on the Courts of Appeal.

Demographic	Active Judges (n=179)	Senior Status Judges (n=117)	Total Judges (n=296)
Male	118 (65.9)	101 (86.3)	219 (74.0)
Female	61 (34.1)	16 (13.7)	77 (26.0)
White	138 (77.1)	108 (92.3)	246 (83.1)
African American	17 (9.5)	4 (3.4)	21 (7.1)
Hispanic	13 (7.3)	4 (3.4)	17 (5.7)
Asian American	11 (6.2)	1 (0.9)	12 (4.1)
Pacific Islander	0	0	0
Native American	0	0	0
Mixed race	0	0	0

Table 1: Active and senior status US Courts of Appeals judges

Larger differences, though, are clear when you compare President Obama's and President Trump's judicial cohorts rather than examining the overall impact on the courts of appeals. President Obama's judicial nominees were extremely diverse by most standards (Solberg and Diascro 2020). Although George W. Bush also pursued diversity as a goal for his judicial nominees and succeeded to a great extent (see Diascro and Solberg 2009), as table 2 reveals, his efforts paled in comparison to President Obama's. When we compare the Trump and Obama cohorts side by side, we see that President Trump's cohort for the appellate courts was far less diverse than Obama's. Indeed, President Trump's appellate judges are actually less diverse than President G. W. Bush's. In fact, President Trump nominated more Whites to the federal appellate bench than his past three predecessors; he almost matches President Carter in the percentage of Whites appointed to the intermediate appellate courts some four decades earlier.[12]

12. Carter's appellate cohort was 78.6 percent White, which represented significant progress on diversity in the late 1970s. For comparison, Reagan and Bush's appellate cohorts were 97.4 percent and 89.2 percent White, respectively (see Goldman and Slotnick 1999).

Demographic	Total	Percentage	Percent change from Obama to Trump	Percent change from G.W. Bush to Obama*
Male	42	79.2	+20.3	-18.2
Female	11	20.8	-20.2	+18.2
White	45	84.9	-20.2	-19.2
African American/mixed	0	0	-19.8	+6.2
Hispanic/mixed	1	1.8	-9.3	+5.8
Asian American/Pacific Islander/mixed	7	13.2	+6.5	+7.3

Table 2: Trump's US Courts of Appeals successful nominees

* Data for the George W. Bush administration comes from Goldman et al. (2008).

The effect of Trump's nominees on the diversity of the courts of appeals is made clearer by table 3. By the end of the Obama presidency, there were no all-White appellate courts. All but one appellate court held some descriptive representation for Black Americans. The number of courts with no representation for Latinx or Asian Americans was also greatly reduced (from seven to four and thirteen to nine respectively). Women of color were more present across these courts after the Obama presidency. At the end of the G. W. Bush administration, eight of the thirteen courts had no intersectional representation, and this was further reduced over Obama's presidency to six courts. President Trump's replacement strategy, which seems to almost wholly ignore diversity as a goal, saw an uptick in the number of appellate courts without an African American or Hispanic American sitting on the bench. Currently, two of the thirteen courts seat no Blacks and five seat no Latinx judges. Additionally, the number of appellate courts without a woman of color present increased from six to seven. This is mainly because President Trump replaced four Black women but only appointed two women of color to the appellate courts (one Latina and one Asian American). The only demographic that seems to have benefited from President Trump's nominations besides Whites, at least in terms of demographic representation, are Asian Americans. President Trump nominated more Asian Americans to the courts of appeals than any of his predecessors and reduced the number of appellate courts without Asian American representation from nine to seven. While President Obama also used judicial appointments to engage this emerging voting block (see Solberg and Diascro 2020), it is clear that President Trump is doing so more boldly, given his general lack of concern regarding the racial diversity of his appointments.

	All male	All White	No African Americans	No Hispanics	No Asian Americans	No women of color
2016	0	0	1 (7%)	4 (31%)	9 (69%)	6 (46%)
2020	0	1 (7%)	2 (15%)	5 (38%)	7 (53%)	7 (53%)

Table 3: Composition of the US Courts of Appeals, end of Obama administration to Trump's 200th appointment (N=13)

Investigations of other presidents' nominations revealed clear and consistent patterns. Carter used new seats provided by the *Omnibus Judges Act of 1978* to diversify the courts.[13] Clinton followed a different strategy in which he generally replaced women with women and judges of color with other judges of color (see Spill and Bratton 2001). For President Trump, the replacement strategy is fairly straightforward: in most instances, the replacement will be White and male. Again, the only exception is for Asian Americans, where no members of this demographic left the bench and seven were appointed (13.2 percent of Trump's appellate nominees). Most of these judges replaced Whites (N = 6). Only one replaced another judge of color (Latinx).

As the above tables also attest, overall the circuit courts have become more male under President Trump, again reversing trends from the last three presidents. Almost 44 percent of President Obama's circuit court judges were women. For President Trump, the percentage drops significantly to almost 21 percent; however, women remain represented on all appellate courts despite the low numbers of appointments in the last four years.[14]

In general, Trump's nominations to the courts of appeals have not altered the demographic complexion of the intermediate federal courts as much as many forecasted. However, the continued levels of diversity have less to do with Trump taking diversity into account and more to do with the focus on diversity that held sway for presidents Clinton, G. W. Bush, and Obama. Their joint efforts to diversify the bench have blunted the impact of an appellate cohort that is 79 percent male and almost 85 percent White.[15]

13. Root, Faleschini, and Oyenubi (2019).
14. The continued presence of women across these courts is likely a remnant of the diversification efforts of President Obama and Clinton. President Obama's appellate judges were almost 44 percent women (noted above) and President Clinton's cohort was 33 percent women (Goldman and Slotnick 1999).
15. We only focus on symbolic diversity here. We are not suggesting that President Trump's nominees will have no discernable impact on the decision-making of these courts.

District Courts

As we turned our attention to the US district courts, the trial courts of the federal system, we anticipated that Trump's nominees would be more diverse than those we see at the courts of appeals simply because the district courts are so much more numerous and vacancies are more frequent. To put it more concretely, there are so many opportunities to appoint a judge to the federal trial courts that the law of large numbers assures that some of these picks, in the modern era, will be women and/or judges of color. Additionally, the literature also suggests that it is easier to diversify less prestigious institutions, and while any federal judicial seat is a plum position, the district courts are considered less prestigious than the appellate bench (Diamond 1977; Squire 1992).[16] Even for presidents less concerned with diversity, the district courts tend to offer enough opportunities for appointments that we expect to see greater diversity regardless, and indeed this is the case.

Table 4 provides overall demographic data on all 94 district courts. As you can see, these courts are slightly less male and White than the courts of appeals; however, when we consider only active judges, the differences are negligible (66.8 percent male versus 65.9 percent) for gender, and a bit broader for race, with 72 percent of the district court judges self-identifying as White and 77 percent of the appellate bench similarly self-identifying. Again, given the overall size of the district courts in comparison to the courts of appeals (677 versus 179, respectively) and the findings in the literature, we would expect more diversity in the district courts than the appellate courts. However, the federal courts as an institution do not reveal that expected pattern. We can only speculate as to why this is the case and suspect that while the federal district courts are less prestigious when compared to the federal appellate courts, this difference is not significant enough to generate the gender divide seen in other institutions. Simply put, federal trial court judgeships are sufficiently prestigious to see a skew toward White men on these courts. Additionally, while the overall number of judgeships here is much higher (4.5x), these courts are distributed across the nation and many of them are actually quite small. So while the district courts are a "larger" institution, the geographic distribution and separation of the individual courts might mitigate the pattern found previously in the literature.

16. After all, when a district court judge is nominated for a seat on the appellate bench, she is said to be "elevated" to the courts of appeals.

Demographic	Active judges (n=605)	Senior status judges (n=460)	Total judges (n=1065)
Male	404 (66.8)	366 (79.6)	770 (72.3)
Female	201 (33.2)	94 (20.4)	295 (27.7)
White	437 (72.2)	407 (88.5)	844 (79.2)
African American	81 (13.4)	32 (7.0)	113 (10.6)
Hispanic	55 (9.1)	17 (3.7)	72 (6.8)
Asian American/Pacific Islander	22 (3.6)	3 (0.7)	25 (2.4)
Native American	1 (0.2)	1 (0.2)	2 (0.2)
Mixed Race	9 (1.5)	0	9 (0.8)

Table 4: All active and senior status District Court judges, June 24, 2020

While the overall picture of the district courts is interesting, our focus here is on Trump's judicial nominees, and so we now turn to examine his trial bench cohort. Again, the difference between President Trump's judicial cohort and President Obama's is quite glaring. However, we caution that President Obama's appointment behavior was a large departure from his predecessors, and President Trump's trial court nominees are more like G. W. Bush's cohort (See table 5). For example, President Trump's trial court judges are a smidge over 15 percent more male than Obama's; whereas Obama's were 20 percent more female than President G. W. Bush's district court judges. In terms of race and ethnicity, though, President Trump's cohort is distinctly White, much more so than President Obama's and even President G. W. Bush's. And while President Trump can be lauded for continuing to increase representation of Asian Americans, this increase comes at the expense of other underrepresented groups on the bench, particularly Blacks and Latinx judges. Clearly, President Trump is not continuing G. W. Bush's use of judicial nominations as a tool for outreach to the Latinx community, at least not in the lower federal courts.

Demographic	Number of nominees (n=143)	Percentage	Percent change from Obama to Trump	Percent change from G.W. Bush to Obama*
Male	106	74.1	+15.1	-20.3
Female	37	25.9	-15.1	+20.3
White	122	85.3	+20.4	-16.2
African American/ mixed	9**	6.3	-13.5	+12.9
Hispanic/mixed	7	4.9	-6.2	+.8
Asian American/ Pacific Islander/ mixed	5	3.5	+3.2	+5.2
Native American/ mixed	1	0.7	+0.4	+.3

Table 5: Demographics of President Trump's District Court successful nominees through his 200th appointment

* Data for the George W. Bush administration comes from Goldman et al. (2007).

** Ada E. Brown (N.D. Tex.) is Black/Native American and is included in both categories. As a result, the percentages add up to 100.7 percent because one appointee is counted twice.

This picture of Trump's demographic impact is clearer when we examine the diversity across the district courts by demographic category. Table 6 shows that President Trump's lack of diversity in his cohort is increasing the number of courts lacking key demographics. Even though President Trump seems to be reaching out to the Asian American community more than previous presidents, these nominees have not been distributed in a way that actually increases the number of courts with this representation. Indeed, the number of district courts without Asian American representation increased from seventy-three to seventy-six during Trump's term, highlighting plainly how underrepresented this group is among federal judges. Similarly, under President Trump the number of courts without any judges of color or women increased as did the number of courts without women of color, and without Black or Latinx representation.

	All White and all male	All male	All White	No African Americans	No Hispanics	No Asian Americans	No women of color	No Whites
2016	6 (6%)	8 (9%)	36 (38%)	42 (45%)	64 (68%)	73 (78%)	52 (55%)	1 (1%)
2020	7 (7%)	9 (10%)	37 (39%)	43 (46%)	67 (71%)	76 (81%)	55 (59%)	2 (2%)

Table 6: Composition of the District Courts, end of Obama administration to Trump's 200th appointment (N=94)

When we consider the sheer number of appointments made to the federal courts, the only pattern that really emerges is that President Trump worked fairly hard to create a homogenous cohort that is significantly male and White. Again, table 6 provides the overall impact of Trump's appointments on several diversity categories. The next four tables (7 through 10) provide a different perspective on diversity by keying in on the replacement effects of the Trump judges on district and appellate courts. These tables reveal that for men, Whites, and Asian Americans the numbers of appointed are higher than the numbers replaced. This pattern holds for all three of these groups, but the overall numbers of Asian Americans in this category (five appointed and two replaced) are extremely small in comparison to the other two groups (Whites and men)—highlighting the very clear pattern of homogeneity in the Trump nominating class.

Race/ethnicity	**Total appointed**	**Total replaced**	**Difference**
White	122 85.3%	125 87.4%	-3
African American	7 4.9%	11 7.7%	-4
Latino/a	7 4.9%	5 3.5%	+2
Asian American/Pacific Islander	5 3.5%	2 1.4%	+3
Mixed race	2 1.4%	0	+2

Table 7: Appointments and replacements by race/ethnicity for the District Courts

Gender	**Total appointed**	**Total Replaced**	**Difference**
Male	106 74.1%	100 69.9%	+6
Female	37 25.9%	43 30.1%	-6

Table 8: Appointments and replacements by gender for the District Courts

Race/ethnicity	Total appointed	Total replaced	Difference
White	45 84.9%	45 84.9%	0
African American	0	4 7.5%	-4
Latino/a	1 1.9%	4 7.5%	-3
Asian American	7 13.2%	0	+7

Table 9: Appointments and replacements by race/ethnicity for the US Courts of Appeals

Gender	Total appointed	Total replaced	Difference
Male	42 79.2%	40 75.5%	+2
Female	11 20.8%	13 24.5%	-2

Table 10: Appointments and replacements by gender for the US Courts of Appeals

Yet again, these numbers look particularly bad when compared to the numbers from the Obama administration. However, this dyadic comparison may be unfair, as it is possible that Obama was the outlier rather than Trump (see Solberg and Diascro 2020). To place President Trump's judges in a historical context, we compare President Trump's replacement patterns to the last eight presidents—starting with Carter since he was the first president to prioritize diversity and implement a related appointment strategy (Goldman 1997). To do so, we employ a crude index of increasing diversity in which White males serve as the baseline and are coded zero. The index increases by one whenever a White man is replaced by a White woman or man of color or if a White woman is replaced by a woman of color. The index increases by two if a White man is replaced by a woman of color (intersectionality). The index is scored the same way in reverse. Accordingly, if a White man replaces a woman of color, the index drops two points (see Solberg and Diascro 2020).[17]

17. We deem this a crude measure of diversity because our equivalence of men of color and White females is less than ideal; however, we believe this measure allows us to gain a sense of the trends in judicial appointments over time.

The data in table 11 below clearly show that President Trump's flouting of diversity as a consideration in his judicial appointments is not by accident. While his cohorts resemble those of Reagan or G. H. W. Bush, demographically speaking, the large-scale changes in the bench over time and the continued goal of presidents from both parties to increase the diversity of the bench—either because they are committed to increasing representation and opportunities for underrepresented groups, or because they are using judicial nominations as outreach to communities for their party, or both—reveal that President Trump is truly different in his approach and is bucking historical trends. Bluntly put, his increases in diversity are among the smallest on the list and compare poorly to these previous presidents. The lone exception to this statement may be Reagan, but even Reagan scored more "1s" than Trump in raw numbers and percentages. Trump, by far, has done the most to reduce diversity at a time when contributing to diversity is significantly easier, given the current demographics of the profession (see Carsh 2019, and Achury and Hofer 2020, this volume). Given the importance of diversity to representation and the legitimacy of institutions, the judiciary should be extremely concerned about this trend.

Increase in diversity	**2**	**1**	**0**	**-1**	**-2**	**Total***
President						
Carter	4 3%	37 29%	85 66%	2 1%	0	128
Reagan	3 1%	51 17%	229 79%	8 3%	0	291
G.H.W. Bush	5 3%	44 29%	97 65%	4 3%	0	150
Clinton	13 4%	143 42%	172 50%	16 5%	0	344
G.W. Bush	12 4%	90 30%	178 60%	13 4%	5 2%	298
Obama	28 9%	141 43%	130 40%	28 9%	1 >1%	328
Trump	5 3%	29 15%	120 61%	40 20%	2 1%	196
Total	70	535	1011	111	8	1735

Table 11: Changes in diversity: A historical comparison

* Total numbers for each president will not match overall appointments for two reasons. First, new seats are not

included in this table. Second, some judges are counted twice in that they were appointed to two different courts by the same president. In other words, if President Clinton appointed someone to the district court in his first year and then elevated that same person to the court of appeals in his fifth year, that judge enters the dataset twice.

As we have mentioned several times now, Trump's judicial cohort at either the courts of appeals or the district courts is not as monolithic as was predicted early in his administration (see Solberg and Waltenburg 2018a, b, and c.) While we make no claim that Trump's judges are by any means as diverse as his recent predecessors, the apparent difference between those early predictions, supported by contemporaneous analyses, and the final tally leaves one wondering whether something changed or whether scholars were just too quick off the mark in making claims about Trump's nominees. To investigate this small puzzle further, we collected data on the initial nomination for each of Trump's successful judicial nominees as well as information on their self-identified gender and race.[18] Figure 1 displays a scatterplot of the percentage of Trump's appointees who are women and/or judges of color over time, while figure 2 displays the results of using a statistical procedure that aids in identifying any signal or pattern in the data. Specifically, the procedure computes the best-fitting regression line for the dependent and independent variables for a given observation and then a small set of additional observations near that observation. The resulting estimations are then weighted so that the specific observation contributes the most to the estimated value of the line, while observations further away contribute less to the estimated value. Since the procedure estimates a series of local lines, it is able to follow the data much more closely than does the standard regression procedure.[19]

Although the scatterplot itself is quite noisy, figure 2 displays a discernable pattern: more women and judges of color[20] were appointed later in time than earlier. In other words, there does seem to be a shift as time passes. While we cannot say whether President Trump or his administration reacted to the coverage in various outlets alluding to the lack of diversity in his judicial nominees,

18. Again, this information was gleaned from the biographical database available from the Federal Judicial Center. In doing so, we also noticed that President Trump renominated thirteen judges that were initially nominated by President Obama. Given the vitriol that President Trump spewed about his predecessor and his judges, we were surprised there were so many. We do not know if this is de rigueur for presidents and intend to investigate this in future work.
19. See https://www.stata.com/manuals13/rlowess.pdf (last accessed November 26, 2020).
20. Previously, the literature has denoted this broad category as nontraditional. The term began as an easy way to class the few women and minority judges on the federal bench and because, due to discrimination in the legal field, these men and women tended to follow career paths divergent from their White and male counterparts. We eschew that term as it suggests that alternative career paths are somehow "not normal" and places the privileged path paved for Whites and men as the normal. We believe this is changing, though slowly, and the literature needs to evolve as well.

we can say that as time passes Trump's cohort was more diversified, yielding an overall cohort that was less White and less male than initially predicted.

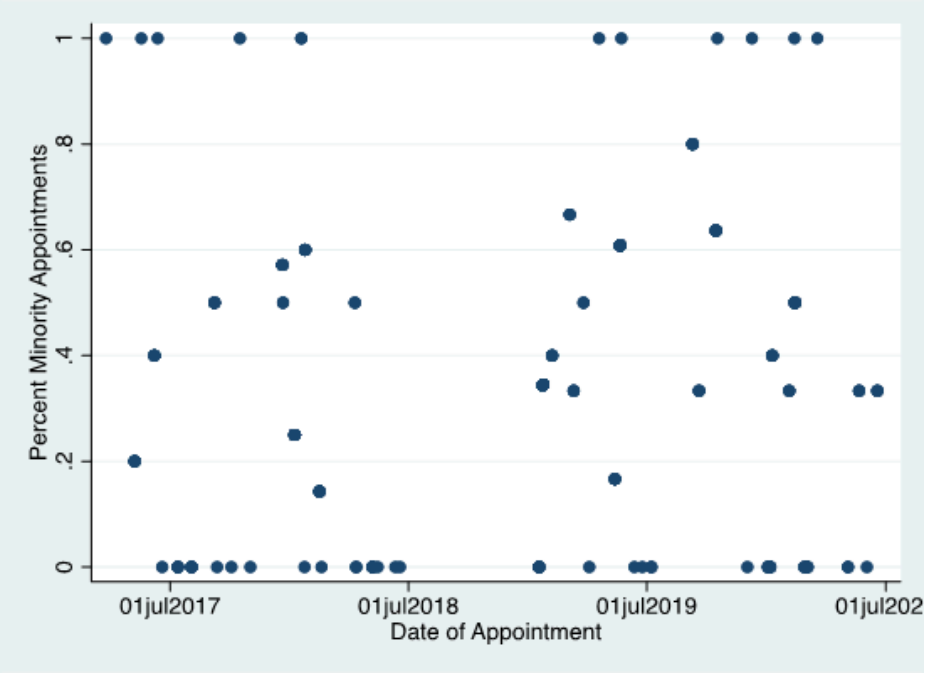

Figure 1. *Scatterplot of Percentage of Trump Appointments that Are Women and/or Judges of Color over Time*

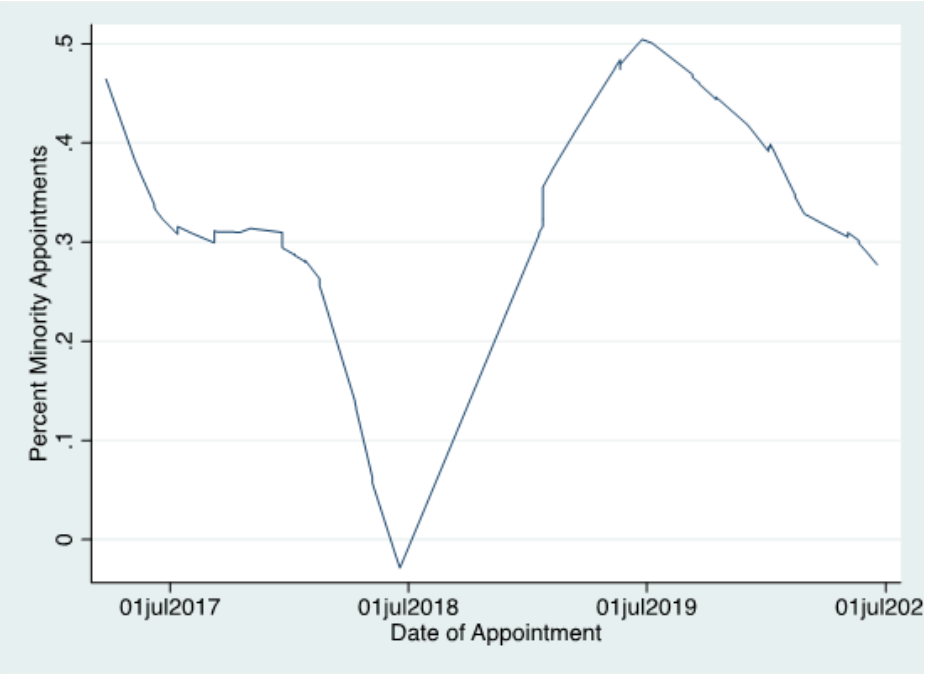

Figure 2*. Lowess regression of percentage of Trump appointments that are women and/or judges of color over time*

Conclusion

In this paper, we took a deep look into the demographic diversity of President Trump's successful lower court judges. As expected, we found that his judicial cohort is generally lacking in diversity. Indeed, he is appointing judges like it is 1989.[21] While it is reasonable to suggest that President Trump compares well with Presidents Reagan and G. H. W. Bush in terms of diversity, such a comparison ignores the thirty- to forty-year spread between the start of the Reagan presidency and the end of the Trump presidency. Recall that in 1980 few women were on the bench or attending law school. Sandra Day O'Connor became the first woman on the Supreme Court in 1981. Reagan's selection pool was significantly smaller in terms of women and lawyers of color. While there are still significant pipeline problems (Carsh 2019; Achury and Hofer 2020, this volume), women now make up a majority of most law school cohorts, and lawyers and judges of color are easily found on both sides of the ideological aisle.[22] President Trump's 2020 list of twenty potential justices is 25 percent people of color (four men and one woman) and 30 percent women (N = 6). Among the potential justices of color are people who self-identify as Asian American and Black; three judges are of Latin descent (Lagoa and Cruz are Cuban American, and Muniz's family emigrated from Nicaragua).[23] Thus it is clearly possible to find conservative nominees that also serve to broaden the descriptive representation on the bench.

Exploring the demographics of Trump's judges is more than an exercise in ranking presidents by their commitment to diversity. Diversity yields tangible benefits for the courts and for US citizens. Diversity has direct connections to diffuse support for the courts and legitimacy for the judiciary as a whole. While the courts still seem to enjoy greater support and trust than the rest of the federal government, this support is splintered by partisan affiliation.[24] This broad support can only be enhanced by interactions with courts and those interactions are affected by diversity (Lee et al. 2021). Litigants and lawyers before the federal courts are more likely to perceive the process as fair and equitable if the bench is diverse (Scherer and Curry 2010; Ulbig 2007). Thus the question of how diverse President Trump's judges are has much broader implications than a commitment to equality and social justice. For example, Democrats are less likely to support a court because they

21. Apologies to Prince and his iconic song "Party like It's 1999."
22. To further support this contention, we can look to the diverse cohort appointed by G. W. Bush, who valued ideology as well as diversity in his judicial nominees (see Solberg 2005).
23. It is interesting that Trump's Supreme Court list has more Latinx representation than Asian American, since the latter demographic is the only one save Whites that gained any representation under this president.
24. See Golde (2019).

perceive the courts as tilted by President Trump, but if those courts remain diverse and mirror the population, then some of that support may be regained.[25]

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25. During the 2020 campaign, some argued that GOP efforts to replace Justice Ginsburg should be met by Democrats with court packing to readjust the courts. See Bouie (2020).

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Class Activity

1. Break students into small groups and assign each group a district or circuit court. If it is a small class, you can just use the courts in your home circuit.
2. Have the students use the Federal Judicial Center (FJC) website to examine the composition

of their court before and after Obama's appointments, before and after Trump's appointments, and before and after Biden's appointments.

3. Students should then discuss how these appointments affected the diversity of the court.
    a. You could also have students investigate partisan balance or even the background of the judges appointed, since the FJC provides brief resumes for all confirmed judges.
4. Reconvene as a class to discuss the results.

10. The Appearance of Justice

A Historical Case Study Evaluating One Supreme Court Justice's Recusal Decisions

CRAIG ALAN SMITH

Judicial recusal is when a judge voluntarily disqualifies herself from hearing a case. The reasons for this usually include conflicts of interest, such as financial investments with one of the parties or personal or professional relationships with the parties or their attorneys. Federal law requires judges to recuse themselves under certain circumstances; for example, when a district court judge gets promoted to the appellate level or a trial judge sits by designation on an appeal, she cannot hear a case that she decided previously. For the most part, at the trial and appellate levels, there has been little controversy over the recusal of federal judges because when they disqualify themselves—whether voluntarily or on the basis of one of the parties requesting it—another federal judge is capable of serving as a substitute.[1]

Such is not the case for the justices of the US Supreme Court because the nation's Constitution requires that there be "one Supreme Court." No one, not even retired justices, can substitute for one of the Court's nine members. If any one of them disqualifies themselves, then the Court would be left shorthanded. In most cases, this would not pose a problem, but in close decisions, one justice's recusal could leave the Court evenly divided, and the lower court's decision would stand. As a result, Supreme Court justices feel a "duty to sit," an expression that usually refers to not leaving the Court evenly divided but just as likely reflects the singularly unique position of the Supreme Court within the federal hierarchy. There is, after all, only one Supreme Court.

Like other federal judges, today's Supreme Court justices are legally bound to disqualify themselves. However, for much of the High Court's history, there was no recusal requirement. Instead, justices exercised their discretion and sense of propriety when deciding whether to sit on a case, and they adopted common-law principles, or the prevailing practices of other federal judges (Frank 1947). Whenever questions arose over their disqualification, controversy more often followed from their participation in a case rather than from their recusal. According to Stempel, Supreme Court history has been "rife with questionable recusal practices and conduct widely condemned by today's standards of disqualification" (1987, 608). Frost similarly observed that

1. Hirsch and Loveland (2002) offer a comprehensive explanation of the federal recusal statutes. For the purposes of this discussion, the terms recusal and disqualification are used synonymously, although technically, there can be a difference (Bassett 2005, 21n5).

"on many occasions during the past 200 years the public has focused on a judge's questionable decision not to recuse and has found the laws governing that decision to be wanting" (2005, 532–33). All of that changed in 1948, when Congress, for the first time, mandated that justices must disqualify themselves under certain circumstances.

For example, the 1948 legislation required that justices disqualify themselves when they had been "of counsel" or when they had been "a material witness" in a case before the Court.[2] Of course, justices continued to exercise considerable discretion over their recusal decisions, as the new legislation left it to their opinion as to whether they were "so related to or connected with" a party in a case or to their lawyer. The issue that prompted the 1948 legislation involved, in part, Justice Hugo Black's participation in a case argued by his former law partner, Crampton Harris, in *Jewell Ridge Coal v. United Mine Workers*, 325 U.S. 161 (1945) and Justice Robert Jackson's concurring opinion to a denial for rehearing where Jackson intimated the impropriety of Black's having participated, as the case raised "a question as to the qualification of one of the Justices to take part in the decision."[3]

For the next quarter of a century, by and large Supreme Court disqualification remained, as Virelli put it, a "personal, independent, unreviewable decision by an individual justice whether to participate in an individual case" (2012, 1547). Therefore, in 1974 Congress amended the recusal law to create a "stricter, more comprehensive, and objective" standard for Supreme Court disqualification (Stempel 1987, 594).

This study focuses on that period from 1948 to 1974, when Congress first required justices to disqualify themselves but the justices had few precedents to guide them other than past practices. Specifically, this study will examine the recusal decisions of Justice Tom C. Clark, who served the longest (1949–67) of any justice whose service commenced post-1948 but concluded pre-1974.[4] As a case study, Justice Clark offers several compelling reasons to review recusal behavior. First, Clark had served as the US attorney general for four years before President Harry S. Truman elevated him to the High Court. As a result, he recused himself from more cases than most of his Court colleagues, especially during his first four terms. Hume found that Clark had a recusal rate of 4 percent over eighteen terms; the other justices with whom he served with higher recusal rates were short-term Justices Goldberg (4.5 percent) and Fortas (6.25 percent) and former attorney general Robert Jackson (4.5 percent; 2014, figure 1). Interestingly, more former attorneys general have gone to the Supreme Court than former solicitors general, although more attention has

2. 28 U.S.C. § 455, "Disqualification of Justice, Judge, or Magistrate," 1948.
3. Jewell Ridge Coal v. United Mine Workers, 325 U.S. 897 (1945).
4. The other justices who fit these parameters were Arthur Goldberg (1962–65), Abe Fortas (1965–69), Charles Whittaker (1957–62), Sherman Minton (1949–56), Earl Warren (1953–69), and John Harlan (1955–71).

focused on the recusal patterns of former solicitors general (Beamer 2012; Hume 2014; Stempel 1987; Virelli 2011). In fact, when Clark retired from the Court, he acknowledged that "for the first time in 69 years the membership did not include a former Attorney General. No other public office has furnished so many members of the Court" (1969b).

Another reason for examining Clark's recusal decisions—or more specifically, his decisions to participate in cases when he might have disqualified himself—relates to Congress's 1974 amendments. The impetus for the 1974 amendments was, in part, Justice William Rehnquist's decision to participate in *Laird v. Tatum*, 408 U.S. 1 (1972) after the respondents requested his disqualification. Laird challenged the government's domestic surveillance program. Before joining the Court, Rehnquist had served as head of the Office of Legal Counsel at the Justice Department, and because he had testified before Congress about the program, respondents argued that he had advised the White House about the program's constitutionality. Rehnquist denied the respondents' request and instead joined a five-person majority to support the government's contention that the respondents lacked standing. In a surprising move, which was unnecessary and admittedly unprecedented, Rehnquist defended his participation in a lengthy memorandum[5] that became the object of widespread commentary and criticism ("Justice Rehnquist's Decision to Participate" 1973; MacKenzie 1974; Stempel 1987). Consequently, Congress amended the recusal statute, most likely in response to Rehnquist's memorandum. Stempel characterized Rehnquist's defense as "pernicious," calling it "an important catalyst" in congressional reform efforts (2009, 81). The amended statute required justices to disqualify themselves when their "impartiality might reasonably be questioned." In other words, the appearance of partiality triggered mandatory recusal. Actual bias did not need to be proved; justices had to avoid even the appearance of bias.[6]

For our purposes, Justice Clark warrants scrutiny because Rehnquist's memorandum drew on past cases when there was perceived bias, but it neglected to consider any instances when Clark chose to disqualify himself. For example, Rehnquist mentioned Justices Murphy's and Jackson's behaviors in *Schneiderman v. United States*, 320 U.S. 118 (1943); Chief Justice Stone's congressional testimony in 1943; Justice Black's participation in *United States v. Darby*, 312 U.S. 100 (1941) and *Jewell Ridge Coal v. United Mine Workers*, 325 U.S. 161 (1945); Justice Frankfurter's participation in *United States v. Hutcheson*, 312 U.S. 219 (1941); and Justice Hughes's participation in *Adkins v. Children's Hospital*, 261 U.S. 525 (1922) and *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937). However, Rehnquist disregarded those instances when Clark participated in questionable cases—cases that presented the appearance of partiality, which could have substantially aided in his Laird defense. Instead of citing post-1948 judicial behavior, Rehnquist relied on pre-1948 instances to contend that "none of the former Justices of this Court since 1911 have followed a practice of disqualifying

5. 409 U.S. 824 (1972).
6. 28 U.S.C. § 455, "Disqualification of Justice."

themselves in cases involving points of law with respect to which they had expressed an opinion or formulated policy prior to ascending to the bench".[7]

Such a claim appeared anachronistic, as there was no pre-1948 congressional mandate for Supreme Court recusal. MacKenzie considered Rehnquist's defense "irrelevant" (1974, 209); others have called it "misplaced" ("Justice Rehnquist's Decision to Participate," 1973, 123). Flamm observed that Rehnquist's examples amounted to no more than "historical relics from a time when society's attitudes toward judicial bias were more relaxed" (2007, 916).

Therefore, this study will review Justice Clark's recusal decisions, paying particular attention to those instances when he participated in questionable decisions. Although Beamer examined "controversial and overlooked recusal affairs to prove that a consistent flaw exists," she did not consider Clark or specifically reference former attorneys general (2012, 1). As the first justice appointed following the enactment of the 1948 recusal statute, Clark's entire Court service was encompassed by the law until the 1974 revisions. His recusal decisions may shed light on the efficacy of the 1974 amendments and the current debate over further reforms.

Supreme Court recusal, although understudied and often misunderstood, has become, as Virelli put it, one of "the most high profile and controversial issues involving the Court" (2012, 137). In another context, Virelli observed, "Supreme Court recusal . . . has been a regular topic of passionate debate since the Founding" and today has become one of the Court's "most hotly debated issues" (2011, 1182 and 1185). Over the past four decades, concern about Supreme Court disqualification has become more urgent and widespread, leading to a number of news stories and scholarly articles on the topic, and two recent books have closely examined it to evaluate the merits of proposed reforms (Hume 2017; Virelli 2016). In a review of Hume's book, Black observed that Supreme Court recusal "lands in that scholarly sweet spot of being really important but woefully understudied" (2018). Justice Clark's recusal behavior deserves a closer look. The one time that I found Clark's behavior questioned was when he participated in a relatively obscure case, *Madsen v. Kinsella*, 343 U.S. 341 (1952), involving the trial of an American citizen by military commission (Kastenberg and Merriam 2016, 166–67). In addition, Hume mentioned only that Clark had to frequently disqualify himself because of his former position as the attorney general (2017).

An Attorney General Becomes Associate Justice

Tom Clark served as the US attorney general during the postwar period of the Truman

7. 409 U.S. 824 at 831 (1972).

administration, from 1945 to 1949. During that time, he dealt with a number of issues that eventually made their way to the Supreme Court. As a result, in his first term he sat out of nearly one hundred cases, of which the Court decided fifteen on the merits. He found this aggravating, as litigants were entitled to a full Court, he believed, and "there were quite a few affirmances by an evenly divided Court" (T. Clark 1969b). How did Clark make his decision to disqualify himself from these cases? Principally, he relied on the advice of Court colleagues, as the new federal statute was still untested. Shortly after starting his judicial service, he requested guidance from Solicitor General Philip Perlman, who advised Clark to consult with Justice Jackson and the law clerk to the recently deceased Justice Murphy, whom Clark replaced (Perlman 1949). Section 455 of the Judicial Code read, in its entirety,

> Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.[8]

Clark felt ethically bound to disqualify himself from cases connected to his service as attorney general, though strictly speaking, the law did not require recusal for past government service. Typically, an attorney general's connection to a case before the Court was nominal, since as Frank observed, the attorney general had "only theoretical responsibility for minor cases in their departments" (1947, 624). Chief Justice Harlan Stone similarly suggested that the standard for disqualification should have "something more to do with the case than the merely pro forma relations which an Attorney General often has with cases in the Department of Justice" (Frank 1970, 48). Whatever his reasons for disqualification, there was no obligation for Clark to explain his decision, just as there were no means of enforcing his recusal. According to Lubet, "By tradition, most Supreme Court Justices do not announce their reasons for recusal. It is therefore impossible to know with any precision what the bases were for the great majority of these disqualifications" (1996, 659; see also Bassett 2005, 50; and Flamm 2007, 915). During his entire Court service, Clark decided for himself whether his "substantial interest" in a case warranted his recusal. As Frank summarized, for the next quarter of a century, justices generally did not disqualify themselves unless (a) they had a dollar interest, (b) they were related to a party or to counsel, (c) their former law office was involved, or (d) when serving in government, "they dealt with the precise matter" before the Court (1970, 50).

Clark's service as the attorney general offered substantial reasons for disqualification, and two-thirds of his recusals occurred during his first four terms. In total, he sat out of seventy-three cases decided on the merits (see the appendix). So far as the record shows, none of those were due to illness or injury, but during the first week of January 1953, he was in Texas attending his

8. Ch. 646, § 455, 62 Stat. 908, June 25, 1948.

mother's funeral and missed oral arguments in five cases decided on the merit.[9] Most often, he disqualified himself from antitrust decisions[10] and cases involving suspected Communists.[11] He also sat out of several alien property claims. In 1942, President Roosevelt had established the alien property custodian by Executive Order 9095, but in 1946, President Truman terminated the office by Executive Order 9788 and transferred its authority to the attorney general.[12] In addition, Clark missed deportation or denaturalization cases because, as part of a 1940 reorganization plan,[13] the powers and functions of the Immigration and Naturalization Service were transferred from the Labor Department to the Justice Department.[14] In some instances, Clark disqualified himself because he had argued before the Court as the attorney general on the very issue before the Court. In other instances, he had publicly supported Truman administration policies. Several of these issues will be examined more closely, paying particular attention to cases in which Clark participated when there was ample reason for him to recuse himself.

His inconsistency in this regard should not impugn his character, however. According to Frank, "In repeated instances, Attorneys General rise to the Supreme Court, and they must then decide whether they can sit on cases which were in the Department when they themselves were there," but Clark was "immensely sensitive to the value of high ethical appearance as well as substance" (1970, 47 and 48). That he disqualified himself from seventy-three decisions on the merits before

9. May v. Anderson, 345 U.S. 528 (1953); Lauritzen v. Larsen, 345 U.S. 571 (1953); Wells v. Simonds, 345 U.S. 514 (1953); Bode v. Barrett, 344 U.S. 583 (1953); and B&O Ry v. United States, 345 U.S. 146 (1953).
10. United States v. Yellow Cab, 338 U.S. 338 (1949); United States v. Real Estate Board, 339 U.S. 485 (1950); Bowman Dairy v. United States, 341 U.S. 214 (1951); Timken v. United States, 341 U.S. 593 (1951); Lorain Journal v. United States, 342 U.S. 143 (1951); Far East Conf v. United States, 342 U.S. 570 (1952); United States v. Oregon Med. Soc., 343 U.S. 326 (1952); Besser Manufacturing v. United States, 343 U.S. 444 (1952); and United States Gypsum v. National Gypsum, 352 U.S. 457 (1957).
11. United States v. Fleischman, 339 U.S. 349 (1950); United States v. Bryan, 339 U.S. 323 (1950); Blau v. United States, 340 U.S. 159 (1950); Blau v. United States, 340 U.S. 332 (1951); Rogers v. United States, 340 U.S. 367 (1951); and Service v. Dulles, 354 U.S. 363 (1957).
12. McGrath v. Manufacture Trust, 338 U.S. 241 (1949); Zittman v. McGrath, 341 U.S. 446 (1951); Guessefeldt v. McGrath, 342 U.S. 308 (1952); Kaufman v. Societe International, 343 U.S. 156 (1952); Uebersee Finanz v. McGrath, 343 U.S. 205 (1952); Orvis v. Brownell, 345 U.S. 183 (1953); Brownell v. Chase National, 352 U.S. 36 (1956); and Societe Internationale v. Rogers, 357 U.S. 197 (1958).
13. Reorganization Plan No. V of 1940, 5 F.R. 2223, 54 Stat. 1238, June 15, 1940.
14. Eichenlaub v. Shaughnessy, 338 U.S. 521 (1950); Wong Yang Sung v. McGrath, 339 U.S. 33 (1950); McGrath v. Kristensen, 340 U.S. 162 (1950); Harisiades v. Shaughnessy, 342 U.S. 580 (1952); United States v. Spector, 343 U.S. 169 (1952); Bindczyck v. Finucane, 342 U.S. 76 (1951); Ackerman v. United States, 340 U.S. 193 (1950); Knauff v. Shaughnessy, 338 U.S. 537 (1950); and Bridges v. United States, 346 U.S. 209 (1953).

Congress imposed more objective recusal standards speaks of his integrity. According to Hume, Clark's recusal rate was twice the average of all justices from the modern era and well above the vast majority (2014, figure 1; 2017, figure 2.1). In fact, Clark was so committed to the appearance of justice that he retired from the Court principally because his son, Ramsey, became the US attorney general. There was no legal requirement for him to do so, just as there was no legal requirement for him to disqualify himself from cases handled by Ramsey at the Justice Department. Nevertheless, Clark retired to make room for his son's advancement, writing to one well-wisher, "I believe it would be best for me to retire. Litigants have enough problems without having a father-son psychology to face. And while there is no actual conflict the potential is there, and the appearance of justice is as important and effective as the real thing" (1967).[15]

Ramsey Clark at the Justice Department

Clark's retirement notwithstanding, his recusal record with respect to his son, Ramsey, was haphazard at best. Eight years before Ramsey became the attorney general, he had argued a case at the Supreme Court involving Safeway Stores, *Safeway Store v. Oklahoma Retail Grocers*, 360 U.S. 334 (1959), and his father disqualified himself. Then after Ramsey was confirmed as the attorney general, Clark disqualified himself from *Honda v. Clark*, 386 U.S. 484 (1967), an appeal where Ramsey was named as a party in an alien property case. However, these were the only two instances of Clark recusing himself due to his son's direct involvement in a case before the Court.

During the four years that Ramsey served as the assistant attorney general of the Justice Department's Lands Division and then two years as the deputy attorney general and the acting attorney general, his father did not disqualify himself from cases brought by the Justice Department. "The cases came to the Supreme Court that I had participated in in the lower courts, and had actually been involved in formulating the position taken by the government," Ramsey told an interviewer. "Dad always sat on the cases; he never, as far as I know, disqualified himself in any cases, because I happen to have been in it" (1968). Ironically, Justice Clark chose to retire when his son became the attorney general to avoid the appearance of a conflict of interest, yet when his son headed the Lands Division, the question of a conflict of interest hardly arose. "I don't know why it didn't," Ramsey recalled. He continued,

In fact, your proximity to actual cases in the Supreme Court is much greater as Assistant Attorney

15. A couple years after his retirement, Clark expressed a similar sentiment. "You know there's more to justice than just trying cases and dispositions and judgments," he said. "The appearance of justice, I think, is more important than justice itself" (1969a)

General than as Attorney General, because they are much closer to specifics and to individual cases. . . . Actually, as Deputy I was much further away from the work of the Supreme Court than I had been as Assistant Attorney General in the Lands Division where we would have six or eight cases before the Court in a single term (1968).

Frank acknowledged that "there was in fact no functional difference between the son's relationship to the Supreme Court as Deputy Attorney General or, certainly, as Acting Attorney General, a post he held for a long time, and his final position as Attorney General" (1970, 47). Of course, Tom and Ramsey Clark's situation was without precedence. The only other time that a similar father-son relationship created a potential conflict of interest was in 1930, when Charles Evans Hughes Jr. resigned his position as the solicitor general because his father became the chief justice of the United States.

Former Law Clerks

Other than his son appearing before the Court, the next closest "family" to Clark who posed the potential for a conflict of interest were his former law clerks. Given that his Court service extended for eighteen terms, it was not unusual that some of his former clerks worked on cases where he had to decide whether to participate. Of course, the prevailing recusal statute said nothing with respect to former law clerks, so Clark's decisions as to whether he was "so related to or connected with any party or his attorney as to render it improper" for him to participate were left to his discretion. As a result, his decisions appeared indiscriminate, especially since some of them changed case outcomes.

Clark twice recused himself when his fourth-term clerk Frederick Rowe presented cases to the Court. He sat out of a case involving illegal oil pipeline rebates where Rowe prepared the briefs for one of the pipeline companies, *United States v. Atlantic Refining*, 360 U.S. 19 (1959), and he sat out of a case involving public utilities regulation that Rowe argued on appeal, *Commercial Communications v. Public Utilities Commissio*n, 359 U.S. 341 (1959). In his final term, Clark also disqualified himself from three antitrust cases when his second-term clerk Donald Turner appeared before the Court as the assistant attorney general of the Antitrust Division. Turner had worked on the briefs in two of the cases, *United States v. Sealy*, 388 U.S. 350 (1967) and *United States v. Arnold, Schwinn*, 388 U.S. 365 (1967) and presented the government's arguments in the third, *United States v. 1st City Nat Bank*, 386 U.S. 361 (1967). One of Justice William Brennan's former law clerks, Richard Posner, also assisted on the briefs and argued before the Court; however, Brennan did not recuse himself.

Clark also participated in cases when his former law clerks appeared before the Court. For

example, he participated in *Bushnell v. Ellis*, 366 U.S. 418 (1961), argued by his first-term clerk Percy Don Williams, who represented an indigent defendant; *Escobedo v. Illinois*, 378 U.S. 478 (1964), where his fourth-term clerk Bernard Weisberg argued as an amicus curiae for the American Civil Liberties Union; and *United States v. John Hancock Mutual Insurance*, 364 U.S. 301 (1960), argued by his eighth-term clerk Harry Hobson. Although he had disqualified himself from two of Frederick Rowe's cases, he also participated in cases presented by Rowe, and sometimes his participation determined the outcome. For instance, Clark provided the fifth vote in *Federal Trade Commission v. Henry Broch*, 363 U.S. 166 (1960), an antitrust decision adverse to Rowe's corporate client. Two years later, Rowe was back at the Court after the US Court of Appeals modified a cease and desist order on remand, and Clark participated in *Federal Trade Commission v. Henry Broch*, 368 U.S. 360 (1962), but Rowe lost a second time. In a habeas corpus petition where Rowe represented an indigent defendant, *Payne v. Madigan*, 366 U.S. 761 (1961), Clark participated, but instead of providing the fifth vote, his participation created an evenly divided Court due to Justice Felix Frankfurter's nonparticipation, and the Court affirmed the lower court's ruling. Considering the nature of the appeal, that may have been a strategic move, as Clark was regarded generally as tough on criminal defendants, and affirmance meant that the defendant remained incarcerated for the prescribed sentence. A similar instance occurred when Clark participated in *United States v. Huck Mfg.*, 382 U.S. 197 (1965), argued by his second-term clerk Donald Turner, and Clark's participation led to affirmance by an evenly divided Court, as Justice Abe Fortas did not participate.

When his former law clerk Assistant Attorney General Donald Turner assisted in preparing the brief in *Baltimore & Ohio v. United States*, 386 U.S. 372 (1967), Clark's participation determined the outcome. The case involved an order of the Interstate Commerce Commission, which had permitted a proposed railway merger. In his majority opinion, Clark reversed the lower court, thereby precluding the proposed merger. Had he disqualified himself, then an evenly divided Court would have affirmed the lower court's decision. Of course, Clark may have participated only because Justice Brennan did, even though Brennan's former clerk Richard Posner had also assisted on the brief.

By participating in a case involving an Interstate Commerce Commission (ICC) order and a proposed railway merger, particularly one involving his former law clerk, Clark appeared inconsistent. Years earlier, he had disqualified himself from *St. Joe Paper v. Atlantic Coast Line Railroad*, 347 U.S. 298 (1954), which involved an ICC plan to reorganize a bankrupt railway by merging it with another railway, and in a split decision, the Court forestalled the proposed merger because Justice Hugo Black also sat out of the case. Clark's decision to participate in Baltimore & Ohio may have been strategic, or it may have been simply waiting long enough. After all, Turner had been his law clerk more than fifteen years beforehand, and Clark's recusal in St. Joe Paper was more than a dozen years previously. As he once told an interviewer, "Indeed, I sat in cases involving Safeway stores even though I represented them in 1937. I think you can go to ridiculous lengths

in abstention" (1973b). However, in one antitrust case, *Safeway Stores v. Vance*, 355 U.S. 389 (1958) and its companion, *Nashville Milk v. Carnation*, 355 U.S. 373 (1958), decided twenty years after his personal association with Safeway had ended, Clark's participation determined the outcome.

Antitrust Cases

Antitrust cases represented the greatest number of cases where Clark disqualified himself, which was unsurprising given that he had served for several years as a lawyer in the Justice Department's Antitrust Division and for a short time had headed the division. As the attorney general, he reportedly had "started more antitrust suits than any previous Attorney General," and he was proud of his record for filing "almost as many [antitrust] suits as we formerly had in the history of the United States" ("Enforcing the Antitrust Laws"; see also "Clark, Cautious Trust Buster"). At the Court, he disqualified himself from cases involving the Du Pont Corporation because as the attorney general, he had made high-profile attacks against the industrial giant. For example, he sat out of *United States v. Du Pont*, 351 U.S. 377 (1956); *United States v. Du Pont*, 353 U.S. 586 (1957); and *United States v. Du Pont*, 366 U.S. 316 (1961). He also recused himself from a number of movie industry cases because he had argued before the Court in a major film distribution monopoly case, United States v. Paramount Pictures, 334 U.S. 131 (1948), which led to similar recusals in *Sutphen Estates v. United States*, 342 U.S. 19 (1951); *Hughes v. United States*, 342 U.S. 353 (1952); and *Partmar v. Paramount*, 347 U.S. 89 (1954). As a result, he necessarily sat out of other antitrust cases that relied on the principles announced in Paramount Pictures, such as *United States v. Gypsum*, 340 U.S. 76 (1950) and *United States v. New Wrinkle*, 342 U.S. 371 (1952).

That Clark disqualified himself from so many antitrust cases, particularly ones involving the movie industry, did not necessarily mean that he had to recuse himself from all of them. For example, when the Court considered the "scope and effect" of *Paramount Pictures in Theatre Enterprises v. Paramount*, 346 U.S. 537 (1954), Clark wrote the majority opinion and found the petitioners' allegations "untenable" and any relevance to Paramount Pictures "slight." Having had experience with—even having expressed an opinion on—an issue before the Court did not automatically disqualify a justice. As Justice Rehnquist argued in his defense for participating in Laird,

> It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers. Proof that a Justice's mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.[16]

16. 409 U.S. 824 at 835 (1972).

However, Clark participated in two antitrust decisions so closely related to Paramount Pictures that his impartiality appeared questionable. The first involved an alleged antitrust violation in the promotion of professional boxing. In *International Boxing Club v. United States*, 358 U.S. 242 (1959), Clark wrote the five-person majority opinion. He had argued in Paramount Pictures to end a movie industry monopoly, and in International Boxing Club he effectively ended a professional boxing monopoly. Most significantly, in his *International Boxing Club* opinion he made frequent references to significant holdings from Paramount Pictures, at one point announcing, "The case which most squarely governs this case is *United States v. Paramount Pictures*."[17]

Clark's participation in International Boxing Club had two plausible explanations, which may temper the impression of partiality. When the case first appeared at the Court, *United States v. International Boxing Club*, 348 U.S. 236 (1955), it did not present the antitrust questions controlled by Paramount Pictures but instead questioned whether professional boxing could receive the same antitrust exemption as professional baseball. Chief Justice Earl Warren ruled that boxing was different from baseball for the purposes of interstate commerce and sent the case back to the district court, which subsequently found an antitrust violation. Clark had participated in the first International Boxing Club decision, which was unquestionably appropriate, so when the case returned to the Court as an antitrust violation, it may have seemed reasonable to participate a second time. There was also the length of time involved, as Clark's arguments in Paramount Pictures were a decade in the past.

The second antitrust case where Clark's participation should have raised questions about his impartiality involved a named defendant that he had prosecuted as the attorney general. One of the original defendants in Paramount Pictures was Loew's, and Clark recused himself from *United States v. Loew's*, 339 U.S. 974 (1950), an appeal of the Paramount Pictures decision. A dozen years later, Loew's was back before the Court in a case questioning whether block booking of copyrighted feature motion pictures for television violated antitrust law. Although Loew's new appeal involved television broadcasting instead of movie theater film distribution, the connection to Paramount Pictures was unmistakable.

Relying on Paramount Pictures, Justice Arthur Goldberg ruled that "tying agreements," no matter the medium, were illegal. "Appellants attempt to distinguish the Paramount decision in its relation to the present facts," Goldberg announced in *United States v. Loew's*, 371 U.S. 38 (1962), but "appellants cannot escape the applicability of Paramount Pictures." The degree to which Paramount Pictures controlled the new television medium was indubitable:

The principles underlying our Paramount Pictures decision have general application to tying arrangements involving copyrighted products, and govern here. . . . Enforced block booking of

17. 358 U.S. 242 at 251 (1959).

films is a vice in both the motion picture and television industries, and that the sin is more serious (in dollar amount) in one than the other does not expiate the guilt for either. Appellants' block booked contracts are covered by the flat holding in Paramount Pictures.[18]

On previous occasions, Clark had disqualified himself from cases that relied on principles announced in Paramount Pictures, such as *No Pac Ry v. United States*, 356 U.S. 1 (1958), when the Court considered whether tying agreements were unreasonable restraints on trade. However, this time he participated, and the only reasonable explanation for his participation was that enough time had passed.

Communist-Inspired Decisions

Clark served as the attorney general during the immediate postwar period, when Communist or subversive infiltration was keenly feared. As part of President Truman's federal loyalty program, Clark had made public the infamous "Attorney General's List of Subversive Organizations," and because he was the original named respondent, he recused himself when the attorney general's list was challenged in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951), which was the appeal of *Joint Anti-Fascist Refugee Committee v. Clark*, 177 F. 2d 79 (D.C. Cir. 1949). He also disqualified himself from Smith Act prosecutions, such as *Dennis v. United States*, 341 U.S. 494 (1951), which led to the convictions of American Communist Party leaders. The Smith Act punished advocating the violent overthrow of government. Clark also sat out of *Dennis v. United States*, 339 U.S. 162 (1950), which challenged the trial jury's impartiality when the defendant refused to appear before the House Un-American Activities Committee; *Sacher v. United States*, 343 U.S. 1 (1952), which involved contempt charges against Dennis lawyers; and In re Isserman, 345 U.S. 286 (1953), which considered disbarment of Dennis lawyers.

One of the more significant Communist-inspired cases where Clark recused himself was *American Communications Association v. Douds*, 339 U.S. 382 (1950), which also became the basis for one of his more questionable participation decisions in a case that appeared to overturn Douds. During his first term, Clark sat out of Douds, which challenged the non-Communist oath for union officers in the Taft-Hartley Act, a law that Congress had passed over President Truman's veto and that Attorney General Clark had sought to repeal. In the Court's majority opinion, Chief Justice Fred Vinson upheld Taft-Hartley's non-Communist oath, concluding that it was not a bill of attainder. Had Clark participated in Douds, undoubtedly he would have supported Vinson's majority position, as Clark's anti-Communist views were well established—his opposition to Taft-Hartley had more

18. 371 U.S. 38 at 50 (1962).

to do with his views on labor—and during his first term, Clark reflectively voted alongside Vinson in 98 percent of cases decided on the merits.

Fifteen years later, the Court considered *United States v. Brown*, 381 U.S. 437 (1965), a case that challenged a law making it a crime for Communist Party members to serve as union officers or employees. The new law, which had replaced that portion of Taft-Hartley requiring a non-Communist oath, was enacted a decade after Clark joined the Court, and Brown became the first time that the Court reviewed a conviction under it. Speaking for a five-person majority, Chief Justice Earl Warren invalidated the law principally because it was a bill of attainder, and Clark joined three other dissenters. Although Brown did not consider the First Amendment freedom of association as had Douds, the similarities between the two cases were unmistakable.

The purpose of the two laws was the same. According to Chief Justice Vinson, the non-Communist oath of Taft-Hartley was intended to "prevent political strikes," and Chief Justice Warren held that its replacement was to minimize "the danger of political strikes." In fact, Warren conceded that the new law "was designed to accomplish the same purpose" as Taft-Hartley "but in a more direct and effective way"[19], while the four Brown dissenters considered Douds "obviously overruled."[20] Dissenting along with Clark were Justices Byron White, John Marshall Harlan, and Potter Stewart. Not incidentally, Victor Rabinowitz and Leonard Boudin appeared as counsel in both cases. They represented the appellants in Douds, where they lost the decision, and they returned in Brown with amicus briefs, where their side prevailed.

Clark's participation in Brown seemed suspicious because Brown appeared to overrule a case where he had recused himself. As with most of his questionable decisions, enough time had passed to give the appearance of impartiality, and this time Clark's participation did not change the outcome, so it made little difference. Furthermore, Clark had changed. He was no longer a freshman justice who uncritically followed the chief justice; he was now fourth in seniority on the historically activist Warren Court. In fact, only two other justices—Black and Douglas—who had served with him in Douds remained on the Court for Brown. Black, who had dissented in Douds, joined the majority in Brown. Douglas, on the other hand, had missed Douds and half of Clark's first term due to serious injuries he suffered from falling off a horse that then fell on him, but he also joined the majority in Brown. The country was also different, as concern with Communist infiltration had waned considerably since the demise of McCarthyism, and the Court reflected this shift in perspective.

By the 1960s, public criticism of the Court was directed at its rulings, not at recusal decisions. For example, the Court faced harsh public criticism following its school prayer decisions, *Engel v.*

19. 381 U.S. 437 at 439n2 (1965).
20. 381 U.S. 437 at 465 (1965).

Vitale, 370 U.S. 421 (1962) and *Abington v, Schempp*, 374 U.S. 203 (1963), and its criminal prosecution decisions, such as *Mallory v. United States*, 354 U.S. 449 (1957) and *Escobedo v. Illinois*, 378 U.S. 478 (1964). Just as important, Justice Arthur Goldberg had as much reason to disqualify himself from Brown as did Clark. Fifteen years earlier, Goldberg had worked on the briefs for the Congress of Industrial Organizations (CIO) in a case consolidated with the Douds ruling, and he had filed amicus curiae briefs for the CIO in the final Douds decision. Yet Goldberg participated in Brown, which may have given Clark reason for doing so. While Goldberg provided the crucial fifth vote to overturn a law that the Brown majority argued was "not necessarily controlled by Douds,"[21] Clark and the dissenting justices asserted that Congress was now forbidden "to do precisely what was validated in Douds."[22]

The Submerged Lands Act

Commonly referred to as the "tidelands" controversy, the states and federal government had a long-standing dispute over who controlled offshore oil, gas, and mineral rights. As the attorney general, Clark had argued in *United States v. California*, 332 U.S. 19 (1947) that the federal government should have "paramount rights in and power over" California's three-mile belt along the coast. After his successful argument defending national sovereignty, Clark tried to forestall congressional efforts to restore state authority, writing, "The United States should not by legislative action transfer to the respective coastal states dominion and control over the lands and resources underlying the ocean areas adjacent to our shores but should retain and administer these valuable national assets for the benefit of all" (1948). Nonetheless, Congress tried to restore state sovereignty over the tidelands, once while Clark was still the attorney general and again after he joined the Court, and both times President Truman vetoed the measures.

It was unsurprising, then, when Clark disqualified himself during his first term from a pair of cases raising the issue of state sovereignty. Other states, such as Louisiana and Texas, had joined California in urging state sovereignty, but the Court continued to rule against them in *United States v. Louisiana*, 339 U.S. 699 (1950) and *United States v. Texas*, 339 U.S. 707 (1950). The Court found no reason to treat Louisiana any differently than California, even though Texas's unique status as an independent republic caused some disagreement among the justices. Texans were especially furious with the Court's decisions—in part because Attorney General Clark had previously indicated in a press statement that Texas was different: "As a Republic it owned all of the

21. 381 U.S. 437 at 457 (1965).
22. 381 U.S. 437 at 465 (1965).

lands within its boundaries, including the marginal sea commonly called tidelands. This area was under the sovereignty of Texas during the Republic and was retained by it under the provisions of the Act of Admission" (Daniel 2010).

Following these Supreme Court losses, several additional states not party to the original disputes renewed court challenges after President Dwight D. Eisenhower signed the 1953 Submerged Lands Act, which granted to coastal states title to submerged lands and natural resources within their traditional boundaries, limited to three miles.[23] When the Court considered these new state challenges, Clark participated, even though as the attorney general he had argued for and publicly defended national sovereignty. Instead of recusing himself, he joined the Court's per curiam opinion in *Alabama v. Texas*, 347 U.S. 272 (1954) to uphold the Submerged Lands Act on the constitutional ground that Congress could dispose of territory under its control any way it wanted. Because California was involved, the chief justice and former California governor Earl Warren did not participate.

The most striking aspect of Clark's participation in the Submerged Lands Act decision was not the timeframe involved—only four years had elapsed from his recusal in tidelands cases to his participation in one—but his reversal of position. Given that he had successfully argued in favor of and had publicly supported national sovereignty, it was surprising that he voted to uphold a law granting state sovereignty, effectively reversing the Court's prior decisions. By reversing his own position as the attorney general, Clark gave the impression of being unbiased and probably deflected attention away from whether he should have disqualified himself. However, in three subsequent tidelands cases, *United States v. Louisiana*, 363 U.S. 1 (1960); *United States v. Florida*, 363 U.S. 121 (1960); and *United States v. California*, 381 U.S. 139 (1965), Clark continued to recuse himself.

The Steel Seizure Case

The one time that Clark's participation in a case publicly raised concern was during the high-profile incident when President Truman ordered his secretary of commerce, Charles Sawyer, to seize the nation's steel mills. By that time, the Korean War was entering its third year, and a threatened strike of steelworkers potentially endangered America's forces overseas. Contemporary commentators, such as syndicated columnist Drew Pearson, expected Clark to support the president's action because he had made statements to that effect as the attorney

23. The actual tidelands, which lie between the high-tide mark and the mean low tide, were not involved ("Submerged Lands Act"; see also "The Tidelands Oil Controversy," 116n1).

general. Pearson predicted that Clark would vote in favor of the president (1952), and Truman probably counted on Clark's assent. According to Marcus, "Everyone anticipated that Clark would vote for the President" (1994, 190).

As the attorney general, Clark had advised Truman regarding labor relations and industrial work stoppages that threatened the nation's well-being. In fact, when coal miners threatened to go on strike in defiance of a court injunction and the government took control of the mines, Clark successfully defended the administration in *United States v. Mine Workers*, 330 U.S. 258 (1947), calling the miners' defiance an "insult to the United States itself." In addition, Attorney General Clark had made public statements to the Senate Committee on Labor, which were widely reproduced in the press, defending the president's authority to interfere in proposed strikes. "With regard to the question of the power of the Government," Clark contended, "I might point out that the inherent power of the President to deal with emergencies that affect the health, safety and welfare of the entire Nation is exceedingly great" (1949).

Therefore, in the steel seizure case, Clark was on record as having advised the president on the very issue before the Court, and while the case was under review, initially it did appear as though he would support Truman's action. "There was quite a clamor for me to disqualify myself in that case," Clark remembered twenty years afterward. "They all said I'd prejudged it—that I was going to decide in favor of the President" (1973a). Nevertheless, rather than supporting the president, Clark joined a Court majority to deny Truman the authority to seize private property. However, he would not join Justice Hugo Black's opinion in *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952), which ruled that Truman lacked constitutional authority or congressional authorization for his action.

Instead, Clark concurred in the judgment insofar as Congress had "laid down specific procedures to deal with the type of crisis confronting the President." Without such statutory guidance, Clark argued, "the Constitution does grant to the President extensive authority in times of grave and imperative national emergency," but "the President's independent power to act depends upon the gravity of the situation confronting the nation."[24] In other words, Justice Clark maintained the position he had taken as the attorney general—that the president possessed "exceedingly great" inherent power—but only so long as Congress did not prescribe a specific alternate procedure to follow under the circumstances. Unfortunately, as Dickson observed, Truman was "infuriated by Tom Clark's 'betrayal' and never forgave his old friend" (2001, 182n32).

This middle ground—acknowledging the president's authority to act yet denying its exercise—may have been in response to the dissenting justices, who used Clark's views as the attorney general to defend Truman's action. Chief Justice Fred Vinson, writing in dissent, also drew attention to

24. 343 U.S. 579 at 662 (1952).

two former attorneys general, Frank Murphy and Robert Jackson, whose views were "in line" with Clark's. After the Court announced the steel seizure decision, public attention shifted from Clark's recusal to his changed position, what he called a self-reversal:

I found myself in that spot in the Steel case where the press pointed out that as Attorney General I had advised Senator Thomas that the inherent powers of the President were very great, but as a Justice had stricken down the President's seizure of the steel mills. My reply was that when writing the Senator, I was Attorney General; now I am a Justice! (1969b)

Once again, by altering the position he had taken as the attorney general, Clark diverted attention away from his participation in the steel seizure decision.

Contemporary Issues

As previously mentioned, in 1974 Congress amended the federal recusal statute to require justices to disqualify themselves when their "impartiality might reasonably be questioned." Congress did this in large part to address concerns over Justice William Rehnquist's defense of his participation in *Laird v. Tatum* using pre-1948 examples of questionable judicial behavior. Thirty years later, Justice Antonin Scalia sparked renewed interest in Supreme Court recusal when he similarly denied a motion to disqualify himself from a case involving Vice President Richard Cheney as a named party, *Cheney v. U.S. District Court*, 542 U.S. 367 (2004). The controversy began when Scalia, among others, went on a duck hunting trip with Cheney, and afterward news coverage and critical commentary became so intense that Scalia issued a memorandum defending his participation in the case.[25] A spate of duck-themed articles followed Scalia's participation in Cheney (Freedman 2004; Goodson 2005; Riffle 2005). Like Rehnquist's defense, Scalia's memorandum was remarkable given the well-entrenched custom on the Court to avoid explaining recusal or participation decisions, what Weaver called a "conspiracy of silence" (1975).

Justice Scalia's defense relied, in part, on a doctrine first propounded by Rehnquist, what came to be known as the "duty to sit." This duty to sit has become such a compelling reason to avoid recusal that Hume concluded it oftentimes outweighs other ethical considerations favoring disqualification (2017, 4). However, the duty to sit has come increasingly under fire, as other commentators have argued that Congress repudiated the doctrine with the 1974 amendments requiring disqualification regardless of the potential for leaving the Court shorthanded (Bassett 2005, 21; Beamer 2012, 3; Stempel 1987, 607; 2009, 814 and 818; Virelli 2016, 15–16).

25. 541 U.S. 913 (2004).

Nevertheless, justices continued to participate in questionable decisions, more often than not without explanation. For example, when the Court considered the constitutionality of the Affordable Care Act (Obamacare) in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), critics sought Justice Elena Kagan's recusal because she had served as the solicitor general when, presumably, the government developed its defense of the program (Hume 2017, 1, 4, and 41). Calls were similarly heard for Justice Neil Gorsuch to disqualify himself from *Janus v. AFSCME*, 138 S. Ct. 2448 (2018) because of his close ties to political interests who funded one side of the controversy (Warren 2017; "Ginsburg and Gorsuch Should Explain" 2017). In neither instance did Kagan or Gorsuch explain their participation despite publicized misgivings about their impartiality. Undoubtedly, they subscribed to the duty to sit requirement, as their disqualifications would have left the Court evenly split, which may have been the sole objective of those advocating for their recusals.

More recently, disqualification became an issue during the confirmation hearings of Judge Brett Kavanaugh. In addition to some arguably partisan attacks on Kavanaugh's qualifications—not to mention the scandalous accusations of prior sexual misconduct—there was also concern about his impartiality, particularly when deciding cases involving a sitting president who faced the potential for indictment. Because he had previously written articles suggesting that the president could not face criminal charges while in office, some commentators believed that Kavanaugh should disqualify himself from any case involving President Donald Trump, who faced the possibility of a criminal investigation (Hurley 2018; Nichols 2018; Rizzo 2018). Thus Kavanaugh's nomination raised the specter of Supreme Court disqualification even before his confirmation occurred.

Calls for Reform

The most salient issue regarding Supreme Court recusal has centered on who has the authority to decide when a justice must disqualify themselves. For most of the Court's history, that decision belonged to the justices themselves; however, for the past seven decades, Congress has required justices to disqualify themselves when their participation raised ethical questions, but that decision has always been unreviewable and unenforceable. Even after Congress amended the law to provide for more objective recusal standards, for the next forty-five years, as Hume observes, "the justices have at times conducted their business as though the 1974 revisions never happened" (2017, 117). As a result, a number of reform measures have been proposed to correct what Stempel calls the Court's "flawed practice of permitting each justice to make a final and unreviewable decision" (1987, 590).

Calls for reform most often followed from a justice's participation in a particular case when there

were arguably reasons for their recusal. More sustained criticism of a justice's behavior inevitably followed from his participation in close decisions, when his disqualification could have potentially changed the outcome. Reform measures have ranged from leaving the law intact but changing the Court's practice to repealing the law entirely and relying on "more indirect constitutional tools" (Virelli 2011, 1185).

One proposal, for example, would retain the law in terms of the criteria used for deciding when to recuse, but justices with the potential for bias in borderline cases would be required to explain their participation in a "statement of interest." These statements would then become a part of the public record, which would draw the other justices'—and the public's—attention toward the ethical implications of their participation. In addition, other proposals would require similar statements whenever a justice disqualified herself because justices have never explained their recusal when they did sit out of cases (Bassett 2005, 50; Hume 2017, 130–31).

Beyond these reporting requirements, another area of potential reform involves some type of review, usually by the other justices, of a particular justice's decision to participate. For example, one proposal would require a "statement of interest" whenever a party requested a justice's recusal but was denied, and then the full Court would review that decision (Goodson 2005, 186 and 213–20). Another proposal would amend the current recusal statute to require justices to inform parties of factors that might prompt their disqualification, which could then lead to requests for their recusal. Again, if the parties' request were denied, then the Court would review and possibly overturn that decision (Stempel 1987, 590 and 643; see also Hume 2017, 127–28). Such a method of reporting and oversight may still be possible without amending the law, as traditional forms of adjudication already permit it (Frost 2005, 535 and 592).

Yet a third proposal would address the most compelling reason justices sometimes ignore the ethical implications of their participation—the "duty to sit." Unlike other federal courts where visiting judges can sit by designation, Supreme Court justices are irreplaceable if they choose to disqualify themselves. Therefore, to avoid the possibility of an evenly divided Court, another proposal would allow replacements for recused justices, such as retired justices or chief judges on the US Court of Appeals (Hume 2017, 128–29).

Of course, all of these proposals, from reporting requirements, to judicial oversight, to potential substitutions, presuppose that Congress can legislatively compel justices to disqualify themselves. However, legislative control over Supreme Court behavior may be an "unconstitutional intrusion" on the separation of powers principle. Therefore, before the Court rules on its constitutionality, Congress should repeal the current recusal statute affecting justices. As an alternative to legislation, Virelli has argued, Congress could rely on constitutionally sounder methods, such as impeachment and removal, which may be the only effective means of enforcing the current statute regardless (2011, 1185; 2012, 1535–36; 2016, chap. 5). Bassett, on the other hand, thought that it was "unclear whether the statute potentially infringes on separation of powers" (2005, 50).

Conclusion

When President Truman nominated his attorney general to a seat on the Supreme Court, there was little consternation over Clark's past government service, which included eight years in the Justice Department before serving four years as the attorney general. Whether Clark would have to disqualify himself because of his close connection to issues that he had considered as the attorney general never came up during his confirmation. There was some controversy over Truman nominating a non-Catholic to fill the seat of the recently deceased Justice Frank Murphy, and a few Senators objected to Clark's nomination for his failure to appear before the judiciary committee for questioning, a familiar practice today that was then still developing. When Clark did recuse himself, usually there was a recognizable connection to his service as the attorney general, but at times it was difficult to discern. For example, he sat out of several cases where the most plausible explanation for his recusal was the case's Texas-based origins: *Dalehite v. United States*, 346 U.S. 15 (1953) involved the notorious Texas City disaster, where over five hundred people perished in one of the deadliest industrial accidents in US history; *United States v. Harriss*, 347 U.S. 612 (1954) involved federal lobbying law violations and a Texas corporation's failure to report its lobbying efforts affecting agricultural prices; *United Gas v. Memphis Gas*, 358 U.S. 103 (1958) involved a Federal Power Commission decision affecting gas prices where a Texas corporation served as one of the parties; and *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963) was an appeal from the Supreme Court of Texas involving Dallas-based banks and insurance that turned on the question of venue.

As the first justice appointed to the Court following enactment of the 1948 recusal statute, Clark used his best judgment to decide whether he would participate in cases. By and large, he was free to exercise his discretion, and for the most part, he behaved appropriately. Rarely did his decisions affect the outcome of cases, and only once was his decision to participate publicly questioned.

Following the 1974 amendments, concern about Supreme Court disqualification persisted, leading to calls for further reform. However, it is unclear whether additional statutory amendments will make a difference in how justices behave. Since recusal decisions seldom change case outcomes or public perceptions of the Court, as Hume has argued, justices routinely disqualify themselves when the stakes are low. When the stakes are high and their participation will determine the outcome, then policy preferences overcome ethical concerns (2017, 15–16 and 117–18). In other words, even when there are good reasons for a justice's recusal, she will still participate in cases when the outcome matters to her.

Clark understood this as well as the separation of powers problem behind legislative efforts. Writing in another context, he observed,

> To many minds the judge is the law. To bend the judge to anyone's will, therefore, raises grave questions. This makes it the more necessary to give pause to any temporary popular demand to straightjacket the judges. . . . It cannot be gainsaid that the founders intended for each branch of the federal government to be master of its own house. This is especially true in the judiciary where history teaches that the bulwark of a free society is its courts. (1970)

Recent attention to Supreme Court recusal, with its attendant calls for reform, should heed Clark's example. There may be no constitutionally effective way—save impeachment—to enforce Supreme Court disqualification; the law will have to serve as well as the justices who abide by it. Although he departed from the federal bench in disgrace following allegations of sexual misconduct, the Ninth Circuit Court of Appeals judge Alex Kozinski put it best when reflecting on rules and restrictions to promote ethical judicial behavior: "The hard truth is that none of these things really matters. Judicial ethics, where it counts, is hidden from view, and no rule can possibly ensure ethical judicial conduct. Ultimately, there is no choice but to trust the judges" (2004, 1106).

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Class Activity

1. Compare the 1948 recusal statute affecting Supreme Court justices as found in this chapter to the 1974 amendments, which were much more extensive. A copy of the 1974 amendments is available at https://www.law.cornell.edu/uscode/text/28/455.

Discuss which of these statutes you believe is more appropriate for Supreme Court recusal. What would you change or amend to improve the requirements for Supreme Court recusal?

2. Discuss whether you believe Justice Tom Clark behaved ethically with regard to the 1948 statute. If the 1974 amendments had been in place while he served, do you believe that he behaved ethically?
3. In 1993, seven justices signed a "Statement of Recusal Policy," announcing when they would—and when they would not—disqualify themselves with respect to their spouses, children, or other family members who practiced law. A copy of the policy is available at http://eppc.org/docLib/20110106_RecusalPolicy23.pdf. Today, only two of those justices still serve on the Court, Justices Ruth Bader Ginsberg and Clarence Thomas, although Chief Justice John Roberts and Justice Samuel Alito have announced that they subscribe to its requirements.

Discuss whether you think Supreme Court justices should issue such a policy statement. Weigh the advantages and disadvantages of such a move.

4. Consider the reforms mentioned in this chapter, including repeal of the current recusal statute, and evaluate which proposals have merit. Discuss the ethical and/or constitutional implications of each proposal.

Congress

The courts are part of a system of separate institutions that make up the US federal government. Congress controls the budget and generally the shape and form of the federal courts. In terms of staffing the judiciary, for the most part, the Senate, with its role of advice and consent, confirms all life-tenure judges. How do the interactions of Congress and the judiciary play out politically? In this section, Mark Miller examines this question by closely analyzing the role of the House and Senate judiciary committees and their dealings with Article III courts. Using elite interviews, he shows that the congressional committees have a variety of mechanisms to influence the decisions of the courts. His inquiry also uncovers the important role that lawyer-legislators play in this process, suggesting that changes in this particular demographic could have significant consequences for the relationship between the courts and Congress. Stone et al. zoom in on senatorial responses to charges of sexual misconduct during Supreme Court confirmation hearings. Using the Senate floor speeches during the Thomas and Kavanaugh confirmation hearings, these scholars explore and assess whether that behavior systematically changed during the intervening decades (1991 to 2018). They find that the more things change the more they stay the same, a somewhat surprising finding given the significant developments surrounding women's rights, gender inclusivity, the increasing number of women in the Senate, and the #MeToo movement.

Miller, Mark C. "The Relationship between the Federal Courts and the Two Congressional Judiciary Committees."

Stone, Molly, Carol Moren, Laruen Sluss, Rorie Spill Solberg, and Eric Waltenburg. "Senatorial Speeches from Thomas to Kavanaugh: A Short Note."

11. The Relationship between the Federal Courts and the Two Congressional Judiciary Committees

MARK C. MILLER

The interactions and relationships between the federal courts and Congress are important for understanding the role of the judiciary in the larger American governmental system. While scholars have studied the courts and Congress separately, there are fewer efforts to examine how these two government institutions interact. As den Dulk and Pickerill have noted, "Treating the Court or Congress in isolation misconstrues the nature of inter-institutional lawmaking in the United States. The actions of each institution have important reciprocal effects; both contribute to the form and substance of law" (den Dulk and Pickerill 2003, 420). The chapter will explore these court-Congress interactions over three different historical periods: the late 1980s, the early 2000s, and today.

This chapter will examine the relationship between Congress and the federal courts from the perspectives of the House Judiciary Committee and the Senate Judiciary Committee, the two congressional committees that have jurisdiction over most court-related and legal matters. It is worth looking at court-Congress interactions through the lens of congressional committees because committees matter a great deal in Congress. As Woodrow Wilson in 1885 famously observed, "Congress in session is Congress on public exhibition, whilst Congress in its committee-rooms is Congress at work" (Wilson 1885). Comparing the interactions between the federal courts and the House and Senate Judiciary Committees respectively is important because, as Richard Fenno noted in his landmark study, "Congressional committees differ from one another. And House committees differ from Senate committees" (Fenno 1973, 280).

The relationships between the courts and Congress are especially important to study for students of judicial politics, "given the profound influence that the legislative branch of government has exerted on the very nature of the judicial branch" (Geyh 2006, 18). Congress working through its Judiciary Committees has the ultimate decision about how to structure the federal courts and their jurisdictions (the power to hear a case). Congress also decides how many judges will serve on each level of the federal judiciary, including the US Supreme Court. For example, in 1977, 1984, and 1990 Congress greatly expanded the number of judgeships on the US District Courts (the federal trial courts), suddenly giving the then president many more judicial nominations than his predecessors (see de Figueiredo and Tiller 1996, 443). Congress also sets the number of justices on the US Supreme Court, and during and after the Civil War, the Republican Congress altered

that number to fit its political needs at the time (see Collins and Ringhand 2013, 18). By refusing to consider President Obama's nomination of Judge Merrick Garland to the Supreme Court, in effect the Republican Senate reduced the number of justices on the Court to eight for almost a year. With the Supreme Court now having a clear conservative majority, some liberals are calling for an expansion of the size of the Supreme Court if liberals gain control of both houses of Congress and the White House (see, e.g., Otterbein 2020).

Congress also determines the boundaries of the US Courts of Appeals, occasionally redrawing those boundaries for workload or ideological reasons. For example, following the lead of its Judiciary Committees, Congress in 1980 split the old Fifth Circuit Court of Appeals and moved the states of Florida, Georgia, and Alabama to the new Eleventh Circuit for both political and management reasons (Barrow and Walker 1988). Today, many conservatives would like to split up the current Ninth Circuit because of its perceived liberal decisions. When Republicans controlled the House Judiciary Committee, that committee held various hearings over the years on this issue, as did the Senate Judiciary Committee (see, e.g., Bomboy 2017).

One of the routine points of interactions between the federal courts and the Congress involves the Senate's role in the confirmation of appointees to the federal bench. The president appoints federal judges, while the Senate must confirm them. The House has no role in this process. Judicial confirmations are a very important point of interaction between the Senate Judiciary Committee and federal judges. As Bell has noted, "Presidents routinely fill more federal judgeships than any other office" (Bell 2002, 102).

Since 1939, most presidential nominees to the federal bench have faced confirmation hearings before the Senate Judiciary Committee before the nomination is considered by the full Senate (see Collins and Ringhand 2013, 1). Senators have often used these hearings as a mechanism to send signals to the potential judges about what past rulings they oppose and what kinds of future judicial decisions they would like to see. As Gerhardt explains, "Senators, and presidents, employ their authority over appointments to impress their constitutional views upon other institutions (and the public)" (Gerhardt 2000, xxvi). At the hearings, Senators may ask a lot of questions about the nominees' views on judicial activism and other judicial philosophies. Thus, the Senators are trying to figure out how the nominees may rule on future controversies. Today, most judicial nominees refuse to give direct answers to these questions (Baker 2007, 108). In fact, the judicial confirmation process may affect future interactions between Congress and the courts. As Baker explains, "In recent years, justices of the Supreme Court have emerged badly battered from the polarized, partisan, and contentious confirmation process in the Senate, so it would not be surprising if they were to harbor lingering bitterness towards the politicians who subjected them to harsh and lengthy interrogation" (Baker 2007, 107).

Historical Institutionalism and Elite Interviewing

This chapter examines court-Congress interactions using a Historical Institutionalist analysis. In Historical Institutionalism, scholars explore how over time "institutional cultures, structures, rules, and norms constrain the choices and action of individuals when they serve in a political institution" (Miller 2015, 185). The assumption is that political institutions may develop new norms, traditions, and functions as they interact with other institutions and refine their institutional relationships (see Gillman and Clayton 1999, 6–7).

The Historical Institutionalism approach allows scholars to consider the big picture questions that more narrow studies often cannot address. As Pierson and Skocpol explain, "Historical-institutional scholars address big, substantive questions that are inherently of interest to broad publics as well as to fellow scholars" (Pierson and Skocpol 2002, 695). For our purposes, the big questions mean examining court-Congress interactions. These big-picture questions can tell us a lot about how institutional cultures and norms affect political decision-making in our governmental institutions. As these scholars continue, "Researching important issues in this way, historical institutionalists make visible and understandable the overarching contexts and interacting processes that shape and reshape [nations], politics, and public policymaking" (Pierson and Skocpol 2002, 693).

Another aspect of the Historical Institutional approach is that the researcher can easily shift levels of analysis. This chapter will begin with an overview of court-Congress interactions at the highest level of analysis, the full Congress, before moving to a lower level of analysis that focuses on the two Judiciary Committees and then a third level of analysis: the individual politicians who serve on these committees and their views of the federal courts.

In order to understand how institutional variables constrain the decisions made by legislators in Congress, I conducted elite interviews with people who served on or worked closely with the House Judiciary Committee and the Senate Judiciary Committee. These committees have the closest and most frequent interactions with the federal courts because they have jurisdiction over most legal and court-related matters. The Judiciary Committees also hold most of the constitutionally based hearings in Congress (Devins 2017, 750). As stated previously, the Senate Judiciary Committee also investigates and holds confirmation hearings for all federal judicial nominees at all three levels of the federal judiciary.

I interviewed US Representatives, legislative staff members in both the US House and the US Senate, federal judges, lobbyists familiar with the two committees, staff in think tanks that deal with Congress-court relationships, and academics who have studied judicial-legislative interactions. These semistructured interviews occurred in Washington, DC, over three different periods of time: calendar years 1989, 2006–7, and 2017–18. Some of these interviews were as short

as fifteen minutes, but others lasted almost two hours. Instead of surveying the interviewees strictly for their opinions and then aggregating those views, these semistructured interviews were designed to elicit the interviewees' expertise about the institutional culture of the two congressional committees and how the committees interacted with the federal courts. These interviews were more like in-depth conversations where the participants often provided key information before I even asked for it. For example, my interviewees told me that lawyer-legislators were the key to understanding the relationships between the federal courts and the Judiciary Committees, something I had not considered before I started my interviews.

This type of empirical elite interviewing does not involve formal hypothesis testing because I had no preconceived notions of what I would hear from my expert interviewees. As Richard Fenno stated in one of his landmark studies of Members of Congress, "Someone doing this kind of research is quite likely to have no crystallized idea of what he or she is looking for or what questions to ask when he or she starts" (Fenno 1978, 250). My analysis draws on these interviews; thus, the quotations from the interviews illustrate how the experts understand the institutional factors that constrain the decision-making of the individuals who serve on the House and Senate Judiciary Committees when they interact with the federal courts, both at the individual level of analysis and at the committee level of analysis. In his study of the Supreme Court's certiorari decision-making, Perry states, "Elite interviewing is a well-developed tradition in social science....Done well, it is particularly useful for developing general understandings of processes, and it highlights assumptions that can be tested empirically" (Perry 1991, 8). At various points in this chapter, I will cite important quotations from these various interviews.

Separation of Powers

We will begin at the highest level of analysis: the role of the branches of government in the American separation of powers system. Each branch of the federal government (executive, legislative, judicial) has its own duties and responsibilities, but each governmental institution is also subject to checks and balances from the other branches. Rubin calls this governmental system, "a network of interconnected institutions" (Rubin 2002, 61). Rarely can a single political institution make decisions without at least considering the perspectives of the others. Thus, Richard Neustadt has referred to this system as one of "separated institutions sharing powers" (Neustadt 1980, 26). And as Clark reminds us, "Separation of powers represents perhaps the most important contribution the American experiment has made to constitutional democracy throughout the world" (Clark 2011, 1).

In this complex separation of powers system, the relationships between the Congress (and its

committees) and the federal courts are very important. These interactions are worth exploring because each institution needs the other. Martin notes that Congress and the courts have a relationship of "institutional interdependence" because "the Founders created a separation of powers system whereby no single institution could enact policy unilaterally" (Martin 2006, 4). The current constitutional relationship between these two governmental institutions also deserves attention. As Bailey, Maltzman, and Shipan conclude, "Whereas Congress's relationship with the executive is spelled out in detail in the Constitution, the relationship between Congress and the judiciary was left by the founders to be defined by history. Since history is rarely tidy or consistent, the relationship that exists between the courts and Congress is as messy as the Constitution itself" (Bailey, Maltzman, and Shipan 2011, 835).

Some of the interactions between the courts and Congress are quite routine and sometimes even cooperative. For example, Congress often purposefully assumes that the courts will clarify vague legislative language (see Miller 1956; Lovell 2003, 5–7), and in their opinions, the courts may request that Congress act to fix a perceived legal problem (see Hausegger and Baum 1999). These routine interactions rarely lead to conflict between the institutions. As Pickerill has noted, "Those who expect a constitutional revolution, a constitutional moment, or other form of severe confrontation between the Court and Congress simply do not appreciate the more routine and typical type of interaction between the Court and Congress in the political process" (Pickerill 2004, 130). At other times, however, the interactions between Congress and the federal courts can become more conflictual.

One of the key differences between the courts and the other voices in the interinstitutional dialogue about governance is the fact that appellate courts including the US Supreme Court must justify their decisions using legal reasoning and legal analysis. Politicians in Congress are under no such constraints and can justify their decisions in purely political terms if they justify them at all. As Justice Kennedy has noted, the Supreme Court is "set apart from other branches of government because it speaks a different language from the political branches" (quoted in Perry 1999, 48).

In our separation of powers structure, at times Congress and the federal courts really do not understand each other very well. As one scholar has explained, "The judiciary seeks an environment respectful of its independence. Congress seeks a judicial system that faithfully construes the laws of the legislative branch and efficiently discharges justice" (quoted in Katzmann 1997, vii). Thus, the courts and Congress clearly have different institutional cultures, different institutional needs, and different institutional wills. As Judge Katzmann has argued, "Congress is largely oblivious of the well-being of the judiciary as an institution, and the judiciary often seems unaware of the critical nuances of the legislative process. But for occasional exceptions, each branch stands aloof from the other" (Katzmann 1988, 7).

Misunderstandings between Congress and the courts can therefore arise because the two institutions thus have very different approaches to policy making. As Judge Katzmann has

concluded, "The study of judicial-congressional relations is rooted in the premise that the two branches lack appreciation of each other's processes and problems, with unfortunate consequences for both and for policymaking more generally" (Katzmann 1988, 1). The policy-making process thus depends on these two institutions working together as much as possible. As Pickerill explains, "Lawmaking in our separated system is continuous, iterative, speculative, sequential, and declarative, and consequently each institution in our system must necessarily anticipate, interact with, and react to the actions of the other institutions" (Pickerill 2004, 4). These potential conflicts between Congress and the Supreme Court, as well as other federal courts, often receive the most attention from scholars and from the media.

It is quite common for various politicians to criticize specific court opinions with which they disagree. Legislators can be especially critical when the US Supreme Court declares an act of Congress to be unconstitutional and thus void. All regular courts in the United States have the power of judicial review, which is the ability to declare the actions of the Congress, the president, the bureaucracy, or the states to be unconstitutional. Although not specifically mentioned in the Constitution, the Supreme Court took this power of judicial review for itself in the landmark case of *Marbury v. Madison* (1803). However, most of the time the Court upholds the constitutionality of congressional laws. In his exhaustive study of Supreme Court cases from 1789 until 2018, Whittington found that over time the Court has upheld the constitutionality of federal statutes about three-fourths of the time (Whittington 2019, 25).

At times, Congress even attempts to overturn various federal court rulings. If the judicial decision is constitutionally based, then in theory a constitutional amendment is required to overturn the ruling. Recall that a constitutional amendment requires two-thirds of the US House, two-thirds of the US Senate, and three-quarters of the states to be approved. Sometimes, however, Congress tries to use mere statutes to overturn constitutionally based court decisions. When the Supreme Court in *Texas v. Johnson* (1989) declared that burning an American flag was protected political speech under the First Amendment, instead of passing a constitutional amendment Congress instead attempted to overturn the ruling with a new federal statute. The Court quickly declared that federal statute to be unconstitutional as well in *United States v. Eichman* (1990). For statutory interpretation rulings, if Congress is unhappy with the judicial interpretation of the statute, then all they need to do is to enact a new statute, which has the effect of overturning the court interpretation (see Barnes 2004). For example, The Lilly Ledbetter Fair Pay Act of 2009 overturned the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.* (2007), which interpreted the Civil Rights Act of 1964 to make it more difficult to prove sex discrimination regarding salaries.

One issue that nicely illustrates the differing institutional wills between Congress and the federal judiciary involves cameras at the Supreme Court. The Supreme Court has never allowed its oral arguments to be televised. Every year at least two justices go across the street and ask the appropriate subcommittee of the House Appropriations Committee for money for the federal

judiciary's annual budget (see, e.g., Walker and Barrow 1985). Inevitably, members of the subcommittee seem to ask two perennial questions: Why are there so few minority law clerks at the US Supreme Court? Why doesn't the Court allow cameras in its courtroom to televise oral arguments? On the cameras question, some of the justices (such as Justice Souter) have replied that cameras will come into their courtroom "over their dead bodies" (Kopko and Krause 2015, 62). On the other hand, legislation has been proposed in Congress since the 1970s to try to get the Supreme Court to televise its proceedings (see, e.g., Thornberry 2012). For example, in December of 2014 a House Judiciary Committee subcommittee held a hearing on the so-called Sunshine in the Courtroom Act of 2013, which would have required cameras to be allowed in all federal courts, including the US Supreme Court (US House Judiciary Committee 2014). To date, Congress has never approved any legislation requiring the federal courts to televise their proceedings, but the issue keeps getting raised.

Court-Congress Interactions in the 1980s

The level of potential conflict between Congress (and its committees) and the federal courts seems to vary greatly over time. Conservatives have been wary of the federal courts since the heyday of liberal judicial activism during the 1950s and 1960s. They have certainly criticized many federal court decisions that they perceived to be too liberal, and they have offered a number of court-curbing proposals over the years, but Congress enacted very few of them (see, e.g., Geyh 2006). This conflictual relationship between the courts and Congress certainly played out in the two Judiciary Committees.

The chapter will now move to the committee level of analysis to help us better understand the interactions between Congress and the federal courts. When I started my interviews in 1989, one of my main concerns was finding out how the institutional culture of the House Judiciary Committee had worked to thwart the various court-curbing proposals. I quickly discovered that the lawyer-legislators on the House Judiciary Committee had been instrumental in shielding the federal courts from institutional attacks. The most important players in protecting the courts turned out to be the respective chairs of the House Judiciary Committee.[1]

1. Congressman Peter W. Rodino Jr. (D-NJ) chaired the committee from 1973 to 1989 and was extremely supportive of the federal courts. Following Chairman Rodino was another supporter of the court, Representative Jack Brooks (D-TX), who chaired the committee from 1989 to 1995. Another leader of the committee who worked to protect the courts was Congressman Henry Hyde (R-IL), who served

Both the Senate and House Judiciary Committees are often known as the Committees of Lawyers. Clearly lawyer-politicians have been greatly overrepresented among the membership of both Judiciary Committees.[2] While lawyers have long been the largest professional group in the US Congress as a whole (see, e.g., Bonica 2020), the Judiciary Committees have attracted almost exclusively lawyer-legislators. In their longitudinal study of the committee assignment process in the US House from World War II to the early 2000s, Frisch and Kelly found that "lawyers, regardless of party or electoral status, are likely to request assignment to Judiciary" (Frisch and Kelly 2006, 148). The parties generally obliged these requests, and only lawyers were appointed to the committees for many years (see, e.g., Perkins 1981, 348).

Both the House and Senate Judiciary Committees have developed generally lawyerly decision-making cultures that are extremely partisan in nature and thus rife with conflict. For example, one set of scholars have described the House Judiciary Committee as a forum "where passionate and combative oratory is generally the order of the day" (Koszczuk and Stern 2005, 797). And as Devins notes about the two committees, "Judiciary Committee polarization is more extreme than party polarization elsewhere because the Judiciary Committees tend to attract especially ideological lawmakers" (Devins 2017, 777). Traditionally, both Judiciary Committees attracted members from the extremes of each political party, but this ideological polarization has been most evident in the House. Comparing the Judiciary Committees, a Democratic Senate staffer told me that "the committee is much bigger in the House and it has a broader range of extremists in both parties than in the Senate" (Miller 2020, 218).

In my early research, lawyer members of the House, and especially those lawyers who served on the House Judiciary Committee, were extremely protective of the courts. During my 1989 interviews, I found that over 70 percent of the US Representatives I interviewed who served on several House committees had extremely positive attitudes toward the federal courts, while only about 50 percent of the nonlawyer members did (Miller 1995, 105). Traditionally, the various chairs of the House Judiciary Committee were especially protective of the courts and prevented the committee from considering any court-curbing legislation. In 1989, one House Judiciary Committee staffer offered an extremely insightful explanation of why he felt the committee was extremely supportive of the courts. He said, "Just like one can disagree with different schools of thought among legal scholars or other academics, Judiciary members disagree with the courts

as the Ranking Minority Member of the Committee when it was under Democratic control and then who chaired the committee from 1995 to 2001 under GOP control.

2. When counting lawyer members in Congress, I count all individuals with law degrees, as opposed to counting only those who list *attorney* or some other lawyer-related field as their main occupation. I argue that even lawyer-politicians who have never practiced law nevertheless have been socialized into the profession through law school and thus "think like a lawyer" (Miller 1995, 17–23).

without attacking the courts as an institution. When Judiciary members disagree with a court's decision, they don't call for the impeachment of the judge; they file amicus briefs for the appeal" (Miller 1995, 137). While some conservatives advocated for a variety of court-curbing measures, the House Judiciary Committee quietly killed those attacks on judicial independence.

Court-Congress Conflicts in the Early 2000s

Things had changed quite a bit when I conducted my next round of interviews in 2006–7. Federal judges felt that they were under attack from Congress in general, and specifically from the House Judiciary Committee. I wanted to find out what had changed in the institutional culture of the Judiciary Committee that made the federal judiciary feel vulnerable.

After the Republicans took control of the full House and therefore the House Judiciary Committee after the 1994 elections, Chairman Henry Hyde (R-IL) remained strongly supportive of the courts, and never let the committee consider court-curbing measures (Miller 2009, 145–47). On the other hand, Hyde's successor, Chairman Jim Sensenbrenner (R-WI), was extremely antagonistic toward the federal judiciary when he chaired the Committee from 2001 to 2007, including convincing his committee to pass a variety of court-curbing legislation. Both men were very conservative lawyer-legislators from the Midwest, but they took radically different approaches to the issue of institutional attacks on the courts. As one congressional staffer told me in 2006, "Congressman Hyde had an old-school approach to the courts, treating judges with the respect deserved for members of a co-equal institution. Sensenbrenner is a highly partisan guy who wants to assert his own power and impose his will on anyone who gets in his way, including federal judges" (Miller 2009, 146). And as a Democratic member of the House Judiciary Committee told me in 2006, "Chairman Sensenbrenner wants to whip up the country against the courts, turning the judges into the enemy. Federal judges feel physically insecure right now" (Miller 2009, 143). Sensenbrenner thus led the charge against the federal judiciary. As an employee of the judicial branch told me in 2006, "The days when we could count on lawyers in the House to protect judicial independence are long over. Today ideology and party matter much more than whether a member has a law degree" (Miller 2009, 139).

Under Chairman Sensenbrenner, the conservative lawyers on the House Judiciary Committee (backed by various socially conservative interest groups) led the attack against the federal courts. Liberals on the Judiciary Committee were outraged. Stressing the importance of having liberal lawyer-legislators on the Committee to protect the courts, one liberal Member of Congress told me in 2006 that "there is less respect for the independence of the courts today" (Miller 2009, 17). Another US Representative told me, "The conservatives don't understand the courts and the legal

ideology of the courts very well. They don't really know the impact of the opinions of the courts, and they don't bother to try to understand judicial rulings. They just attack the courts. Lawyers [on the committee] must stand up for the courts when they can't stand up for themselves" (Miller 2009, 207). The presence of ideological extremists on the committee had clear ramifications in this era. As a lobbyist described the House committee in the early 2000s, "The true believers come to the House Judiciary Committee. There are bomb hurlers on both sides of that committee" (Miller 2009, 136).

The early 2000s seemed to be the low point in the interinstitutional relationship between Congress and the federal courts, in large part because conservative lawmakers (and especially the conservative lawyer-legislators on the House Judiciary Committee) went on the attack against what they perceived to be liberal activist federal judges. Writing about this time period, Baker described the interinstitutional relationship among the judicial and legislative branches as "mutual wariness, suspicion, jealousy, and even a bit of spite" (Baker 2007, 116). In his research, Clark found that the period of 2001–8 was one of the highest in modern history for the introduction of court-curbing legislation in Congress (Clark 2011, 43). During my 2006 interviews, many of the interviewees described the relationship between the two branches at that time as "venomous," "hostile," "tense," "deteriorating," "contentious," "[full of] animosity," "strained," and "adversarial" (quoted in Miller 2009, 17). One liberal US Representative who served on the House Judiciary Committee told me in 2006 that, "the relationship between the Congress and the federal courts is at an all-time low" (Miller 2009, 17).

The tension between the courts and Congress received quite a bit of attention from the media in that period. For example, in 2005 *Newsweek* ran a story entitled, "The War on Judges," which concluded that "concern over the rising tide of anti-judge rhetoric has rocked even the Supreme Court. Though judges have been dragged into the culture wars before, lately the animosity—and a range of new efforts to curb judicial power—have reached fever pitch" (Rosenberg 2005, 23). Even Justice Sandra Day O'Connor highlighted these concerns, stating in 2004 that the relationship between Congress and the federal courts was "more tense than at any time in my lifetime" (quoted in Greenhouse 2005, 10). Justice Ginsburg agreed, stating that the judiciary was "under assault in a way that I haven't seen before" (Mauro 2006, A13). As Chief Justice Rehnquist wrote in his 2004 annual report, "Criticism of judges has dramatically increased in recent years, exacerbating in some respects the strained relationship between the Congress and the federal judiciary" (Rehnquist 2004, 4). Summarizing the alarm that many felt about the rising level of attacks on the judiciary during this period, Geyh concluded that "some have likened the relationship between courts and Congress to a conversation or dialogue, but such measured and civil exchanges do not capture the rough and tumble of the interaction in its ordinary course the way a schoolyard fracas does" (Geyh 2011, 23).

When Congress is angry with the federal courts, it has a wide array of weapons in its arsenal to

use against the judiciary. For example, the House and Senate Judiciary Committees often hold hearings about Supreme Court and other federal court rulings that their majority members find to be wrongly decided, and this was especially true in the early 2000s. For example, a subcommittee of the House Judiciary Committee held a hearing to express their displeasure with the ruling in *Kelo v. City of New London* (2005), where the Supreme Court ruled that local governments had the right to define the phrase "public use" in the Taking Clause of the Fifth Amendment. Representing the views of the committee's opponents to the judicial ruling, Representative Tom Feeney (R-FL) said that the *Kelo* decision was "indicative of the larger trend in the Court to substitute their own prejudices and biases for the constitutional language itself" (US House Judiciary Committee 2005. Statement of Representative Feeney). Sometimes the hearings took on broader topics, such as complaints against the use of foreign court decisions as persuasive precedent in American judicial rulings (US House Judiciary Committee 2004).

Some of the routine interactions between Congress and the courts occur outside of the Judiciary Committees because the legislative branch must approve annual spending for the judiciary. These appropriations include funding for construction of new federal courthouses, for staff salaries, for technology and security needs, for judicial libraries, and for other operating expenses. These budget issues can also involve salaries for federal judges (Bell 2018, 45–46). In order to protect the independence of the federal courts, the US Constitution gives all federal judges life terms and it prevents Congress from reducing the salaries of federal judges. However, Congress is under no obligation to provide annual cost of living increases to them or to pay for law clerks, computers, or even air conditioning for the judges.

In the early 2000s, some conservative politicians demanded that Congress use its budgetary powers against what they perceived to be liberal activist federal judges. For example, in 2005 then majority leader of the House Tom DeLay (R-TX) bellowed, "We set up the courts. We can unset the courts. We have the power of the purse!" (quoted in Klein 2005, A9). At about the same time, Representative Steve King (R-IA), then a member of the House Judiciary Committee, expressed his frustration with the federal courts by proclaiming, "When their budget starts to dry up, we'll get their attention" (Marcus 2005, A19). Although individual legislators have often threatened to use congressional budget powers against the federal courts in order to retaliate for judicial decisions that they do not like, Congress as a whole has rarely done so.

At times, the House Judiciary Committee has considered more severe court-curbing proposals, including court-stripping. Court stripping means that Congress passes a statute prohibiting the federal courts from hearing a specific case or a specific class of cases. Congress creates federal court jurisdiction, and many argue that the legislative branch can also take this jurisdiction away. In the early 2000s, conservative demands gained momentum to strip the federal courts of jurisdiction over a variety of types of cases. Conservative lawyer-legislators, who had traditionally protected the federal judiciary, seemed to have switched sides. For example, writing in 2006,

Bell and Scott found that lawyers in the House were just as likely to introduce court-curbing legislation as were their nonlawyer colleagues. These scholars also found that House Judiciary Committee members were just as likely to introduce court-stripping legislation as were their colleagues who did not serve on that committee (Bell and Scott 2006, 196). Conservatives in the Senate also seemed supportive of court-stripping. In September 2004 the Senate Republican Policy Committee distributed a report entitled *Restoring Popular Control of the Constitution: The Case for Jurisdiction-Stripping Legislation*. The report stated that "the American people must have a remedy when they believe that federal courts have overreached and interpreted the Constitution in ways that are fundamentally at odds with the people's common constitutional understandings and expectations" (Kyl 2004, 1).

The House Judiciary Committee passed a variety of court-stripping measures in the early 2000s, many of which failed to pass the full House. However, when the full Congress did enact court-stripping provisions in the Military Commissions Act of 2006 in order to prevent the high court from determining the constitutional rights of enemy combatants being held at Guantanamo Bay, the Supreme Court promptly ignored them and declared the underlying act to be unconstitutional in *Boumediene v. Bush* (2008). Thus the constitutionality of court-stripping measures is unclear. Clearly, however, the intent of these proposals is to change the direction of federal judicial decisions and thus alter the independent voice of the courts in the interinstitutional constitutional dialogue.

In addition to stripping the courts of jurisdiction over a variety of cases, the House Judiciary Committee discovered some other novel ways to attack the courts. One example came in the form of a bill that would have established an inspector general (IG) for the federal judiciary in order to oversee the courts, investigate ethical problems among federal judges, and conduct investigations into the issue of judges' overreaching their constitutional powers. In 2005, the then chair of the House Judiciary Committee, Congressman Jim Sensenbrenner (R-WI), and the then chair of the Senate Judiciary Committee, Senator Chuck Grassley (R-IA), proposed such a bill. This legislation was approved by the House Judiciary Committee in September 2006 on a party-line vote, although it then died in the full House at the end of the 109th Congress (see Miller 2009, 170–79). The timing of this legislation was important. At the time, the House Judiciary Committee had passed a variety of court-stripping bills, and there were threats of impeachment of federal judges coming from many committee members.

Creating an inspector general for the judiciary would be a very aggressive form of congressional oversight over the independent third branch. Since 1978, Congress has established inspectors general in almost all federal agencies to help conduct oversight of the executive branch. The inspectors general conduct audits and investigations of agency programs and operations, and report directly to Congress on their findings. An inspector general for the federal judiciary, however, has never existed. Although the authors of this inspector-general legislation said that it

was not intended to alter the decisions of federal judges, others were less convinced. The proposal struck federal judges as an attack on judicial independence. They saw the main goal of an inspector general as providing evidence to be used for the impeachment of federal judges whose decisions various politicians did not like (see Miller 2009, 170–79). As one lobbyist told me in a 2007 interview, "Having the IG report information to Congress is a clear form of intimidation of federal judges over the direction of their judicial decisions and a clear impeachment threat against them" (Miller 2009, 173). Along these same lines, Justice Ruth Bader Ginsburg declared that "judges have good cause for concern" about the legislation, implying that the sponsors' intent was to force federal judges to issue decisions with which they agreed (Ginsburg 2006, 8). Adding some force to this argument, House Judiciary Committee Chairman Sensenbrenner said in a speech at Stanford University, "The inspector general would be able to manage how we *punish* and who does the *punishing* for judges' misconduct" (quoted in Yap 2005, emphasis added). Thus the inspector-general legislation was just one of several institutional attacks on the federal courts by the House Judiciary Committee when it was under Chairman Sensenbrenner's control.

Another extremely aggressive weapon that Congress could use against federal judges is the threat of impeachment. The House must first approve articles of impeachment by a majority vote, and then the Senate holds a trial to determine whether the federal official should be removed from office. It takes a two-thirds vote of the Senate to remove a federal judge or federal official. This is a drastic measure, and since the failed attempt to impeach Justice Chase in 1804 Congress has never removed a federal judge solely because of their decisions (see Rehnquist 1992). However, threats of impeachment have long been used by legislators against federal judges. For example, angry members of Congress introduced two different proposals for the impeachment of Justice William O. Douglas, the first in 1953, objecting to his willingness to stay the executions of Ethel and Julius Rosenberg, and the second in 1970 over a variety of concerns (see Pacelle 2002, 96). The standards for impeachment of federal judges are unclear. As part of the efforts to impeach Justice Douglas, then House minority leader Gerald Ford (R-MI) stated, "an impeachable offense is whatever a majority of the House of Representatives considers it to be at any given moment in history" (quoted in Kastenberg 2019, 113).

The House has brought articles of impeachment against at least fifteen federal judges over American history, and at least eight have been removed from office (see Davidson, Oleszke, Lee, and Schickler 2018, 359), but none were removed from the bench merely for their political views but instead for criminal and other similar offenses. However, the movement favoring impeachment of judges for political reasons kept growing in the early 2000s, especially among conservatives. For example, in the early 2000s, various politicians and interest groups called for the impeachment of any judges who dared cite foreign judicial decisions in any form. As one interest group spokesperson stated at a conference entitled "Remedies to Judicial Tyranny" in 2005, "if about 40 [federal judges] get impeached, suddenly a lot of these guys would be retiring" (quoted in Miller 2009, 181). One conservative member of the House Judiciary Committee told me in 2006

that "we need to increase impeachments of federal judges in order to rein in those judges who insist on legislating from the bench" (Miller 2009, 183). The interest group Justice at Stake found that between 2002 and 2006, there were over 58 impeachment threats against federal judges (Brandenburg and Kay 2007, 16–17).

Although Congress has never removed a federal judge merely for their judicial rulings, the mere threat of impeachment remains a weapon some would like to use against federal judges with whom they disagree. Alarmed at the rise in threats of impeachment, one liberal member of the House Judiciary Committee told me in 2006, "Constitutional amendments and impeachment are meant to be extremely rare" (Miller 2009, 180). Another member of the House Judiciary Committee agreed, stating, "The thought of impeaching a judge because of their rulings is astonishing. Fortunately, cooler heads always prevail. Congress must be cautious with the use of this awesome power" (Miller 2009, 180). Concerned that threats of impeachment were being used to attempt to alter specific court decisions, in May 2005 almost two-thirds of the deans of US law schools sent a letter to the leadership of both chambers of Congress opposing such actions. In part, the deans' letter stated, "It is irresponsible and harmful to our constitutional system and to the value of a judiciary that is independent, in fact and appearance, when prominent individuals and Members of Congress state or imply that judges may be impeached or otherwise punished because of their rulings" (Revesz et al. 2005).

Congress-Court Interactions Today

When I again conducted my interviews in 2017 and 2018, the relationship between the Judiciary Committees and the courts was far less tense. There were certainly moments of potential conflict, but in general, the overt institutional attacks against the courts had clearly subsided. I wanted to explore more comparisons between the two Judiciary Committees and their relationships with the federal bench. The Senate Judiciary Committee seemed much less eager to approve anticourt legislation than its House counterpart.

Although the relationship between Congress and the federal courts is much better today, conservative opposition to the judiciary continues. For example, in 2015 a subcommittee of the Senate Judiciary Committee held a very broadly entitled hearing called *With Prejudice: Supreme Court Activism and Possible Solutions* (US Senate Judiciary Committee 2015). The hearing discussed a variety of ways to limit the voice of the federal courts and its power of judicial review. Individual members of the Senate Judiciary Committee have also proposed various court-curbing measures. When running for president in the 2016 presidential primaries against Donald Trump, Senator Ted Cruz (R-TX), a member of the Senate Judiciary Committee, supported a variety of proposals to

curb the power of the federal bench, including ending life terms by imposing retention elections for US Supreme Court justices. Senator Cruz said then, "To see the court behaving as it is today, as a super-legislature, simply enacting the policy preferences of the elite judges who are serving upon it, is a profound betrayal of their judicial oaths of office and of the constitutional design that has protected our liberty for over two centuries" (quoted in Zezima 2015). Given his strong criticism of the Supreme Court's rulings on same-sex marriage and the Affordable Care Act, critics of Senator Cruz have stated that he is advocating "massive resistance" to Supreme Court decisions, much like we saw from conservatives after the *Brown v. Board of Education* (1954) ruling. Senator Cruz countered that the current Supreme Court is out of control and needs a massive reorganization and a narrower mission. As the Senator has stated, "No one in their right mind would establish a system of government where every major contested public policy issue is decided by the decree of five unelected lawyers. That's not a rational way to govern our society" (quoted in Zezima 2015). President Donald Trump, of course, also routinely attacked federal judges in highly personal ways when they issued decisions with which he disagreed (see, e.g., Barnes 2018).

However, the Senate in general, and the Senate Judiciary Committee in particular, have over the years killed many court-curbing bills, including most of the anticourt legislation passed by the House Judiciary Committee early in this century. As one Republican former Senate staffer told me in 2017, "The Senate Judiciary Committee stopped everything coming from the House" (Miller 2020, 216). It is worth noting that since Reconstruction, 78 percent of court-curbing legislation introduced in Congress has originated in the House, while only 22 percent started in the US Senate (Clark 2011, 26). As one lobbyist concluded, "The Senate is slower, more moderate, and more deliberative than the House" (Miller 2020, 217). Agreeing, one lobbyist said in 2017, "The Senate is a shield against the hyperactive House" (Miller 2020, 216–17). The Senate Judiciary Committee has certainly served as the legislative graveyard for anticourt legislation considered by the House Judiciary Committee.

Both the House and Senate Judiciary Committees are thus creatures of the institutional cultures of their respective broader chambers. The House is designed to protect the rights of the majority party and that is certainly true of the House Judiciary Committee as well. The Senate, on the other hand, gives more protections to minority party members, as does the Senate Judiciary Committee. A Democratic Senate staffer told me, "The House Committee is more stage-managed than Senate Judiciary," meaning that the committee chair has a great deal of power in the House; individual Senators have a greater voice on the Senate Committee (Miller 2020, 218). Despite its lawyerlike style and culture, the House Judiciary Committee nevertheless reflects the highly partisan and ideologically polarized nature of the broader House of Representatives. A Democratic Senate staffer noted in 2017 that there is no minority voice on the House Judiciary Committee, just as there is little role for members of the minority party in the broader House chamber (Miller 2020, 217–18).

It is certainly true that the person who is chairing the Judiciary Committees can have an enormous effect on the relationship between the committees and the federal courts. On the House Judiciary Committee, subsequent chairs after Chairman Sensenbrenner were far less antagonistic toward the courts. As one lobbyist mentioned to me in 2018, Chairman Lamar Smith (R-TX), who chaired the Judiciary Committee from 2011 to 2013, was less problematic for the courts than Sensenbrenner, while Chairman Bob Goodlatte (R-VA), who chaired the Committee from 2013 to 2019, was quite sympathetic to the courts, and to federal judges in particular (Miller 2020, 248). Chairman Jerrold Nadler (D-NY), who became chair of the Committee in 2019, has been a strong champion of the federal judiciary and has led the fight against various anticourt measures over the years (see, e.g., Miller 2009, 153). Thus the chair of the committee plays a key role in shaping the interactions between the committee and the courts. As one lobbyist told me in 2018, "The key factor of great importance in the relationship between Congress and the courts is the committee leadership and their individual attitudes towards the judiciary" (Miller 2020, 248).

On the Senate side, although Senator Chuck Grassley (R-IA) was not a friend of the court when he chaired the Senate Judiciary Committee from 2015 to 2019, he could not convince the committee to approve his court-curbing agenda, in part because he could not overcome the Senate's general unwillingness to enact extreme and nonincrementalist measures. Senator Grassley also did not want to increase tensions with the other members of the committee on legislative matters because he was compelled by the party leadership to take certain highly controversial steps on judicial confirmations. As one lobbyist explained to me in 2017, "Grassley wants comity and collegiality, and thus he won't push anti-court legislation in the committee" (Miller 2020, 243–44). The Senate Judiciary Committee is thus clearly reflective of the broader culture of its parent chamber, which means it is harder for the Senate chair to control the approach of the committee, unlike the chair of the House Judiciary Committee.

During Chairman Grassley's tenure, the Senate Judiciary Committee was in the strange situation of having nonlawyers leading each party's membership on the committee. Senator Grassley was not a lawyer, and neither was the Ranking Member of the Committee, Senator Dianne Feinstein (D-CA). The lack of lawyers in the leadership of the committee raised some concerns. As a former Democratic staffer on the Senate Judiciary Committee complained in 2017, "It is quite obvious that Chairman Grassley and Ranking Member Feinstein are not lawyers. It is quite odd to have non-lawyers as both the chair and the ranking member" (Miller 2020, 241). Not everyone was happy that there were so many nonlawyers serving in key roles on the Senate Judiciary Committee. One lobbyist in 2018 was quite critical of Senator Chuck Grassley (R-IA), the former chair of the Committee. This lobbyist stated, "As a non-lawyer, Grassley is unaware of the process used in the Judicial Conference to make policy" (Miller 2020, 242–43). An employee of a think tank was equally critical of Senator Grassley's approach to the judiciary in a 2018 interview with me, noting that "Grassley only has a vague conception of what courts do. Everything with Grassley is personal, and he has a great deal of antagonism toward federal judges." This person continued, "As

a non-lawyer, Grassley doesn't understand how the court system actually functions" (Miller 2020, 243). A Democratic Senate staffer was more subtle in his criticism of the chairman, "Grassley is a non-lawyer, and certain issues matter more to him and matter differently than to the lawyer members on the committee" (Miller 2020, 243). When Senator Lindsey Graham (R-SC) took over the chairmanship of the Senate Judiciary Committee in 2019, lawyer-legislators again controlled the leadership of the committee.

In conclusion, this chapter has employed Historical Institutionalism analysis involving elite interviewing techniques to examine the relationship and the interactions between the federal courts and the House and Senate Judiciary Committees. At times, the interactions are routine and even friendly, but in other periods the relationship can grow extremely tense and even conflictual. Who is chairing the committees seems to have a very important impact on the relationship between the committees and the courts. When the interactions between Congress and the courts are the most difficult, that is when we can clearly see the differing institutional approaches of the two branches. Thus Congress and the federal courts clearly have different institutional cultures, different institutional wills, and different approaches to policy making. The US separation of powers system sets the stage for how these two separate, but interdependent, branches of government interact.

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Activity

What is your opinion on the following discussion questions?

1. Do you think that Congress should pass legislation to require that the Supreme Court televise its oral arguments? Or should that decision be left to the Court itself?
2. Should Congress cut the budgets for the judiciary when its members disagree with a decision of the US Supreme Court?
3. Discuss the issue of court stripping and whether Congress should restrict the type of cases that the federal courts can hear.
4. Discuss whether you believe that Congress should create an inspector general for the federal judiciary.
5. Should federal judges be impeached and removed from office if the majority in Congress disagrees with their rulings?
6. Do you think that members of the Senate Judiciary Committee should vote against a presidential nominee to the US Supreme Court for purely ideological reasons?

12. Senatorial Speeches from Thomas to Kavanaugh

A Short Note

MOLLY STONE, CAROL MORENO, LAUREN SLUSS, RORIE SPILL SOLBERG, AND ERIC WALTENBURG

The confirmation hearings of then judge Brett Kavanaugh reminded many of the hearings for Justice Clarence Thomas. In both situations, there were allegations of sexual misconduct after the initial hearings concluded. In both cases, the Senate Judiciary Committee held an additional hearing to investigate the claims. The ideological balance of the Court was also at stake in both confirmations. Clarence Thomas replaced the liberal icon Thurgood Marshall, swinging the Court further to the right; Brett Kavanaugh replaced the moderately conservative swing vote Anthony Kennedy, solidifying the Court's conservative majority. Both men were confirmed by incredibly small margins (50–48 and 52–48, respectively). And finally, both confirmation battles were followed by large wins by women in the next national election.

Although these similarities are certainly striking, it is the hearings' differences that are perhaps more noteworthy and consequential for examining senatorial behavior. Kavanaugh was accused of sexual assault as a teen, whereas Thomas allegedly sexually harassed colleagues as an adult and supervisor at the Equal Employment Opportunity Commission. Anita Hill, Clarence Thomas's accuser, was questioned directly by the senators in 1991; Christine Blasey Ford, Brett Kavanaugh's accuser, was questioned directly by the Democratic senators, but the Republican senators used a proxy—a female prosecutor with experience in the area of sexual assault.[1] The Thomas hearing spurred awareness of sexual harassment (Black and Allen 2001). The Kavanaugh hearings, on the other hand, occurred in the wake of the Me Too movement and after several high-profile men had lost significant positions of power and privilege. In 1991, there were only two women in the Senate and none on the Judiciary Committee; by 2018, there were twenty-three women sitting as senators and four serving on the Judiciary Committee.

These differences resulted in the Kavanaugh hearing presenting a context especially conducive to senators making rhetorical overtures both supporting women and recognizing the issues of sexual harassment and assault. In this short research note, we leverage the different contexts of

1. Additionally, Clarence Thomas and Anita Hill are Black; Brett Kavanaugh and Christine Blasey Ford are white. Both men aggressively defended their innocence; though Thomas racialized the proceedings in a way that Kavanaugh could not (i.e., "hi-tech lynching")

the Thomas and Kavanaugh hearings to explore whether institutional and broader social contexts affect the representational and strategic behavior of senators. To do so, we systematically examine the frames senators used in the floor speeches that were made during both confirmations. To put it more simply, we investigate whether there is an association between a change in the institutional and social context and a change in use of rhetorical representation.

A relative constant of senatorial behavior is the use of floor speeches to declare and explain publicly an intended vote (Mayhew 2004; Jacobson and Carson 2019). To be sure, current members of Congress have many options for communicating with their constituents and signaling colleagues and interest groups (see Lublin 1999; Tate 2003; Gamble 2011; Minta 2011; Stout 2019). The senatorial speech justifying a vote remains part of this arsenal. Senator Collins's forty-minute floor speech explaining her support for Kavanaugh is a clear example of the continued viability of the floor speech as a signaling method.[2] Since at least some senators engaged in this behavior in the two time periods described, these speeches are excellent tools to investigate whether the different contexts of the hearings resulted in senators responding differently to the issue of sexual misconduct by a Supreme Court nominee.

Scholarly investigations into congressional behavior are legion. Mayhew (1974) provides the seminal explanation for why senators explain their votes. Hill and Hurley (2003) show that senatorial speeches are clear examples of representational and strategic behavior, and Osborn and Mendez (2010) find that gender affects the content of these speeches. The highly salient and controversial nature of both the Thomas and Kavanaugh confirmations would spur significant senatorial talk for representational and/or strategic ends (Haines, Mendelberg, and Butler 2019).[3] Given this research, the emergence of the Me Too movement, and the increase in female senatorial representation, we expect to see different frames employed in the Senate floor speeches prior to the Thomas and Kavanaugh confirmation votes (Thomas 1991; Lawless 2015; Wade and Brittan-Powell 2001). Specifically, we expect there would be an increase in recognition of the issues of sexual harassment and assault or women's issues more obliquely in the speeches from the Kavanaugh hearing regardless of a senator's party.

Although we expect the speeches during the Kavanaugh confirmation overall to contain more references in support of women and women's issues, we also anticipate that there will be differences in the speeches' recognition of sexual assault, harassment, and support for women in general at the level of the individual senator for two reasons. First, the GOP in the current period suffers from a significant deficit when it comes to support from women (Cassese and Barnes 2018; Barnes and Cassese 2017). Republican senators, then, signaling their support for women or the Me

2. A transcript of Senator Collins's speech can be found at Agorakis (2018).
3. Indeed, both elections following these two confirmations were hailed as years of women (see Rosenwald 2018; Zhou 2018).

Too movement in their justification for Kavanaugh would provide some rhetorical representation that could benefit their reelection goals. While some research suggests that politicians might avoid the topic altogether, fearing the potential backlash any statement might incur (Pietryka 2012; Milita et al. 2014), it is also clear that if there is an electoral reward or the political context simply requires action, politicians will speak out (Sides 2006; Pietryka 2012). The high-profile nature of both of these confirmation events places the situation in the latter category. Thus we expect that the increased rhetorical support for women and women's issues during the Kavanaugh confirmation should be greater for Republican senators than for Democratic senators.

Second, signaling support for women (an increasingly mobilized and potent voting bloc) should yield electoral dividends. Thus for those senators facing reelection soon after the hearings, the benefit of speaking out is clear. Accordingly, we expect higher levels of senatorial speech among senators facing reelection directly after the Kavanaugh confirmation than for the Thomas vote.

To state each of these hypotheses more plainly, if the Thomas hearing is considered our first time period and the Kavanaugh hearing the second period, our expectations are as follows:

H1: Prowomen Rhetoric$_{t2}$ > Prowomen Rhetoric$_{t1}$

H2: (Change in Prowomen Rhetoric*GOP)$_{t2}$ > (Change in Prowomen Rhetoric*Democrat)$_{t2}$

H3: (Incidence of Speeches*Penultimate Year)$_{t2}$ ≥ (Incidence of Speeches*Penultimate Year)$_{t1}$

Research Design

To study the senators' speeches, we identify the underlying messages (i.e., frames) of each speech. Individuals "actively classify and interpret their life experiences to make sense of them" using "schemes of interpretation called 'primary frameworks'" (Scheufele 2009; Goffman 1974). Within a political speech, such as a Senate floor speech, "there are ways of…depicting events…that depend on the framework employed" by the speaker (Scheufele 2009). By framing the issues in each speech and in giving a speech, senators hope to connect to their constituents, and in doing so,

take the appropriate position and explain their vote (Mayhew 2004; Jacobson and Carson 2019), thereby ensuring their key supporters that they are voting as expected.

To begin, all floor speeches made by the senators after the second set of confirmation hearings for either Justice Thomas or Kavanaugh were read and analyzed for frameworks (N = 98; N = 63 for Thomas; N = 35 for Kavanaugh). Initially, we content-analyzed the speeches at a granular level, identifying seventeen frames. We then collapsed these frames into ten categories for analysis (see table 1).[4] In addition, we gathered data on every senator including age at the time of the speech, race/ethnicity, gender, date of their upcoming reelection, and political party. We also recorded the vote of each senator at the end of the hearing: yea or nay. Our analyses of these data employ both contingency tables and bivariate logit analysis with interaction effects.[5]

Frame	Description	Frequency Thomas	Frequency Kavanaugh	Total
Qualifications boost	Emphasizes qualifications or credibility of the nominee or testifier	45	23	68
Lasting impact	The influence the hearing will have on the US and women	44	23	67
Qualifications attack	Detracting from credibility or qualifications of the nominee or testifier	35	21	56
Procedure fail	Any kind of reference to the shortcomings of the procedure	24	22	46
Judicial temperament	References to the conduct of the nominee during the hearing	19	15	34
Procedure fair	Any kind of reference to the fairness of the procedure or due process	24	8	32
Partisan strategy	References or accusations of strategies employed or conspiracies by either party	15	15	30
Harm to	References to harm endured by nominee/accuser or family	25	5	30
"I believe her"	Outright support of testifier	7	9	16
Media influence	References to mainstream media influencing procedure or vote	14	3	17

Table 1: Frequency of frames

4. Tests of intercoder reliability yielded a score of 77 percent agreement before we collapsed the frames. Thus our reliability should be higher since the few similar frames were combined to create a broader category
5. A replication dataset is available from the authors by request.

Findings

The test of our first hypothesis, an increased emphasis or mention of issues of sexual harassment or assault, revealed that the frame most closely associated with these salient topics, the `I BELIEVE HER` frame, was not a commonly employed frame. Only 16 percent (N = 16) of the speeches overall contained this frame, and almost half (N = 7) of these occurred during the Thomas confirmation, well before the Me Too movement. The `LASTING IMPACT` frame, which is more obliquely related to these issues and includes references to the weight of the hearings on women or the status of women, was more popular, occurring in 68 percent (N = 67) of the speeches overall, but again the bulk of its use occurred during the Thomas confirmation (44 versus 23). We calculated the bivariate relationship between the confirmation and these two frames and found a significant difference between the nominations in the use of the `LASTING IMPACT` frame (.002), though the direction is not as we anticipated. At first blush, it would seem that we do not find support for our first hypothesis.

	I BELIEVE HER	
Nominee	No	Yes
Thomas	93 93%	7 7%
Kavanaugh	91 91%	9 9%

Table 2a: Cross-tabulation: Nominee by frame for Me Too-related frames

Pearson chi^2=.27 Pr=.602

	LASTING IMPACT	
Nominee	No	Yes
Thomas	56 56%	44 44%
Kavanaugh	77 77%	23 23%

Table 2b: Cross-tabulation: Nominee by frame for Me Too- related frames

Pearson chi^2=9.90 Pr=.002

Another way we can test our first hypothesis is to examine the relative ranking of the frames. The `I BELIEVE HER` frame ranks last among all the frames during the Thomas hearing but rises to seventh place during the Kavanaugh period. The `LASTING IMPACT` frame ranks second during the Thomas hearing and ties for *first* during Kavanaugh hearings. In other words, while the absolute number of times these frames were employed was higher during the earlier hearing, the `I BELIEVE HER` and `LASTING IMPACT` frames were actually employed *more* frequently during the Kavanaugh hearings relative to the other frames (see figure 1). The change in ranking shows that the language used to discuss issues of sexual harassment or assault in these types of speeches may not have changed all that dramatically; however, the emergence of the Me Too movement and the addition of several women to the Senate and the Senate Judiciary Committee seems to have inspired at least increased reference to the status of women.[6] Thus we claim partial support for our first hypothesis.

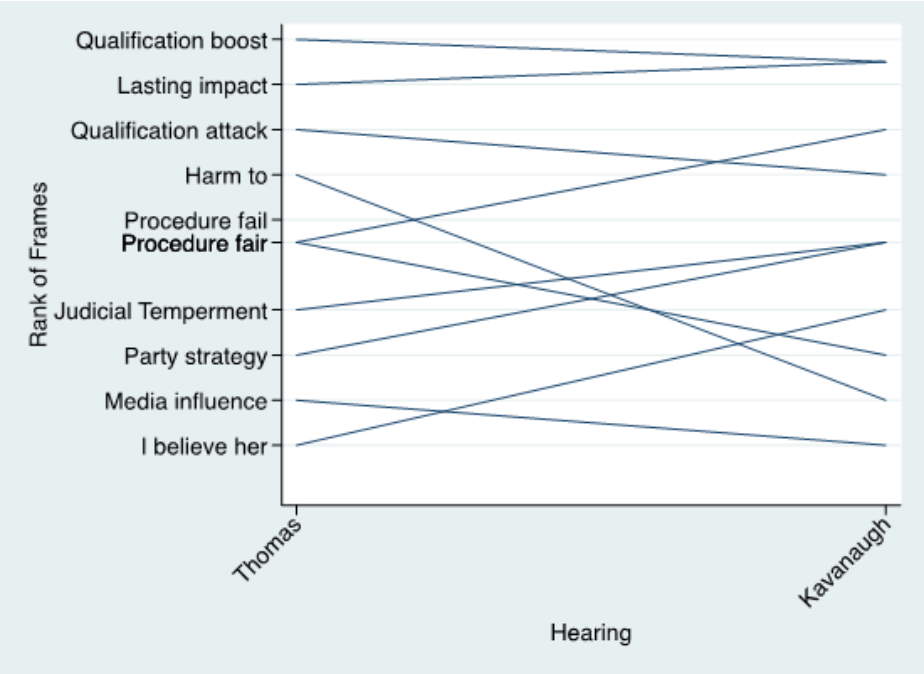

Figure 1: *Ranking of frames*

Across the confirmations, the most frequently used frames, based on raw numbers, were

6. While the data support this statement, we are only examining the speeches on the floor of the Senate prior to a vote on a Supreme Court confirmation. We are not suggesting that our findings go further than that small subset of senatorial speech.

QUALIFICATIONS BOOST for the nominee or testifier (70 percent), QUALIFICATIONS ATTACK (57 percent), PROCEDURAL FAILURE and PROCEDURAL FAIRNESS (47 percent, 33 percent, respectively), JUDICIAL TEMPERAMENT (47 percent), and PARTISIAN STRATEGY (31 percent). These results, we believe, would likely match up with other confirmation hearings and suggest that the unusual aspects of these two hearings did not much alter Senate behavior (see Watson and Stookey 1995; Solberg and Waltenburg 2014).

Thomas		**I BELIEVE HER**			**LASTING IMPACT**	
		No	Yes		No	Yes
Party	GOP	40	3	GOP	25	18
		93%	7%		58%	42%
	Democrat	53	4	Democrat	31	26
		93%	7%		54%	46%
		p>.994			p>.708	
Kavanaugh						
		No	Yes		No	Yes
Party	GOP	51	0	GOP	45	6
		100%			88%	12%
	Democrat	40	9	Democrat	32	17
		82%	18%		65%	35%
		p>.001			p>.006	

Table 3: Frequency of rhetorical representation frames by party and confirmation

Our second hypothesis relates to partisan difference in behavior across our two cases. We anticipated that Republicans would use the I BELIEVE HER and/or the LASTING IMPACT frames more in the later time period. We employed cross-tabulations and a logit model to test our hypothesis. Again, our expectations were not borne out by our data (see table 3). During the Thomas confirmation, there were no significant differences between the parties in the employment of the I BELIEVE HER frame. Although the difference is significant (.006), during the Kavanaugh confirmation it is the Democrats who utilized this frame appreciably more often. The same pattern repeats for the LASTING IMPACT frame. Significant differences only appear between the parties during the Kavanaugh hearing (.006), with Democrats again setting the pace for using this rhetorically representative frame. For their part, GOP senators used the frame at about the

same rate as their Democrat counterparts during the Thomas confirmation, but the inclusion of the frame in their speeches fell off dramatically during the Kavanaugh confirmation.

To further substantiate this finding, we combined the two frames associated with the Me Too era—LASTING IMPACT and I BELIEVE HER—and employed a logit model with the senator's party, the nomination, and an interaction term of those variables as the independent variables (see online appendix for the logit estimation results). Figure 2 clearly shows that the likelihood of employing these frames decreased for senators in both parties, and especially so for the GOP. Indeed, the probability of a Democratic senator making a speech with one of these frames drops meagerly from .49 to .41 while the probability of a Republican senator using this frame decreases dramatically, from .44 to .12.

Therefore, we are again forced to recognize that our hypothesis—that the Republicans would increase their use of frames related to sexual assault and harassment, or at least maintain their recognition of these issues in their senatorial speeches—is incorrect. Despite the changing context and the Republican Party's recognition of the gender gap, the use of these frames actually decreased among those few Republican senators that gave a speech justifying their vote on Kavanaugh. In other words, the Republicans were significantly less likely to use rhetorical representation or to reach out to women in their speeches.

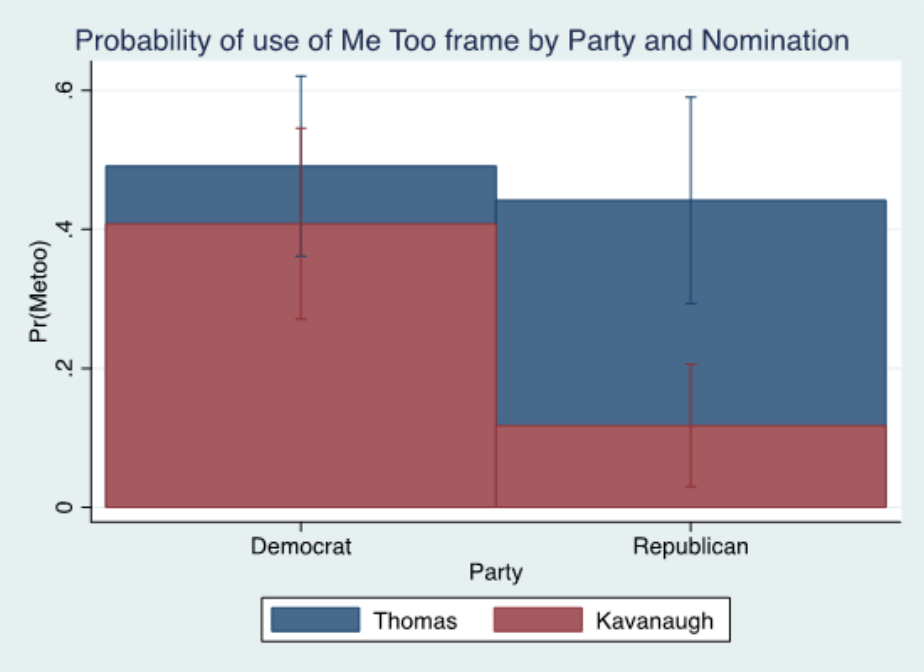

Figure 2: *Probability of use of Me Too frames by party and nomination*

Thus far we have found only partial support for one of our hypotheses; however, in doing so we have also uncovered a most intriguing finding: the rather dramatic decline in the number

of speeches made from 1991 to 2018. During the confirmation hearing for Clarence Thomas, 63 senators spoke, while only 35 chose to make a speech to explain their vote before casting their vote for or against Brett Kavanaugh. Furthermore, 47.6 percent of the speeches after the Thomas hearing were made by Republicans and 52.4 percent were made by Democrats—nearing parity. After the Kavanaugh hearing, 60 percent of the speeches made were by Democrats, and only 40 percent were made by Republicans.[7] This within-party difference for the GOP is highly significant (<.0001). As with the initial comparison, this unexpected finding begs for further investigation. Therefore, we examined the within-party differences in the use of several of the frames.[8]

We calculated the bivariate relationship between the confirmation and the frames under examination within each party. As mentioned earlier, the LASTING IMPACT frame, as anticipated from the earlier results, is highly significant when we examine only GOP speeches (.001), and the I BELIEVE HER frame approaches conventional levels of statistical significance (.055) for the Republican senators. Similarly, the use of two other frequently employed frames—QUALIFICATIONS BOOST, QUALIFICATIONS ATTACK—are significant among the GOP but not the Democrats. The Republicans spent more time in their speeches boosting the nominee or, in the rare case, the testifier,[9] during the Thomas hearing (63 percent versus 22 percent). The discrepancy is not as large for QUALIFICATIONS ATTACK but runs in the same direction (37 percent versus 18 percent) and is still notable. The only frame that showed a difference in behavior for the Democrats is PROCEDURE FAIR, and there was a significant difference in the GOP use of this frame as well. For both parties, the use of this frame decreased significantly between the two confirmations. Senators from either party were less likely to tout the attempts at due process or characterize the proceedings as fair during the Kavanaugh hearing than during the Thomas hearing. In fact, in all frames discussed here, the trend is decreasing employment by the GOP. In

7. We also note that the time taken overall for the two hearings is quite different. Hearings on the allegations made against Thomas lasted four days, while the hearing on the Kavanaugh allegations took up only one day.
8. We also tested whether an upcoming election influenced the likelihood of senators making a speech. We found that pattern for the Thomas hearing; senators whose reelection year was immediately following the confirmation vote were more likely to give a speech (GOP = 66 percent; Dem = 62 percent). This pattern changed during Kavanaugh (GOP = 20 percent; Dem = 38 percent). If we look to the following election cycle, we again see that 75 percent of GOP and 53 percent Democrats up for election in the next cycle gave speeches in 1991; whereas, 35 percent of the GOP and 45 percent of the Democrats similarly situated gave speeches in 2018. Thus the imperative of reelection, in the current time period, does not seem to affect this behavior.
9. This situation happens only one time in either hearing. During the Thomas hearing, Senator Alan Simpson (R-WY) boosted Anita Hill, and during the Kavanaugh hearing, Senator Jon Kyl (R-AZ) did the same for Christine Blasey Ford.

other words, the GOP spoke less after the Kavanaugh hearings and used fewer frames in those scant speeches.

These findings all suggest that there has been some shift in the behavior of Republican senators, even if it is not the adaptation we initially hypothesized. It is possible that the differences we find are still a reflection of typical Congressional behavior, which leads to our last hypothesis. Our third hypothesis examines whether senatorial behavior, in terms of making these types of speeches, reflects the reelection goal (Mayhew 2004; Jacobson and Carson 2019). Examining the speeches overall, we find that about 64 percent (N = 23) of the senators facing reelection immediately after the Thomas confirmation and 33 percent (N = 12) of the senators on the ballot directly after the Kavanaugh hearings gave speeches justifying their votes. While the high percentage after the Thomas hearings supports our hypothesis, the significantly smaller percentage before the vote on Kavanaugh does not.[10] Moreover, senators in their penultimate year are no more likely to give a speech following either hearing than their more electorally secure counterparts, an observation clearly displayed in figure 3. Therefore, we cannot accept our third hypothesis—that the likelihood that a senator gives a speech is spurred by their concerns about backlash or waning support in the election immediately after the confirmation vote.

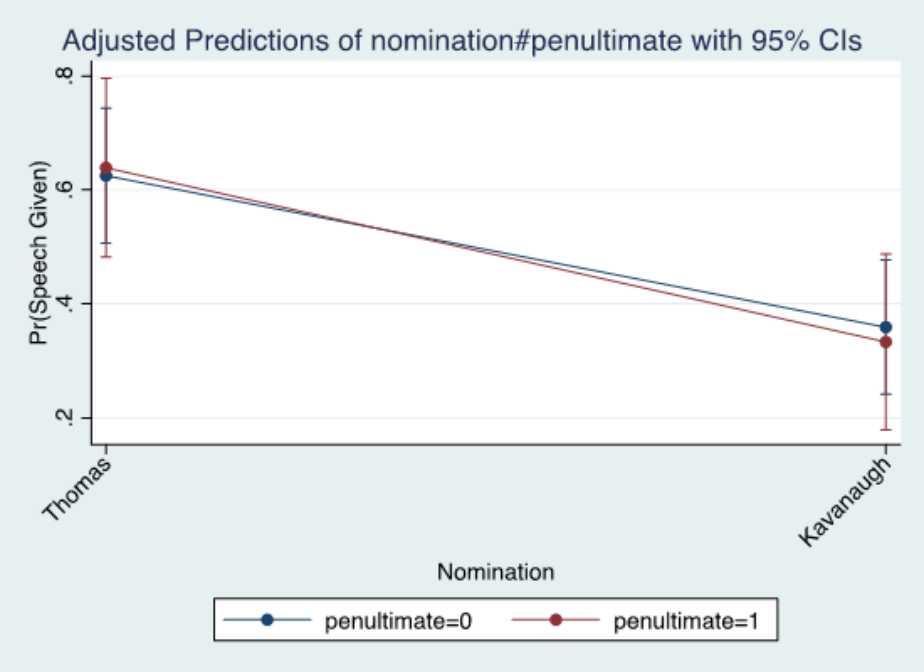

Figure 3: *Probability of penultimate year speech given: Thomas and Kavanaugh confirmations*

10. The different in proportions (two-sample test) is statistically significant ($p > |z| = .0001$).

Figure 3 also confirms the dramatic drop-off in the number of senators giving speeches following the confirmation hearing reported earlier. Clearly something changed between the two hearings and that change deserves at least a modicum of further investigation. To that end, we further examined the participation by party. Of the senators whose reelection year was immediately following the Thomas confirmation vote, 10 Republican senators and 13 Democratic senators gave a speech (70 percent of the Republicans up for reelection and 68 percent of the Democrats). After the Kavanaugh hearing, only two Republican senators but 10 Democratic senators who were up for reelection chose to justify their vote (only 25 percent of the Republicans versus 43 percent of the Democrats).[11] While the difference between the two parties is not significant, the behavioral change here is stronger for Republicans than Democrats. We are not suggesting that these findings are pathbreaking; we recognize that we are only looking at two time points and that the changes are in the same direction for both parties. However, it is possible that since Republicans are polarizing more quickly than Democrats (Theriault 2006), they feel less need to justify or qualify their vote to an increasingly homogenous base. While this is not strong evidence, it is revealing and suggests that further investigation into this change in behavior is necessary.[12]

Conclusion

Overall, these results paint a picture of a change of behavior for Senators, and especially the Republicans in terms of how they approach a confirmation vote complicated by issues of sexual harassment or assault. Our main finding is that there is no greater discussion or employment of frames related to sexual assault or harassment after the Kavanaugh hearings despite the advances made by women and the burgeoning Me Too movement. In fact, the use of the main frames related to these issues was *less*, in absolute terms, during the Kavanaugh than the Thomas confirmation. Despite the prevalence of the "I believe her" hashtag in the Twittersphere, senators, particularly Republican senators, were not using this or similar phraseology as they explained their vote. Similarly, fewer senators highlighted the historical significance of the Kavanaugh hearing and what it means for women and the country moving forward though the use of such language was more

11. This percentage drops to 40 percent if you include the two independent senators running for reelection that caucus with the Democrats. While it is true that the class up for reelection in 2018 was heavily Democrat (N = 23 or N = 25 respectively), there were still eight GOP seats at risk and five incumbents running.
12. It is also possible that the emergence of social media (i.e., Twitter) means that senators no longer need to justify their vote on the floor of the chamber. We intend to investigate if the senators were more prolific via Twitter or if this behavioral pattern extends to social media as well.

frequent than almost any other frame. While both parties saw a large reduction in the number of speeches, the decrease in the use of this tactic overall and of the frames of interest here was considerably one-sided. There was a significant drop in the use of these frames among the GOP during the Kavanaugh hearing when compared to the earlier Thomas hearing. The Democrats, on the other hand, took the opportunity to employ rhetorical representation in their speeches and were the reason these two frames ranked a bit higher in usage in 2018 than in 1991. While it is possible that Republican senators simply did not see the Kavanaugh hearing as setting any precedent or impacting history, we find that explanation implausible. It is more likely that GOP senators simply thought the less said the better for their position and party. Indeed, the largest behavior change we find is an appreciable difference in the number of senators making floor speeches; specifically, Republican senators were much less likely to give a speech in 2018 than in 1991 (see figure 4). To put it concretely, the probability of a Republican giving a speech declines from .7 during the Thomas hearings to .27 during the Kavanaugh hearings, and this pattern is not affected by proximity to reelection as seen in figure 3.

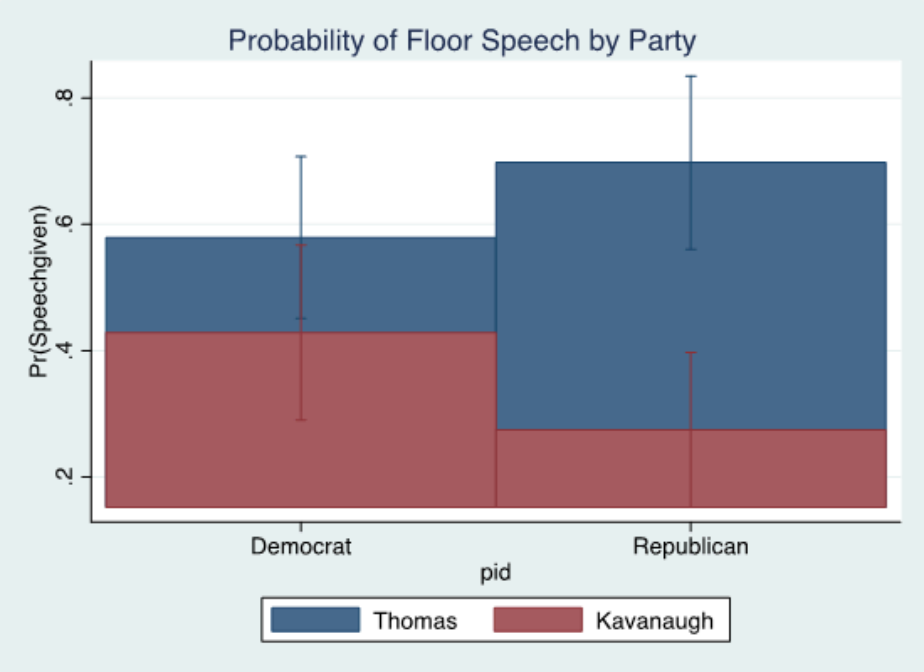

Figure 4: *Probability of giving a floor speech by party and confirmation*

This decline in the use of explanatory or position-taking speech could be related to the change in the political climate. Pew Research finds that both voters and their representatives are more ideologically polarized than in previous time periods (Desilver 2014). Political ideology accounts for almost all congressional choices so that the members' votes have become less about the issue at hand and more about falling in line with the party (Theriault 2006). There are likely

many behavioral consequences of these changes, and we posit that the decrease in senatorial speeches—in position taking—is one of them.

It is also possible that in our more polarized era, Republican senators simply do not need to justify or qualify their vote. Their constituency is driven more by ideology and such rhetorical representation is not as critical today as it was in the 1990s. Additionally, it may be that the emergence of social media (i.e., Twitter) means that senators no longer need to justify their vote on the floor of the chamber. We intend to investigate if the senators were more prolific via Twitter or if this behavioral pattern extends to social media as well. While the evidence presented here is certainly not definitive, it is revealing and suggests that further investigation into this change in behavior is warranted.

Finally, the findings reveal that while the Me Too movement resulted in unprecedented numbers of women being elected to Congress, the effect of the influx of these members may not result in a definitive change in the overall conversation. The purported `LASTING IMPACT` discussed by members during the Thomas confirmation battle did not yield concrete changes in speeches after the Kavanaugh hearings. Senators still used their speeches to attack the credibility of the nominee and the testifier (see figure 1), and while the `LASTING IMPACT` frame moved up in the rankings, it was used mostly by one side of the partisan aisle. In other words, the impact of the Thomas hearings and indeed the Me Too movement in general did not seem to affect business as usual in the Senate.

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Online Appendix

- **Qualifications or Character Boost**: Pointing to qualifications of testifier or nominee to boost credibility.
- **Qualifications Attack**: Pointing to qualifications or lack thereof to detract from credibility of the nominee or testifier; this includes Ad hominin attacks or attacks on the validity of the story.
- **Procedural Failure**: Any kind of reference to the shortcomings of the procedure used or employed or how the hearings were administrated.
- **Procedural Fairness**: Any reference to issues of due process.
- **I believe her or him**: Any reference suggesting a belief in the nominee or the testifier's account.
- **Lasting Impact**: The impact the hearings will have on the US and women in particular.
- **Media Influence**: Media influence or spinning of the procedures.
- **Partisan Strategy (Dem or GOP)**: Suggestions that one party or the other is conspiring to defeat the nominee for partisan reasons or ignoring the evidence for partisan reasons.
- **Harm to Nominee/Accuser**: Harm done to the nominee or accuser by the hearings.
- **Judicial Temperament**: References to the nominee's conduct during the hearings.

Logit Results

```
Iteration 0:  log likelihood = -138.58943
Iteration 1:  log likelihood = -128.61628
Iteration 2:  log likelihood = -128.58207
Iteration 3:  log likelihood = -128.58206
Logistic regression                Number of obs   =     200
                          LR chi2(3)      =   20.01
                          Prob > chi2     =   0.0002

Log likelihood = -128.58206           Pseudo R2     =   0.0722

------------------------------------------------------------------------------
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speech |   Coef.  Std. Err.    z   P>|z|   [95% Conf. Interval]

-------------
+----------------------------------------------------------------

1.pid |  .5177943  .4268795   1.21  0.225  -.3188742  1.354463

1.nomination | -.6061358  .3940851  -1.54  0.124  -1.378528  .1662567

|

pid#|

nomination |

1 1 | -1.201973  .6033366  -1.99  0.046   -2.38449  -.0194546

|

_cons |  .3184537  .2682717   1.19  0.235  -.2073491  .8442566

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```

Classroom Activity

This short research note examines the frames used by members of the Senate in floor speeches when explaining their votes on Supreme Court nominees. Senators also have other options for speaking about nominees in the current era—Twitter, Facebook, and other social media platforms as well as the tried-and-true press release. Since this writing, there has been at least one additional Supreme Court nomination.

Break students up into groups and assign each group a handful of senators. If your class is not that large, focus only on the members of the Judiciary Committee. Also task each group with examining floor speeches, press release/web page announcements, or social media messages. Have the students answer and report back to the group on a series of questions, and construct a mini-dataset.

1. Who are your senators? What is their political affiliation?
2. Did the senator make any pronouncement/speech about the judicial nominee?
3. What did the senators say about the nominee, the confirmation, or the vote?
   a. Possibly give examples of the various statements.
4. Now, can you identify any similarities or underlying concepts running through posts, statements, or announcements?
5. Do the frames differ across the type of medium examined?
6. Do the frames differ across party lines?
7. Can you identify any other patterns?

Interest Groups

While direct lobbying of the courts and judges violates legal ethics and impugns a court's or judge's impartiality and integrity, interest or pressure groups have been active before the courts since the founding, though their rates of participation certainly increased over the course of time. The excitement and grandeur of a test case like *Brown v. Board of Ed* (1954) or *District of Columbia v. Heller* (2008) often captures student imaginations, interest group activity is more commonly accomplished via the amicus curiae, or friend of the court, brief. These briefs offer judges and justices a group's or set of groups' views on how the law should be interpreted and provide a bellwether on the salience of a case beyond the immediate parties. Our volume offers two scholarly examinations of this activity. First, Professor Laura P. Moyer along with Megan Balcom and Alyson Benton, an undergraduate and a graduate student scholar respectively, present an important examination of how interest group attempts to sway the Supreme Court adjust over time. Examining the amicus curiae briefs filed by antiabortion groups in three major decisions, Moyer et al are able to show how groups tailor their arguments to the justices and the temporal context. The article provides a brief history of the legal fight over abortion and also introduces students to the concept of frames. Frames, as shown by this contribution, are a useful and replicable data gathering technique that students may find helpful as they pursue their own research questions. Professor Jenna Becker Kane moves us from the U.S. Supreme Court to the supreme courts of the states. Professor Kane examines what institutional factors spur or allow interest group activity, again via the amicus curiae brief, to flourish in some state high courts but not others. Using a dataset that covers forty years, Kane shows how interest groups target state supreme courts that for one reason or another are more able to assimilate the type of information offered, and thus shows that interest groups are careful with their resources and pursue legal advocacy where it is likely to have the intended effect.

Moyer, Laura P., Megan Balcom, and Alyson Hendricks-Benton. "Opposition to Abortion, Then and Now: How Amicus Briefs Use Policy Frames in Abortion Litigation."

Kane, Jenna Becker. "Institutional Determinants of Amici Filings across State Supreme Courts."

13. Opposition to Abortion, Then and Now

How Amicus Briefs Use Policy Frames in Abortion Litigation

LAURA P. MOYER, ALYSON HENDRICKS-BENTON, AND MEGAN BALCOM

> *They [the public] felt that pro-life people were not compassionate to women and that we were only "fetus lovers" who abandoned the mother after the birth. . . . We had to convince the public that we were compassionate to women. Accordingly, we test marketed variations of this theme. Thus was born the slogan "Love Them Both." . . . Five or ten years ago my emphasis would have been on the right to life and on saving babies. But now I want to tell those who are involved in women's helping centers that they are doing what I believe is the most important single thing that the pro-life movement is doing in our time.*
>
> Jack Willke, former director of National Right to Life (quoted in Siegel 2008: 1670–1)

Early in the debate over abortion, opposition to the procedure was primarily described in terms that reflected moral concerns about the protection of "the unborn." Indeed, much of the media coverage and public discourse describing opposition to abortion since the time of *Roe* characterizes the movement as focused on securing rights for all human beings from the moment of conception (Huff 2014, 39). However, interviews with activists and movement leaders suggest that antiabortion groups have employed an array of public outreach strategies over time.

As seen above, the former director of the antiabortion group National Right to Life described how market research into public perceptions of his organization led to a shift in its outreach strategy in the 1990s.

But did this shift in public rhetoric and outreach strategy extend to litigation as well? While most of the literature on social movements and framing focuses on the media, here we focus on another important venue that social movement organizations use to push for policy change and to raise visibility: the Supreme Court. Given the primacy of Supreme Court decisions in the abortion debate, it is crucial to understand changes in groups' use of frames in legal arguments presented to the Court. There is every reason to believe that the frames employed in briefs filed before the Supreme Court represent important strategic decisions by pro-life activists and groups in response to signals from the political environment and the current temporal context (Meyer and Minkoff 2004; Tilly 1978; Meyer 2004), or what is sometimes called the political opportunity structure. Framing in amicus briefs should align with the messaging strategy employed by the group in other advocacy contexts and be reflective of the political opportunity structure (Tarrow

1998:77) and adapted somewhat to fit the language of law and the contours of legal doctrine. (We explore this point more in the conclusion.)

The Framing of Abortion as a Policy Issue

Framing helps individuals make sense of the world around them by providing a scheme of interpretation (Goffman 1974) that highlights particular aspects for attention while downplaying others (Kahneman and Tversky 1984). For instance, gun rights groups often use the "crime control" frame, emphasizing the ineffectiveness of existing gun restrictions in stopping crime (Goss 2006; Merry 2016). In their review of the research on framing and social movements, Benford and Snow (2000) emphasize that framing is an active, evolving process to construct meaning and that the evolution of frames reflects changes in the social movement or among activists. The authors also note that framing is contentious because it "involves the generation of interpretive frames that not only differ from existing ones but that may also challenge them" (614). This description is an apt one for the interactive, dynamic process that is the abortion policy space.

The pro-life movement began organizing in the 1960s and encompasses a range of groups for whom abortion policy may be either a primary focus (e.g., National Right to Life) or part of a larger constellation of issues (e.g., the Catholic Church; Woliver 1998). Early after *Roe v. Wade*, morality frames emphasized the conflict between the fetus and the mother and characterized women who obtained abortions as morally repugnant (Rose 2011; Rohlinger 2002). For instance, in the amicus filings for the 1989 case *Webster v. Reproductive Health Services*, Woliver describes the framing of abortion this way: "Fetuses are never called fetuses, they are always 'unborn children,' 'unborn life,' 'prenatal life,' 'children in the womb,' 'human life before birth,' unborn grandchildren,' 'viable unborn,' 'minor child,' 'unborn human life' (Webster Brief 20)" (1998, 238).

However, antiabortion groups are not monolithic in their frames or goals (Duff 2014). To illustrate, the American Life League (ALL) emphasized messaging that used frames about morality during the 1980s but differed from other abortion opponents in that the stated goal of the group was to eliminate abortions entirely, with no exceptions for abortions to save the life of the mother (Rohlinger 2006, 550). This hard-line position caused a conflict with the National Right to Life Committee (NRLC), which ran a media campaign in the early 1980s that was linked to their position that abortion should be allowed to save a woman's life (Rohlinger 2006, 550). Similarly, Rose's (2011) study of literature from antiabortion groups finds that the Elliot Institute supported the reframing of abortion to emphasize concern for women. This was done for strategic reasons—namely, the belief that taking a more compassionate stance toward women and emphasizing women's rights would be more likely to "topple the abortion industry" (Reardon 1996, cited in Rose 2011, 12).

The Elliot Institute (and an associated activist, David Reardon) were featured in a 2007 article in the *New York Times* that discussed how they utilized medical and psychological data about the negative impacts of abortion on women and sought out women's stories illustrating this theme through a project called Operation Outcry (Bazelon 2007). This shift in framing was intended to influence public opinion by targeting those who were unmoved by the emphasis on the unborn but who might be persuaded by concern for the woman (Huff 2014; Bazelon 2007). It also capitalized on what some saw as a key weakness within the pro-choice movement: the tendency to downplay the emotional distress surrounding abortion. In sum, these examples demonstrate the range of frames employed and how choices about framing appear to change over time.

Because the presence of one movement in a venue tends to force the opposing movement to operate in that space (Meyer and Staggenborg 1996; Epstein and Kobylka 1992), there were increasingly strong incentives for antiabortion groups to challenge the near monopoly that pro-choice groups had on the use of "science" frames related to abortion. Huff (2014, 61, 78–79) notes that from the mid-1990s on, the antiabortion movement has granted more prominence to scientific claims about how women are harmed by abortion, making assertions about negative associations between abortion and breast cancer, mental illness ("postabortion syndrome"), and infertility. Given that judges are not trained to assess statistical or scientific evidence (Ahmed 2015; Foster and Huber 1997), antiabortion groups could reasonably make the calculation that utilizing medical and scientific claims would cancel out any advantage in framing held by pro-choice groups in litigation, though it is unclear whether this was a coordinated strategy by movement leadership or an opportunity seized by some activists (Huff 2014, 60–1).

While this literature relies on a rich body of interviews, primary source materials, and media coverage to investigate the framing of abortion, no existing work has systematically examined framing in amicus briefs filed in abortion cases before the Supreme Court over an extended time period. This is unfortunate because amicus briefs fit well into the conception of strategic framing processes in which social movement organizations are deliberate and goal oriented in their selection and use of particular frames (Benford and Snow 2000, 623). As the literature has demonstrated, organized interests tend to work simultaneously on several fronts, and litigation is the "sugar on top" strategy that complements advocacy directed at other forums (Solberg and Waltenburg 2006). Given the centrality of court battles to the abortion movement more generally (Rosenberg 1995), it is crucial to gain an understanding of how activists portray their cause to the judges responsible for creating the national legal policy on abortion. Decisions by the Supreme Court dictate the permissible bounds for future state and federal legislation on abortion and have proven to be effective mobilizers for social movement activists as well as the two major political parties (Wilcox and Norrander 2002; Abramowitz 1995).

Again, we argue that the framing choices employed in amicus briefs reflect strategic decisions and signals from the political environment (Meyer and Minkoff 2004). The political opportunity

structure, a concept from the literature on social movements, helps us understand the ways that context affects the claims made by abortion movement activists and groups and why those claims arise in particular moments in time (Tilly 1978; Meyer 2004). Tarrow describes the political opportunity structure as the "consistent—but not necessarily formal or permanent—dimensions of the political environment that provide incentives for people to undertake collective action by affecting their expectations for success or failure" (1998, 77).

Below, we provide a brief timeline of the three cases we use in our analysis as a way to identify factors within the political opportunity structure that should affect the choice of frames used by abortion opponents from the 1970s to 2016. We focus on three key aspects of the political opportunity structure: (1) the legal frameworks within which amicus groups had to structure their arguments, (2) changes to the composition of the Supreme Court, and (3) signals from the political environment about openness to the antiabortion position (Meyer and Minkoff 2004).

Roe and the Trimester Framework

The policy space in which pro-life amicus groups were operating in the early 1970s was quite different from what we observe today. Abortion had only very recently come into the political realm as a contested public policy issue, and abortion-focused interest groups were still relatively young organizations. In the decade prior to *Roe v. Wade* (1973), there had been a sea change in public opinion about abortion, and the momentum clearly appeared to be on the side of those who supported abortion rights (Rosenberg 1995, 396–8). Religious politics around abortion were also in a relatively favorable place for abortion rights compared to later years. While Catholic groups opposed state legislative reforms that would liberalize abortion laws, Protestants were generally more favorably disposed toward such reforms (Greenhouse and Siegel 2011, 2047–48). President Nixon reportedly sought to capitalize on this Catholic-Protestant divide in order to gain the support of Catholic voters (Greenhouse and Siegel 2011, 2053), reversing some of his earlier pro-abortion positions. However, the Nixon administration did not take a formal position on the outcome of *Roe*, unlike presidents in future abortion cases (Keck and McMahon 2016).

After lengthy and divisive deliberations among justices on the Supreme Court (Woodward and Armstrong 1979), Justice Blackmun delivered the seven to two majority opinion striking down Texas's abortion law, establishing abortion as a constitutional right and setting forth a new legal standard for evaluating abortion restrictions nationwide. The new test, called the trimester framework, legalized abortion during the first trimester, keeping the decision between "a woman and her responsible physician." During the second trimester, the state had more interest in abortion cases and could regulate abortion procedures in "ways that are reasonably related to

maternal health" but could not ban the procedure. Finally, during the third trimester, states could prohibit abortions unless the life or health of the mother was in danger (410 U.S. 113, 1973).

Backlash against *Roe* was swift. Within a week of the decision, proposals to amend the Constitution to ban abortion had been introduced in Congress (Rosenberg 1991, 185–188), and Catholic groups called for the excommunication of the only Catholic justice on the Court, William Brennan (Woodward and Armstrong 1979, 287). In the 1980 presidential race, the Republican Party platform expressly advocated for both the overturning of *Roe* and a constitutional amendment that would guarantee "the right to life for unborn children" (Keck and McMahon 2016, 39). The modern era of abortion politics had begun, and amicus groups responded accordingly.

Casey and the Undue Burden Standard

Nearly two decades later, when the Supreme Court granted certiorari in *Planned Parenthood v. Casey* (1992), the composition of the Supreme Court, the state of legal doctrine on abortion, and the now solidified association between the Republican Party and opposition to abortion all appeared very favorable to abortion opponents.

First, since the Court's controversial decision in *Roe v. Wade*, six new justices had been appointed to the Supreme Court, each by Republican presidents. Five of these appointments replaced a justice who had been in the majority of *Roe*, and William Rehnquist (who was one of the two Roe dissenters) was now elevated to the position of chief justice, with opinion assignment power. That left Justice Blackmun, the author of *Roe*, as the sole remaining member of the Roe majority. President Bush's appointments of David Souter (in 1990) and Clarence Thomas (in 1991) also signaled a favorable audience for abortion opponents compared to the justices they replaced (Epstein and Walker 2013, 420).

These personnel changes, coupled with the state of legal doctrine, presented a political opportunity for antiabortion groups. A series of decisions by the Court in the 1980s had increasingly limited *Roe's* reach, allowing for more state regulation of the procedure and restrictions on public funding for abortion. Significantly, a closely divided 1989 ruling (*Webster v. Reproductive Health Services*) laid the doctrinal groundwork for overruling Roe, saying, "To the extent indicated in our opinion, we would modify and narrow Roe and succeeding cases" (492 U.S. at 521). Thus momentum seemed to have shifted back in favor of pro-life groups.

Finally, since the *Roe* decision, the Republican Party had become increasingly identified with the pro-life movement, with presidents Ronald Reagan and George H. W. Bush each taking public positions in opposition to *Roe* (but see Tushnet 2005). In *Casey*, President Bush's solicitor general

took the position that the Court should overrule *Roe*. Known as the "Tenth Justice," the solicitor general enjoys substantial advantages in litigation before the Supreme Court (Black and Owens 2012). Although previous solicitors general had taken this position in the decade before *Casey*, the call to overturn *Roe* came at a time when the makeup of the Court seemed to all but guarantee success (Keck and McMahon 2016). However, this did not come to pass. In *Casey*, Justices O'Connor, Kennedy, and Souter joined together with Blackmun and Stevens to explicitly uphold *Roe* in a five to four decision.

Several aspects of the *Casey* decision created more space for the usage of frames emphasizing the woman rather than the fetus. One such provision was the exception for abortions necessary for the health or the life of the mother. This allowed women, theoretically, to obtain abortions after the point of viability if medical necessity dictated. Another was the requirement that regulations on abortion must "inform the woman's free choice, not hinder it" (505 U.S. 833 (1992)). In the case, mandated counseling scripts were deemed acceptable because they furthered the legitimate interest of the state in "reducing the risk that a woman may elect an abortion, only to discover later with devastating psychological consequences, that her decision was not fully informed" (quoted in Rose 2007, 77). Thus the undue burden test created an opportunity for advocates who opposed abortion to make successful arguments framed in terms of concern for women's health, informed consent, and the like. Some scholars have argued that this ruling effectively put an end to the hopes of antiabortion groups wishing to overturn *Roe*, and it also provided an opportunity for both sides of the abortion debate to claim that their opponents had prevailed and thus motivate their supporters to mobilize (Meyer and Staggenborg 1996).

Abortion Doctrine in the Obama Era

By the time the Supreme Court heard arguments in its *Whole Woman's Health v. Hellerstedt* (2016), the political context remained relatively favorable for pro-life amicus groups. First, the composition of the Supreme Court had steadily shifted in a more conservative direction in the decades following *Planned Parenthood v. Casey*. During his time in office, President George W. Bush was successful in confirming two conservative justices (John Roberts and Samuel Alito) to the Court. In particular, the appointment of Justice Alito to replace O'Connor, one of the authors of the *Casey* decision, was a victory for abortion opponents because of his more conservative stance on abortion (Keck and McMahon 2016). In contrast, President Obama's judicial nominees (Sonia Sotomayor and Elena Kagan) did not change the balance of power on the Court because they replaced two justices (Souter and Stevens) whose voting records generally supported *Roe* and abortion rights.

In addition to the composition of the Supreme Court, legal doctrine also was favorable for abortion opponents. In 2016, the Court had not revisited the right to abortion in nine years, with its last decision (*Gonzales v. Carhart*) upholding a controversial federal law banning "partial birth" abortions. In the majority opinion, Kennedy used terminology favored by abortion opponents (e.g., "abortionist," "unborn child") and then expressed concern that women who had abortions would suffer long-term negative mental health consequences (Ahmed 2015; Gerrity 2010). This seemed to be an encouraging development for groups hoping to persuade the Supreme Court to limit or end abortion.

Another important factor was the success of the Republican Party in making big gains at the state level in 2010. Republican state legislators and state officials used this position of power in the years that followed to propose a number of restrictive abortion laws. For instance, in the year prior to *Whole Woman's Health*, the Guttmacher Institute reported that thirteen states introduced bills that required abortion providers to have admitting privileges at hospitals, and seven states enacted other "targeted" regulations for abortion providers. These types of provisions were at issue in *Whole Woman's Health*. Taking the opposing view, the Obama administration's solicitor general filed a brief that argued that the Texas law and others like it failed to produce "actual health benefits" and created "substantial obstacles" for women seeking abortions, in violation of *Casey* (Brief of the Solicitor General 2016).

Thus when certiorari for *Whole Woman's Health* was granted by the Court in November 2015, the composition of the Court remained evenly split between the four liberal justices and the four conservatives, with Kennedy in the middle. For pro-life groups filing amicus briefs, it seems likely that they would continue to identify Kennedy as a key target for their arguments and emphasize frames that had played well with him in the past. Of course, this strategy could not have anticipated the sudden death of Justice Antonin Scalia, which came after the deadline for amicus briefs to be filed in the case (Denniston 2016). Scalia's death meant that if the court divided evenly (four to four), the decision of the Fifth Circuit upholding the Texas law would stand but would not become national precedent. This would be a minor victory for abortion opponents. Ultimately, Justice Kennedy joined the four liberal justices in a five to three vote to strike down the Texas abortion regulations, with Justice Breyer (a Clinton appointee) writing the majority opinion.

Hypotheses

With this background, we draw from the frames identified in the existing literature on the antiabortion movement and test for their presence in amicus briefs. The literature suggests that "pro-woman" frames utilized by abortion opponents may take several forms. We focus on two such

frames here: harm to women and science. The Harm-women frame emphasizes anecdotes and tragic stories from women with "postabortion syndrome" or other traumatic abortion experiences (described in language intended to pack an emotional punch). An example of this first category is an amicus filing from *Whole Woman's Healt*h by "3,348 women injured by abortion" that consists of a series of harrowing personal anecdotes. The second frame, Science, makes arguments based on data and medical evidence (intended to counter peer-reviewed studies cited by pro-choice advocates). An example of this frame can be seen in a brief filed by Pro-Life Obstetricians and Physicians for Life in which the amici cite peer-reviewed studies about the medical risks associated with abortions performed in outpatient abortion clinics. Both the Harm-women and Science frames shift the rhetorical emphasis from opposition to abortion on moral grounds to opposition on evidence-based grounds that include both anecdotal and more systematic data.

With these definitions in hand, we next detail a series of hypotheses about the amicus briefs filed in each of the four cases in our study. Our first two hypotheses relate to early decisions about framing made by antiabortion groups.

H1: In *Roe*, we expect that the morality frame will be the most common frame used in pro-life amicus briefs.

H2: In *Case*y, we expect that the morality frame will be the most common frame used in pro-life amicus briefs.

Several factors point to a shift in antiabortion strategy after 1992, with an increased focus on harm to women and science frames. First, legal doctrine lent itself readily to these frames; the Supreme Court's decision in *Casey* emphasized themes of self-determination for women, "reasonable" regulations designed to "inform" and not "hinder" a woman's "free choice," and maintained exceptions for late-term abortions necessary to save women's lives or for their health. Second, antiabortion groups could reasonably conclude that shifting their focus would allow them to counter pro-choice arguments about science. Third, the laws being challenged in the 2016 case *Whole Woman's Health v. Hellerstedt* (couched in terms of making abortion and abortion clinics safer for women) were not well suited for arguments about morality compared to previous cases. Together, these factors suggest the following two hypotheses.

H3: Science and harm to women frames will be used more often in *Whole Woman's Health* than in any previous case.

H4: Morality frames will be used less often in *Whole Woman's Health* than in either *Casey* or *Roe*.

Data and Methods

To investigate our hypotheses, we used LexisNexis and Westlaw to download all available amicus briefs filed in three major abortion decisions: *Roe v. Wade* (1973), *Planned Parenthood v. Casey* (1992), and *Whole Woman's Health v. Hellerstedt* (2016). We then identified the position of each brief and limited the sample only to antiabortion briefs, resulting in fifty-nine amicus briefs for content analysis. The three cases selected allow us to compare rulings over the full time span of abortion litigation in the Supreme Court to date (i.e., *Roe* is the first, *Casey* is roughly at the midpoint, and *Whole Woman's Health* is the most recent).

The Supreme Court lays out very precise guidelines for the structure of an amicus brief in its official rules, ensuring consistency across texts. Rather than analyze the entire brief (including extraneous information like the table of contents, table of authorities, and the attorneys' contact information), we trimmed each brief so that the content analysis included only the summary of argument, arguments, and conclusion sections. This decreased the overall denominator of words and allowed us to focus on only the parts of the brief where amici made legal arguments.

Once these briefs were downloaded and trimmed, we utilized two automated content-analysis software programs to process the texts: WordStat and Linguistic Inquiry and Word Count (LIWC). WordStat allows users to identify the most commonly used words in a text, among other features. LIWC has been used in both nonlegal (Merry 2016) and legal contexts (Owens, Wedeking, and Wolfarth 2013). The software program processes text files and produces a battery of indicators related to linguistic and psychological attributes of the writing. Crucially for our purposes, it also allows the user to develop customized dictionaries.

We used WordStat first to generalize a master list of all complete words used in the amicus briefs and from that list created three custom LIWC dictionaries related to the following frames: (1) Morality, (2) Harm-women, and (3) Science. (Full dictionaries for each of these frames appear in the appendix.) The first category includes language linked to the morality frame (e.g., "unborn," "kill," "infant," "murder"), while the second focuses on negative health consequences for women who obtain abortions (e.g., "depression," "complication," "mental health," "regret"). The last category emphasizes scientific evidence (e.g., "peer review," "data," "evidence," "accepted medical practice"). The dependent variables for our analysis reflect the percentage of words from the argument

portion of the brief that fall into the three frames described. Figure 1 displays the distribution of each frame in each case using a box plot, which shows the minimum and maximum values as well as the twenty-fifth percentile, fiftieth percentile (also called the median), and seventy-fifth percentile values. This is helpful because it allows us to see how much variation there is across pro-life briefs in the use of a particular frame; for instance, in *Roe*, we can see that the most variation in frame use across briefs comes from the Morality frame (because the box is longer than for the other two frames). This means that pro-life briefs filed in *Roe* varied rather substantially in how heavily they used Morality language. In contrast, in *Whole Woman's Health*, the distance between the bottom of the box (twenty-fifth percentile value) and the top of the box (seventy-fifth percentile value) is fairly similar across frames.

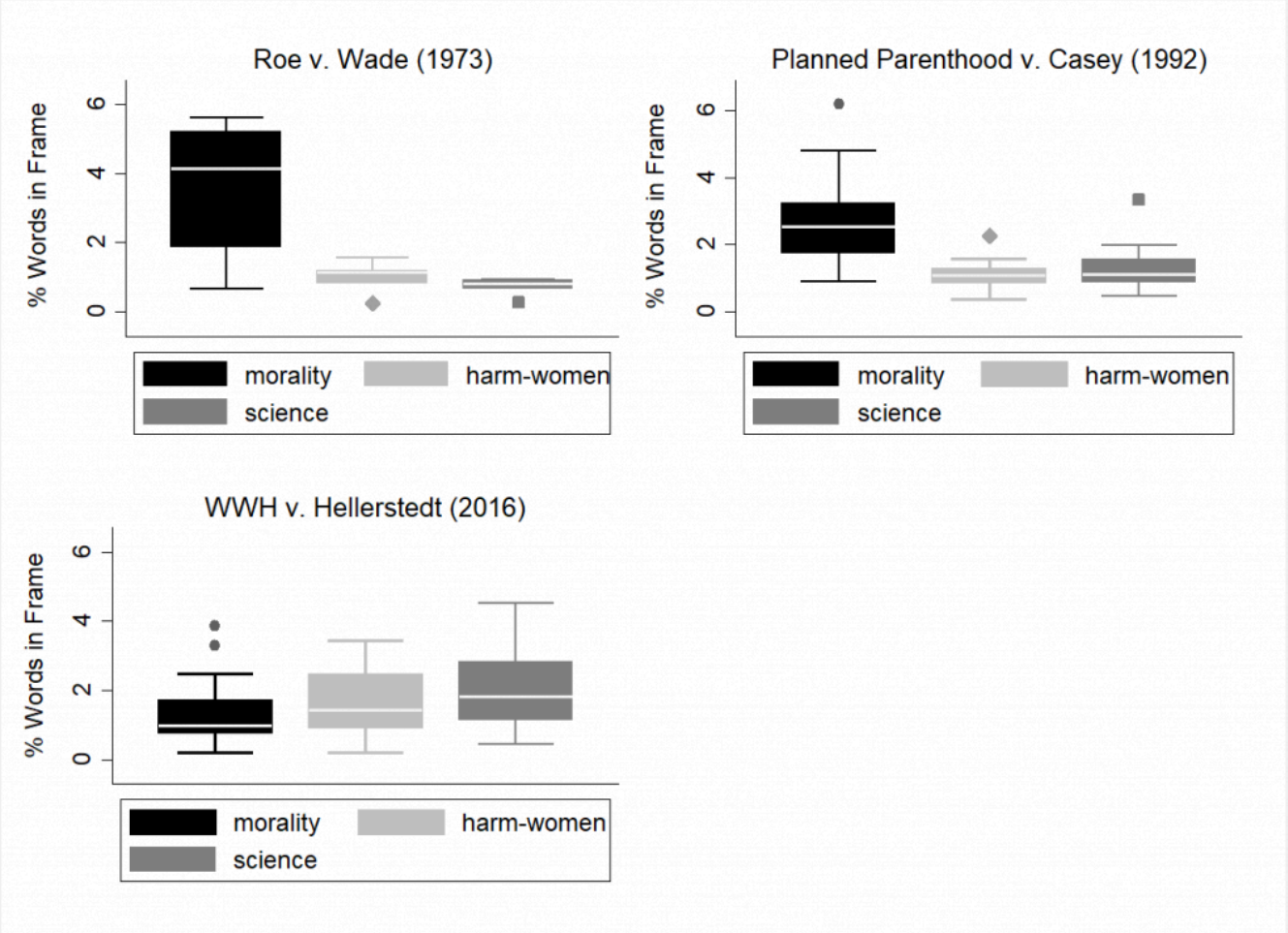

Figure 1: Variation in Frames in Pro-life Amicus Briefs. **Note:** *Figure is a box plot (also known as a box-and-whiskers plot). The number of pro-life amicus briefs for each case is as follows: Roe* (5), *Casey* (20), *and Whole Woman's Health* (34).

To evaluate our hypotheses about how often these frames are used in amicus briefs, we use a statistical test called a t-test. We want to know whether, on average, the use of a particular frame

in a single case is different from the usage of other frames (in the same or other cases), and we want to know whether any differences are statistically different from zero. The results of our analyses are presented in several ways; in the text, we provide standard information about t-tests (including the t-value, degrees of freedom, and the significance for a 95 percent confidence interval with a two-tailed test). We also present results in graphical form, which may be more intuitive to interpret. Figure 2 shows three bar graphs, which allows for comparisons of frames within a single case; there, significant differences between frames are denoted with an asterisk. In figure 3, where we compare the use of frames across cases, we have graphed the mean value (also called a point estimate) for each frame as well as the uncertainty around that value (i.e., the confidence interval). A good rule of thumb for interpreting graphs like this is to check whether the confidence intervals for different point estimates overlap. If they do not, we can say that the difference between the two mean values is statistically significant at a 95 percent level. However, if the confidence intervals do overlap, this does not automatically mean that the difference is not significant (Schencker and Gentleman 2001). Rather, it means that we should check the p-value to see whether it is greater than .05, which would indicate the means are not significantly different from each other. For this reason, we discuss both the p-value and the confidence intervals as shown in the graphs.

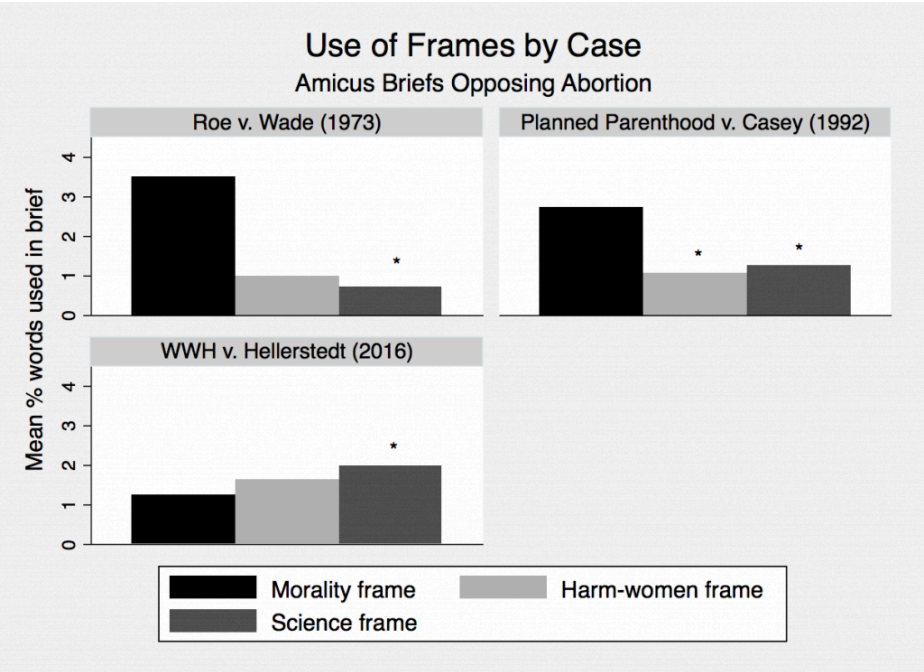

Figure 2: Within-Case Comparison of Frames. **Notes:** *Results shown are from t-tests with assumed unequal variance. * denotes that the mean for that frame was significantly different from the Morality frame mean within the same case (at p < .05, two tailed-test). The number of pro-life amicus briefs for each case is as follows: Roe (5), Casey (20), and Whole Woman's Health (34).*

Framing Analysis

Moving now to our analyses, the first two hypotheses predict that the Morality frame will be the most commonly used frame in both *Roe* and *Casey*. Figure 2 allows us to compare how often frames are used within each case, and we can see that in *Roe*, an average of about 3.4 percent of words fall into the Morality frame compared to 1.0 percent for Harm-women and about 0.7 percent for Science. The results of the t-tests for *Roe* show that the Morality frame is significantly different from Science $t[4.12] = 2.86, p < 0.05$, but the difference between Morality and Harm-women barely misses the p < .05 threshold for significance $t[6.60] = 3.19, p = 0.06$. As such, Hypothesis 1 receives only partial support.

Looking next to *Casey*, we see again that the Morality frame is used more often than the other two frames. T-tests confirm that the differences between both Morality and Harm-women $t[22.2] = 5.21, p < 0.05$ and Morality and Science $t[27.7] = 4.41, p < 0.05$ are statistically significant. This may seem surprising given that the bars for frame use show more extreme differences in *Roe* than in *Casey*. However, it is important to note that because the number of amicus briefs in *Casey* is much larger (twenty) than *Roe* (five), it is easier to achieve statistical significance. (The smaller the number of observations, the harder it is to show that differences are not attributable to chance.) Taken together, these findings indicate strong support for Hypothesis 2, which predicted that the morality frame would be used more frequently than other frames in *Casey*.

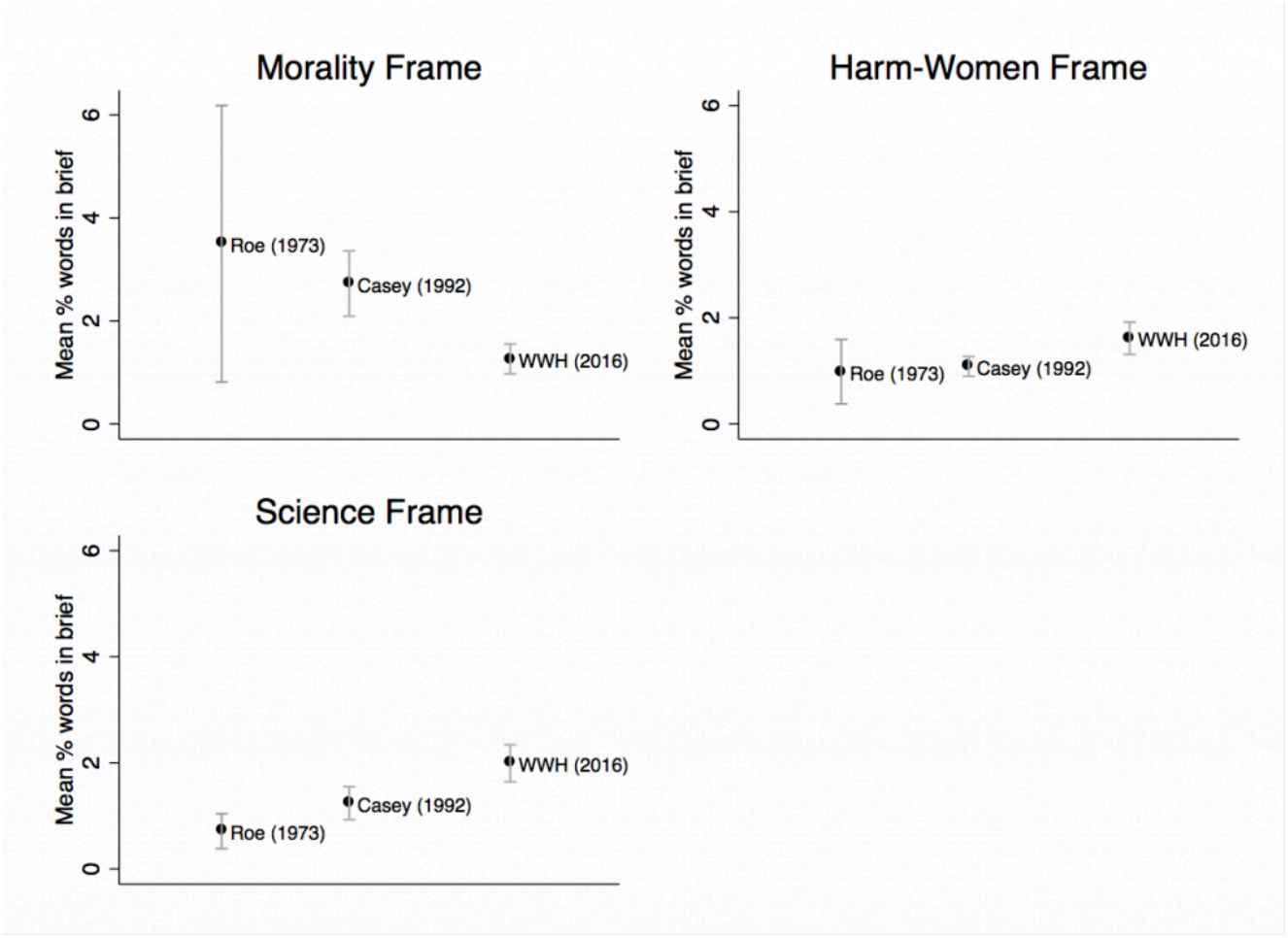

Figure 3: Comparison of Frames across Cases. ***Notes:*** *Results shown are from t-tests with assumed unequal variance. Dots are mean values and range bars indicate 95% confidence intervals. Where confidence intervals do not overlap, the two values are significantly different from each other at p < .05 (two-tailed test).*

Our third hypothesis posited that antiabortion amici would use Science and Harm-women frames more often in *Whole Woman's Health* than in either previous case. This requires us to compare across cases, as seen in figure 3. Recall that the dots represent the mean values, and the range bars show the upper and lower bounds of a 95 percent confidence interval. Starting with the Science frame, we can see that it was indeed used more often in *Whole Woman's Health* than in either previous case and that there appears to be a steady upward trend in its use. Because the confidence intervals for *Whole Woman's Health* do not overlap with either *Casey* $t[51.1] = -3.32, p < .05$ or *Roe* $t[24.9] = -6.17, p < .05$ and the p-values for each are less than .05, we can say that this difference is statistically significant at the 95 percent level. Note, however, that in spite of the overlapping error bars for *Roe* and *Casey*, the difference between the two cases is actually significant at p < .05. This means that the Science frame is increasingly used by antiabortion amici over the time period shown.

Next, we look at the Harm-women frame as shown in figure 3. We want to know whether amici framed abortion more in terms of harm to women in the 2016 *Whole Woman's Healt*h case than in the two earlier cases. The graph shows us that the difference is significant both when comparing *Whole Woman's Health* to *Casey* $t[51.1] = -3.32, p < 0.05$ and when comparing it to *Roe* $t[8.51] = -2.38, p < 0.05$, although not when comparing *Casey* and *Roe* to each other (p = .68). As such, Hypothesis 3 is supported with respect to both frames.

The last hypothesis focuses on use of the Morality frame across cases. As expected, the point estimates show that abortion opponents used this frame the least often in amicus filings for *Whole Woman's Health* and more often in both older cases. Because the confidence intervals for *Whole Woman's Health* and *Casey* do not overlap, we can say that this difference is statistically significant at a 95 percent level $t[27.5] = 4.39, p < 0.05$. But while there appears to be quite a large difference between the point estimates for *Whole Woman's Health* and *Roe*, the confidence intervals overlap, and the difference actually fails to reach the p < .05 threshold for statistical significance $t[4.17] = 2.29, p = 0.08$. Again, this is likely a consequence of the increased uncertainty around the point estimate for *Roe* because of its small number of observations. Thus Hypothesis 4 is supported with respect to *Casey* but not for *Roe*.

Discussion

The Supreme Court has become an increasingly important forum for social movements and their associated interest groups to make policy and to demonstrate "action" on issues of interest (Owens and Epstein 2005). While the conservative legal movement generally eschewed public interest litigation as a focus of their efforts through the 1970s and into the 1980s, the "second wave" of the movement has been more proactive in targeting the courts as a means to achieve policy goals (Teles 2008). Abortion opponents now routinely utilize the opportunity to file amicus curiae briefs in abortion cases coming before the Supreme Court. This presents scholars with a rich body of texts from which to analyze one of the most contentious political issues in contemporary American politics.

The results of our study also highlight distinctive changes in the way that abortion opponents frame the issue, particularly when contrasting the 2016 Supreme Court decision (*Whole Woman's Health v. Hellerstedt*) with earlier decisions from the 1970s and 1990s. In *Roe v. Wade* and *Planned Parenthood v. Casey*, abortion opposition was largely framed in terms of morality language, but by 2016, use of the Morality frame had declined and was used less than it ever had been before. At the same time, we observe a rise in the use of the Science frame by abortion opponents. Briefs using the Science frame focused their arguments on findings from medical studies (though not always

peer reviewed), regulatory agencies like the FDA, and medical experts as a means to demonstrate legitimacy.

Opposition to abortion in terms of harm to women also emerges as a newer emphasis for pro-life groups in Supreme Court litigation. Our results show that this frame was used significantly more often in amicus briefs filed in *Whole Woman's Health* than in amicus briefs for *Casey* or *Roe*. This makes sense as a response to post-*Casey* legal doctrine on abortion, which directs attention to the relationship between abortion regulations and women's health, and seems to pair well with an increased emphasis on Science frames. Moreover, the challenged law in *Whole Woman's Health* emphasized the medical necessity of its various regulatory provisions, so it seems natural that groups defending the state's position would adopt similar language.

Like all studies, there are limitations to our findings. First and foremost, our conclusions are limited by the small number of cases analyzed, and future research should examine how framing choices by both antiabortion and pro-choice groups have varied over time. Along these lines, it could be instructive to compare the framing used in press releases and other public-focused communication materials with amicus briefs on a group-by-group basis. This would provide support for our assumption that messaging is consistent across contexts and would allow for exploration about variation across groups on the same side of the issue. Additionally, because our interest is in identifying the strategies and frames used in amicus briefs, we cannot weigh in on what influence these frames had on the substance of the Supreme Court's ruling in those cases, though the literature suggests such influence is likely (Collins, Corley, and Hamner 2015). We also acknowledge that some frames necessarily work better than others in particular cases and that groups' decisions about how to frame their legal arguments are in some ways responsive to how the movement has been able to shape the kind of legislation that states (and the federal government) have enacted on abortion. In each new instance of litigation, amici must decide how to adjust their arguments to the contours of the case facts and the statutory language so as to provide maximum advantage. Groups also may update their approach for the next case based on how they fared for the previous case and on how influential justices ruled (e.g., O'Connor or Kennedy). Finally, there may be other factors in the political opportunity structure that influence strategic decisions about framing opposition to abortion; for instance, future work could examine changes in public opinion and media coverage of abortion during this time period.

After their 2016 loss in *Whole Woman's Health*, antiabortion groups may be forced to reevaluate the best rhetorical strategy moving forward. Public policy scholars have generally classified abortion policy under the rubric of morality policy, which is considered to be "easy" because it does not require the public to comprehend highly technical information (Gerrity 2010: 64). If both sides resort to using science as a dominant frame, this may change the dynamics of abortion as a policy issue, with judges and the general public not always able to decipher technical language, interpret statistical significance, or determine the quality of the scientific research being presented. Would

such an approach be successful in convincing those in the public who are neither fully opposed nor fully supportive of abortion? Or would it be less persuasive than an approach that emphasized themes of harm to women? Clearly, the answer to these questions depends in large measure on how the composition of the Supreme Court changes over the near term and how such changes affect their resolution of future cases involving the constitutional right to abortion.

Cases

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Appendix

Morality	Harm-women	Science
		Public health
		Safe*
Abortionist	Mother*	Study
Person	Rape	Studies
Body part	Unsafe	Research
Human	Domestic violence	Data
Wholesaler	Intimate partner violence	Evidence
Harverster	Abuse	Peer-review*
Abortion industry	Abusive	Healthcare
Sold	Victim	Procedure*
Unborn	Survivors	Medical prof*
Bab*	Safe*	Maternal mortality
Infant*	Depress*	Accepted medical pract*
Child*	Maternal mortality	Patient*
Kill*	Alone	Obstet*
Murder*	Hurt*	Gynecol*
Die*	Regret*	Physician*
Dying	Cry*	Fetus*
Dead	Cried	Reproduc*
Death*	Upset*	Protect*
Innocent*	Protect*	Risk*
Life	Risk*	Danger*
Alive	Danger*	Complication*
Concept*	Complication*	Mental health
Concieve*	Mental health	Woman
Mother*	Woman	Women
Abortion doctor*	Women	Female*
Right*	Female*	Pain*
Hurt*	Pain*	Blood*
Protect*	Bled	Harm*
Harm*	Harm*	Fetal pain
		Breast cancer

LWIC Dictionaries

Note: * denotes word stem (e.g., death* would include both "death" and "deaths").

Class Activity

Amicus Curiae Activity in Abortion Cases

When third parties that are not involved in litigation want to weigh in on a pending Supreme Court case, they may file an amicus curiae (friend of the court) brief. These briefs must comply with the guidelines established by the Supreme Court. You can read the guidelines here: https://www.law.cornell.edu/rules/supct/rule_37.

Groups like the American Civil Liberties Union (ACLU), the Cato Institute, the Chamber of Commerce, the National Association for the Advancement of Colored People (NAACP), and even members of Congress file amicus briefs to express their views. Below are a few activities to help you research and explore amicus briefs yourself.

Amicus Briefs

SCOTUSblog is a helpful resource for finding the filings by litigants and amicus groups in recent Supreme Court cases.

1. First, find the amicus briefs filed in the 2016 case *Whole Woman's Health v. Hellerstedt* and pick out five to six that look interesting. (Be sure to pick some from each side in the case.) You can access the filings here, under "Proceedings and Orders": https://www.scotusblog.com/case-files/cases/whole-womans-health-v-cole/.
2. There are a variety of different approaches and strategies used in amicus briefs. For instance, one kind of brief calls the Court's attention to the practical impact of ruling in a particular way. Another kind of brief might raise a novel legal argument that the litigants don't mention. Read the following post on SCOTUSblog about different ways to "friend" the Supreme Court. Then look at the amicus briefs you found above and see if you can classify them in the categories identified by the authors. Here's the post:

https://www.scotusblog.com/2018/08/top-10-ways-to-friend-scotus/.

3. Looking at the content of the briefs, what frames can you identify? How do the groups who have signed on to each brief "sell" the expertise or special insights they bring to the issue? What kind of evidence is used to support arguments made by medical professionals? By abortion-related groups? By groups with religious affiliations?
4. Once the Supreme Court has read the written arguments in a case, they hear from lawyers representing each side and sometimes from the US solicitor general. Listen to the oral arguments in *Whole Woman's Health* and compare how the frames used by the advocates representing the litigants compare to the frames you notice in the amicus briefs. You can access the oral arguments here: https://www.oyez.org/cases/2015/15-274.

14. Institutional Determinants of Amici Filings across State Supreme Courts

JENNA BECKER KANE

Arthur F. Bentley recognized the propensity of organized groups to participate in the courts in order to pursue policy goals as early as 1908 (Bentley 1908). Despite this long-standing proclivity for interest groups to pursue policy objectives through the courts, lobbying the courts is very different than lobbying other branches of government (Schlozman and Tierney 1986; Truman 1951). In fact, direct lobbying tactics used to influence policy makers in other branches of government are virtually useless in the courts. Although groups often attempt to influence the courts by bringing "test" cases and sponsoring litigation on behalf of group members or individuals, groups most frequently lobby the courts through the use of amicus curiae, or "friend of the court," briefs (Songer, Kuersten, and Kaheny 2000; Walker 1991). Because the US Supreme Court sits atop the judicial hierarchy, much scholarly attention focuses on interest group involvement as direct litigants (Epp 1998; Epstein and Kobylka 1992; Gonen 2003; Kobylka 1991; O'Connor 1980; Olson 1984; Samuels 2004; Vose 1958; 1959; Wasby 1995) and as amici curiae (Box-Steffensmeier, Christenson, and Hitt 2013; Caldeira and Wright 1998; Collins 2004, 2007, 2008, Kearney and Merrill 2000; Songer and Sheehan 1993) before the High Court. Despite the attention paid to interest group activity in the US Supreme Court, much less is known about the groups seeking to influence state supreme courts.

This lack of attention to understanding interest group involvement in state courts of last resort is surprising given the policy impact of these courts. With the US Supreme Court reviewing less than 1 percent of all cases appealed from state high courts, these courts are the final arbiters of legal, constitutional, and statutory interpretation in the states. The limited literature that investigates interest group lobbying in state high courts tends to focus on the effectiveness of groups filing amicus curiae briefs (Songer and Kuersten 1995; Songer, Kuersten, and Kaheny 2000; Kane 2017). However important these studies are, no study has yet to focus on understanding the variation in interest group participation across the states despite data that show interest group participation in state courts of last resort has increased substantially in frequency and scope (Epstein 1994).

This study seeks to explain why some states generate a more vibrant interest group population in the courts than others. Utilizing data on amicus filings in all noncriminal cases heard across the fifty state supreme courts from 1970 to 2010, this chapter explores how variations in institutional designs influence the likelihood of interest groups to engage state courts in lobbying activities. Specifically, court professionalization, method of judicial retention, and the presence of an intermediate appellate court are expected to affect the proportion of amicus filings found across

state high courts. Understanding the incentives created by different state court systems allows us to understand their implications for interest group strategy in state courts.

Theory and Hypotheses

Amici, Information, and Court Professionalization

Unlike lobbying in legislative or administrative arenas, lobbying the courts through amicus curiae briefs severely limits the amount of control a group has over their advocacy campaign. Participation as amici curiae affords groups control over neither the strength of the case nor the legal framework within which their argument is presented to the courts. Despite these limitations, amici are the primary avenue through which interested third parties—typically interest groups—advocate for their preferred legal outcome in the courts. To accomplish this goal, interest groups use amicus briefs as a vehicle to provide the court with information, legal arguments, novel legal frameworks, and scientific and social scientific data and to alert the courts to the potential legal, political, and societal consequences of a case outcome (Epstein and Knight 1999; Hansford 2004). Thus the information provided in amicus curiae briefs is often theorized to be the mechanism of interest group influence in the courts (Collins 2004, 2008; Hansford 2004).

Widespread evidence exists to support this theory of informational influence. Amici are widely cited in US Supreme Court opinions (O'Connor and Epstein 1983; Spriggs and Wahlbeck 1997). Litigants with supporting amici have been found to be more likely to be successful both before the US Supreme Court (Collins 2004, 2007; Kearney and Merrill 2000; Songer and Sheehan 1993) and before state supreme courts (Kane 2017; Songer and Kuersten 1995; Songer, Kuersten, and Kaheny 2000). The value of information provided by amici is also confirmed by some US Supreme Court justices (Breyer 1998; O'Connor 1996) and by state supreme court judges and their clerks of courts (Flango, Bross, and Corbally 2006).

If groups seek to influence court decisions by offering new information in amicus briefs, they should be more likely to invest these efforts in courts that possess greater organizational capacities with which to assess and utilize amici information. In short, groups should want to file amicus briefs in courts that have the time and resources to review and give serious consideration to the arguments of amici curiae. However, there is variation across states in terms of the professionalization of state supreme courts. State high courts differ greatly in terms of judicial salary, court staffing levels, access and allocation of law clerks, and caseload demands (Squire 2008). States that allow their high courts to control their caseloads (and thus limit their workload

each term), provide law clerks for their justices, and staff their courts at higher levels will be better able to digest, assess, and incorporate the views of amicus curiae briefs. Thus it is expected that states that provide their high courts with greater organizational capacities to utilize amicus information will experience higher levels of interest group participation.

> **H1:** States with greater levels of high court professionalization are expected to have greater levels of amicus filings as compared to states with less professionalized courts.

Judicial Elections and Interest Groups

Differences in methods of judicial retention utilized across the states present another institutional variation that may influence interest groups' engagement in state courts. There are five primary methods through which states retain their judges: partisan elections or nonpartisan elections, retention elections, and gubernatorial or legislative reappointment. The extant literature shows that judicial elections make state high courts more responsive to public opinion (Brace and Boyea 2008; Caldarone, Canes-Wrone, and Clark 2009; Huber and Gordon 2004). However, subjecting judges to the electoral process is often criticized for its potential to erode judicial independence by exposing judicial candidates to the rigors of campaign fundraising and advertising (Cann 2007; Sample et al. 2010; Shepherd 2009; Skaggs et al. 2011). These concerns are heightened by the increased cost of supreme court races in recent decades; the propensity for interest groups like business groups, trial lawyers associations, and unions to contribute to high court campaigns (Sample et al. 2010); and surges in outside spending by interest groups that have contributed to record-breaking spending in many recent high court campaigns (Bannon, Lisk, and Hardin 2017). In recent years, interest groups have increasingly relied on outside spending in an attempt to influence the outcome of high court races rather than contributing directly to candidate campaigns or political parties. In the 2016–17 election cycle alone, interest groups accounted for 40 percent of all outside money spent on advertising in high court races—a total of $27.8 million to elect state supreme court judges (Bannon, Lisk, and Hardin 2017, 2).

In light of the affinity for interest groups to contribute to the campaign coffers of judicial candidates, it is only logical for interest groups seeking to influence state court outcomes to focus their attention on those state high courts where there are contestable elections. A case-level analysis of amicus participation suggests this is the case; judiciaries staffed by competitive elections attracted higher rates of filings as compared to appointed and retention-elected judiciaries (Kane 2018). Therefore, states that retain their courts through contestable elections

(partisan and nonpartisan elections) are expected to garner the highest level of amicus participation.

> **H2:** States that retain high courts through contestable elections, which include partisan and nonpartisan elections, are expected to receive higher levels of amicus participation than states that utilize retention elections or reappointment to retain judges.

Policy Impact and State Court Structure

Interest groups may also target state high courts differently based on the perceived policy-making ability of the court. States whose court structures mimic the federal government's three-tier model with the presence of an intermediate appellate court may attract more interest group involvement in courts of last resort than states with only general jurisdiction trial courts and state supreme courts. States with intermediate appellate courts have high court dockets that are less clogged with routine appeals. Groups seeking to participate as amicus curiae may be more likely to file briefs in states with intermediate appellate courts because high courts in these states have the ability to decide a greater number of substantive cases that impact public policy as compared to those courts whose dockets are filled largely with mandatory appeals (Squire 2008). Having fewer mandatory appeals also tends to signal lower overall caseloads for state supreme courts. Thus groups may perceive courts with smaller caseloads as having more time to consider the additional information and legal arguments contributed by third-party briefs.

> **H3:** States with intermediate appellate courts are expected to have higher levels of amicus filings than states without.

Several additional independent variables are included in the analysis to control for factors that may affect interest group involvement in state supreme courts. First, because the increase in interest group involvement in state courts in the 1970s and 1980s coincided with the growing conservativism of the federal judiciary and calls by liberal groups for a rediscovery of "new judicial federalism" in which constitutional rights provisions could be secured through interpretations of state constitutions rather than the federal Constitution (Epstein 1994), a measure of state supreme court ideology is included to control for the possibility that groups are filing amicus curiae briefs in more liberal-leaning courts. State supreme court ideology is measured using Brace, Langer, and Hall's (2000) party-adjusted judge ideology (PAJID) scores, which range from 0 to 100, with lower

scores representing more conservative-leaning judges and higher scores more liberal-leaning judges. PAJID scores have been shown to outperform partisan identification as a measure of judge ideology and are available for the range of dates included in this study.

Similarly, due to the growing conservatism of the federal bench and emphasis by many groups to see more liberal interpretations of individual rights under state constitutions, the Erickson, Wright, and McIver (1993, 2006) measure of state citizen ideology is also included to control for the possibility that groups may be focusing on lobbying the courts in more liberal-leaning states. This measure of citizen ideology was created by disaggregating pooled CBS News / New York Times national polls between 1976 and 2003 to generate state-level estimates of citizen ideology. Scores range from −30.8 in Mississippi, the most conservative state, to 8 in the most liberal state of Vermont.

Another variable included in the analysis seeks to control for the possibility that interest groups are incentivized to file amicus curiae briefs in states where the groups already have an organization presence. If an interest group has existing offices within a given state, the costs of filing amicus curiae briefs should decrease, as the group's existing resources, infrastructure, and institutional knowledge decreases the costs of lobbying. To account for this possibility, Gray and Lowry's (1996) measure of interest group density, which assesses the number of interest organizations registered to lobby in each state, is included in the analysis.

The final control variable included is a measure of state legislative professionalism. Because many interest groups are primarily engaged in lobbying state legislatures, it may be that groups are filing amicus curiae briefs in the judiciaries of states that they have already targeted with legislative strategies. If this is the case, we may observe greater levels of interest group participation in states that have more professionalized legislatures as opposed to citizen-led legislatures. Squire's (1992, 2007) index of legislative professionalism is a composite index of various factors including legislator salary, length of legislative session, and staffing resources. The measure ranges from 0 to 1, where an index score of 1 indicates that a state legislature perfectly mirrors the professionalism of the US Congress and a score of 0 indicates no resemblance whatsoever.

Data and Research Design

In order to generate a measure of amicus participation in state supreme courts that varies across both states and time, state-specific search queries were crafted in Westlaw to determine the percentage of cases with amicus participation in each year for each state supreme court. These state- and year-specific search queries produced data for the dependent variable—the percentage of noncriminal cases decided by state supreme courts that involved at least one amicus curiae

brief. Criminal cases are excluded from the analysis because they greatly increase the number of cases heard by those state supreme courts that hear mandatory appeals in criminal cases while adding little to the overall picture of amicus participation. Across the fifty states, state high courts hear varying degrees of criminal appeals. In states without intermediate appellate courts, state high courts must review every criminal appeal generated by the lower trial courts. In other state courts of last resort, criminal appeals are only mandatory for certain classes of felony cases or in cases involving death-eligible offenses. If criminal appeals were included in the measure of the dependent variable, it could bias the overall proportion of cases with amicus participation in a downward direction for certain states, potentially masking the amount of interest group involvement in state high courts that hear mandatory appeals. Conversely, because amicus participation in state criminal appeals is infrequent, there is little reason to believe that excluding criminal cases from the measure of amici participation will drastically alter the picture of interest group participation in the states.

In order to gather data on the participation rates of amici across the states, a two-stage Westlaw search was conducted for each state over a forty-year period. The first search identified all noncriminal cases decided with full written opinions in each state while eliminating slip decisions, unpublished decisions, orders, and certiorari decisions that also appear in the Westlaw state databases. The second stage of the search was used to limit the initial search to include only those cases in which the words amici or amicus appear. Once the cases with amici were identified, each case was examined to be sure there was at least one amicus brief filed and that the search terms amicus and amici were not identifying a reference to an amicus brief in the body of the court's decision. In most instances, state-specific search criteria were required in order to identify all noncriminal cases decided with full opinions.

The model below is used to estimate the influence of the independent variables on the proportion of noncriminal cases in state supreme courts that include amici between 1970 and 2004.

$$\text{Percent amici}_{it} = \alpha + \beta\ \text{SSC professionalization}_{it} + \beta\ \text{contestably elected court}_{it} + \beta\ \text{retention elected court}_{it} + \beta\ \text{intermediate appellate court}_{it} + \beta\ \text{controls}_{it} + \sum_{it}$$

All of the hypothesized relationships between independent variables and the amount of amicus participation are premised on the institutional variation across states. While the data utilized in this study vary both over time and across states—time-series cross-sectional data—most of the independent variables of interest are slow or nonmoving over the time period examined. For example, only eight states altered their method of judicial retention over the forty-year span. Because there is little variation over time in most variables, two models will be estimated, both

of which allow for the inclusion of time-invariant variables. First, an ordinary least squares (OLS) regression model with clustered standard errors is utilized with year-fixed effects in order to account for any year-specific effects that might be present. This model will allow all variables to be included while accounting for the possibility that observations within states may be correlated or associated with one another. Second, because many of the hypotheses predict amicus participation rates to differ due to variations of high court institutional design across states, a between-effects model is estimated to explain the amount of variation of amicus filings that is accounted for only by the variation of the independent variables between states.

Trends in Amicus Participation

Figure 1 depicts a snapshot of amicus participation across all fifty states in 2010. By examining the most recent year included in the data set, we are able to obtain a sense of the overall participation rates of interest groups in state high courts. Overall, interest groups filed amicus curiae briefs in 23.1 percent of all civil cases filed in state supreme courts in 2010. However, there is great variation around this mean value of amicus activity. The California Supreme Court had the highest amici participation rate at 92.9 percent. Wisconsin's highest court had the second-largest amici participation rate with 72.7 percent. Michigan and New Jersey saw amici activity at 67.6 percent and 65.9 percent, respectively, while the supreme courts of Minnesota and Massachusetts attracted amici in nearly 53 percent of civil cases for that year. Despite these high rates of interest group participation in some state high courts, many states saw little amicus participation at all. North Dakota's highest court saw virtually no activity in 2010 with an amicus participation rate of 0.7 percent, and the state supreme courts of Nebraska, Alaska, South Dakota, Wyoming, and Delaware all saw amicus filings in fewer than 2 percent of civil cases.

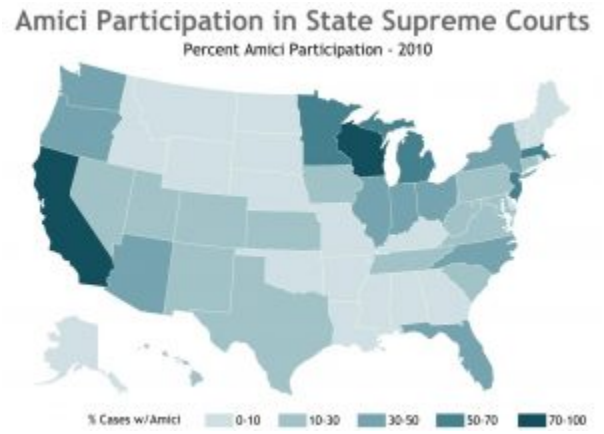


Figure 1: Amici Participation in the State Supreme Courts: Percent Amici Participation- 2010

Figure 2 shows the percentage of change in amicus participation rates in each state between 1970 and 2010. Overall, amicus participation in the states has increased over the past four decades. However, this increase has not occurred simultaneously in all states. While California saw a steady increase in interest group involvement in the high courts—ranging from a low of 30 percent in the early 1970s to nearly 93 percent in 2010—other states saw little to no increase in amicus filings. Most notably, Arkansas, Idaho, Iowa, Maine, Mississippi, Montana, Nebraska, North Dakota, Rhode Island, South Dakota, Utah, Vermont, and Wyoming all saw amicus participation rates that fluctuated below 1 percent over the majority of the forty-year period. Figure 3 shows a more detailed examination of amicus participation rates in each state over the full time frame. Results of the multivariate analysis lend some insight into why interest groups are prominent players in some state high courts and virtually nonexistent in others.

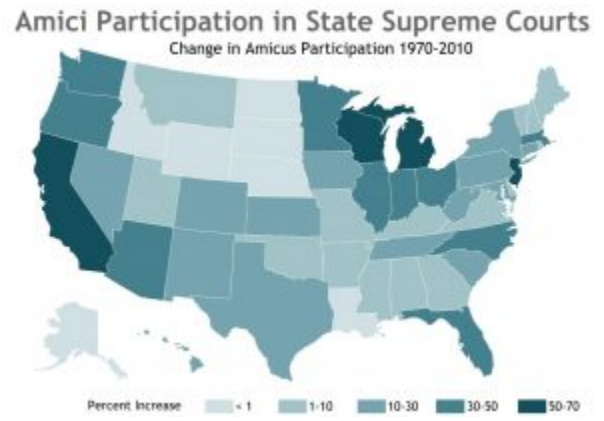
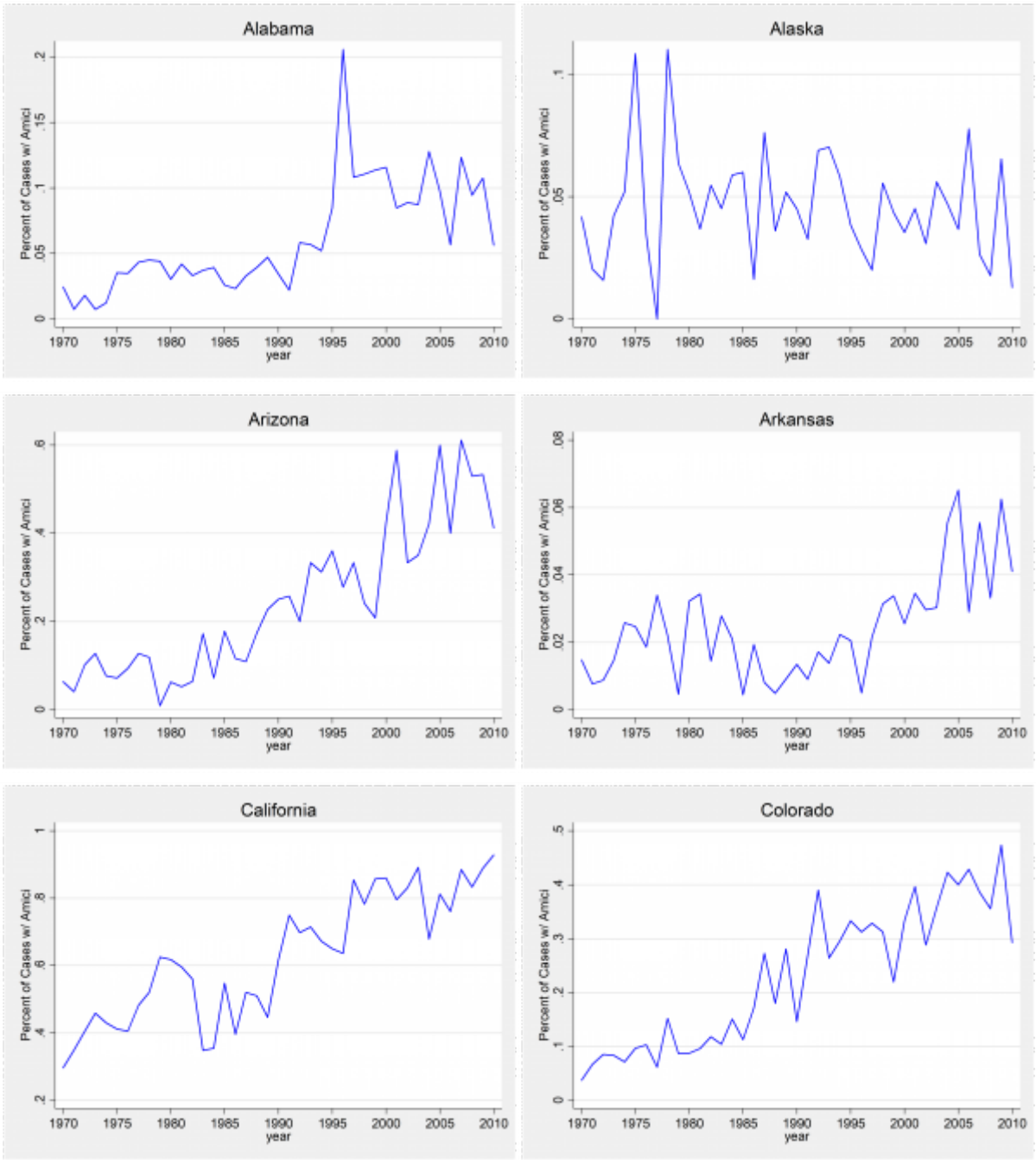
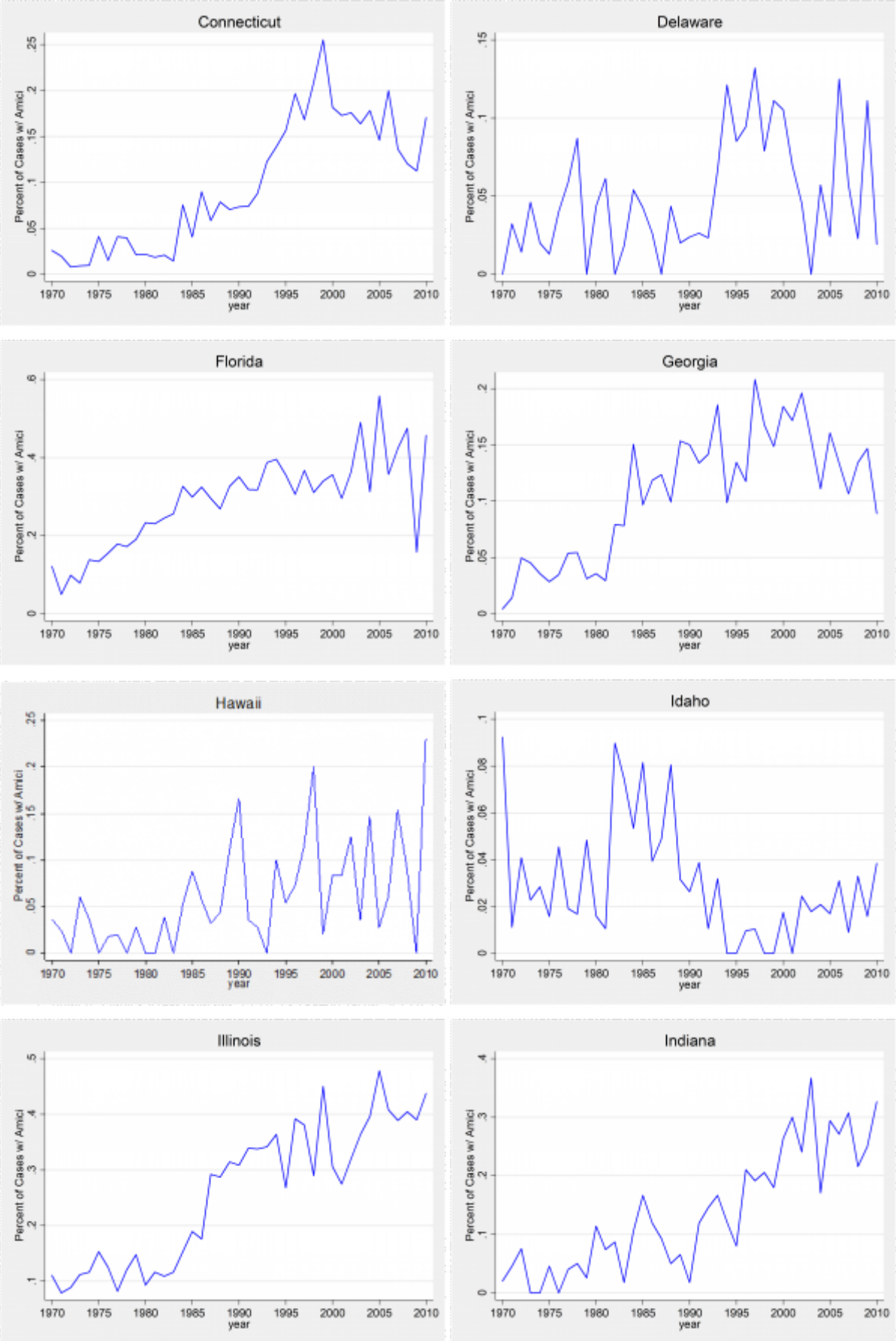
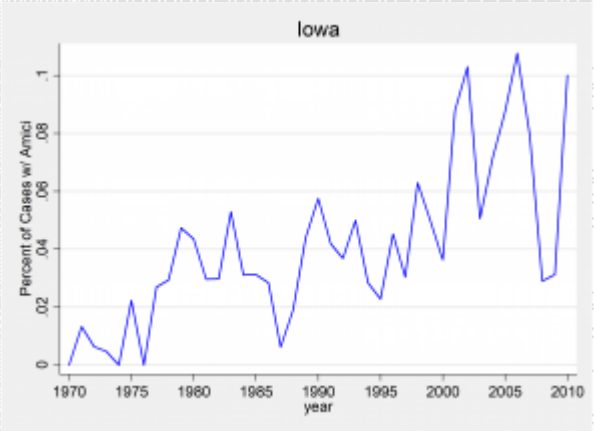


Figure 2: Amici Participation in State Supreme Courts: Change in Amicus Participation 1970-2010

Figure 3. Amicus Participation Rates across Time in the U.S. States




Connecticut
Delaware
Florida
Georgia
Hawaii
Idaho
Illinois
Indiana
Percent of Cases w/ Amici
year
1970
1975
1980
1985
1990
1995
2000
2005
2010


Iowa
Percent of Cases w/ Amici
0
.02
.04
.06
.08
.1
1970
1975
1980
1985
1990
1995
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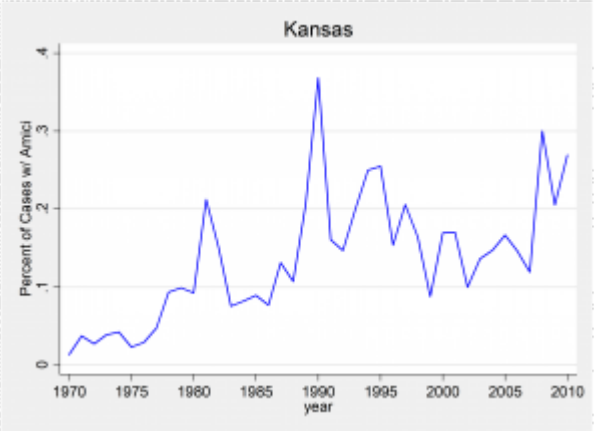
year


Kansas
Percent of Cases w/ Amici
0
.1
.2
.3
.4
1970
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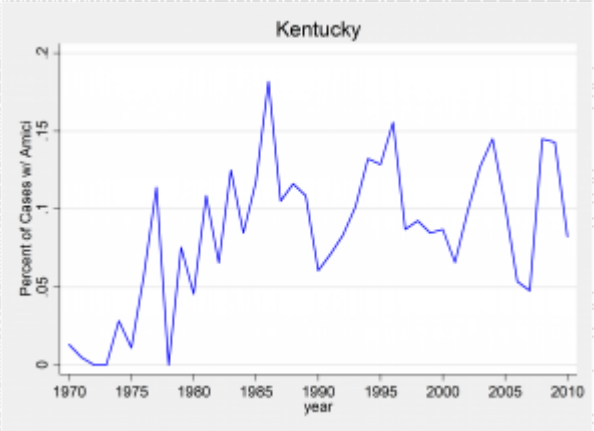
2010
year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Percent of Cases w/ Amici
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.05
.1
.15
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1970
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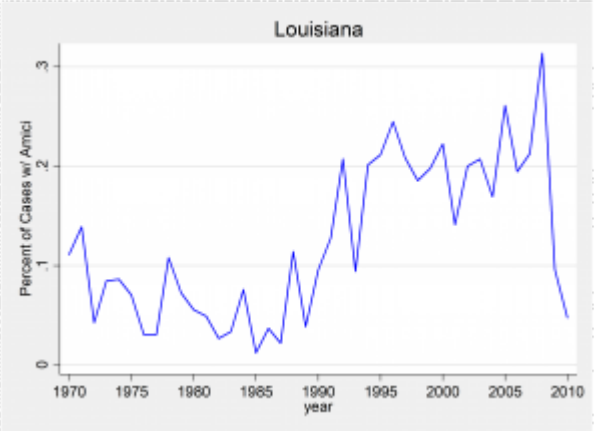
2010
year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Percent of Cases w/ Amici
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1970
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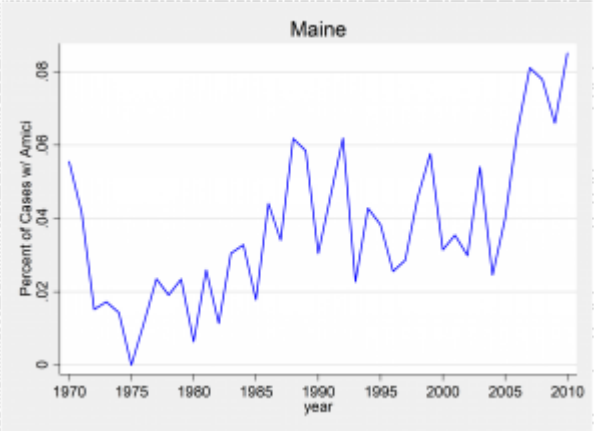
year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Percent of Cases w/ Amici
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.06
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1970
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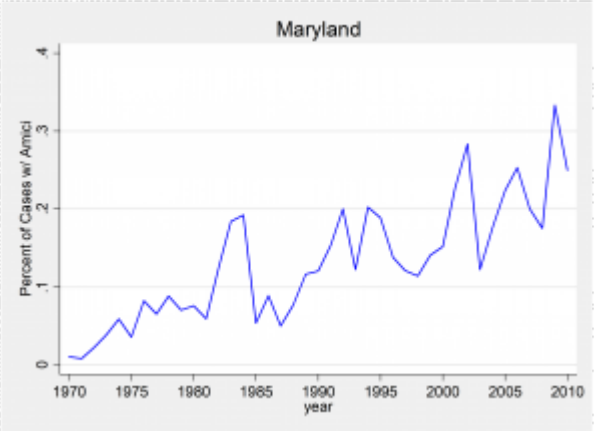
year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Percent of Cases w/ Amici
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1970
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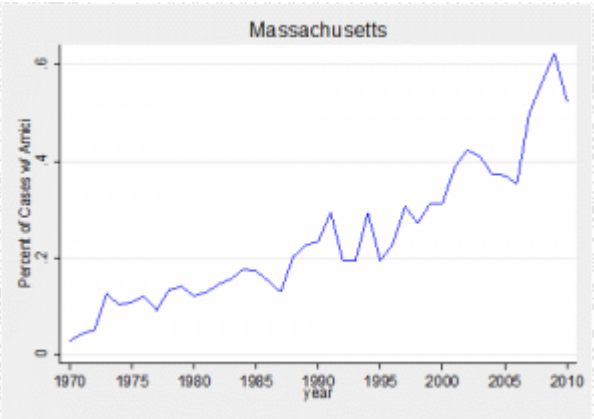
2010
year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Percent of Cases w/ Amici
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1970
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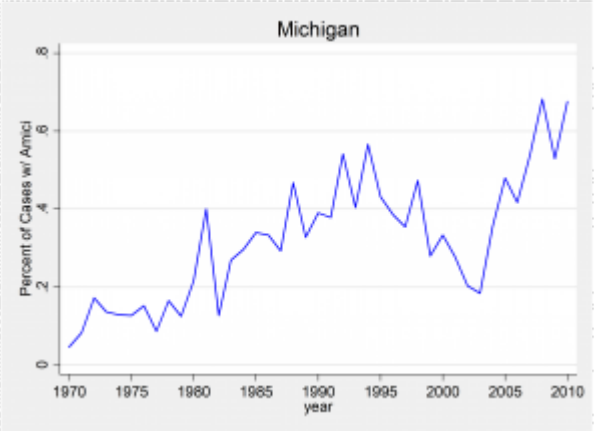
year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Percent of Cases w/ Amici
0
.2
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1970
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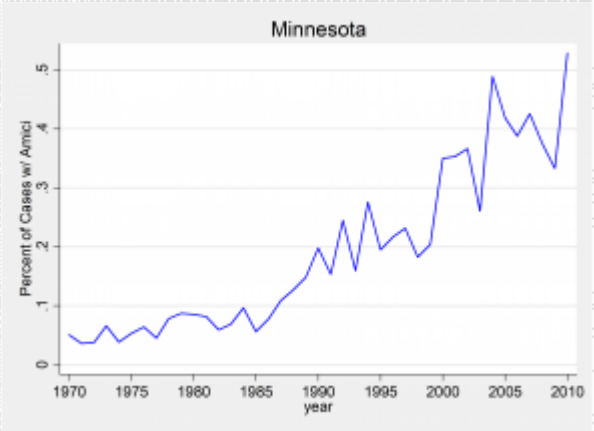
2010
year


Minnesota
Percent of Cases w/ Amici
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1970
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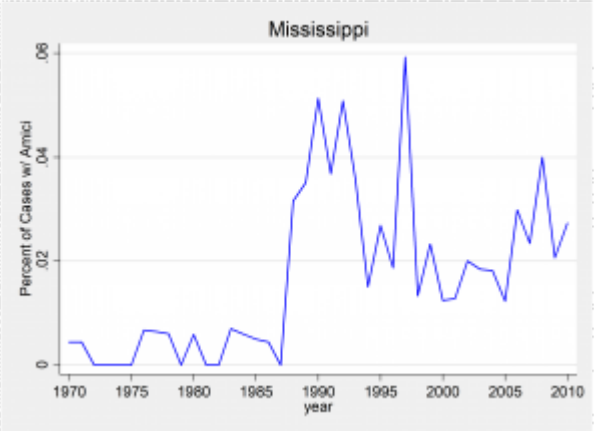
year


Mississippi
Percent of Cases w/ Amici
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1970
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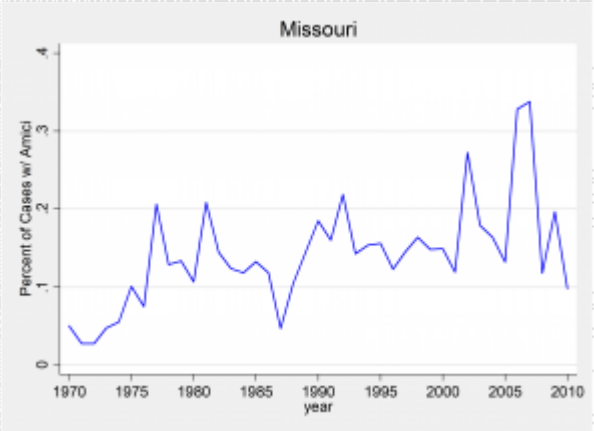
2010
year


Missouri
Percent of Cases w/ Amici
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1970
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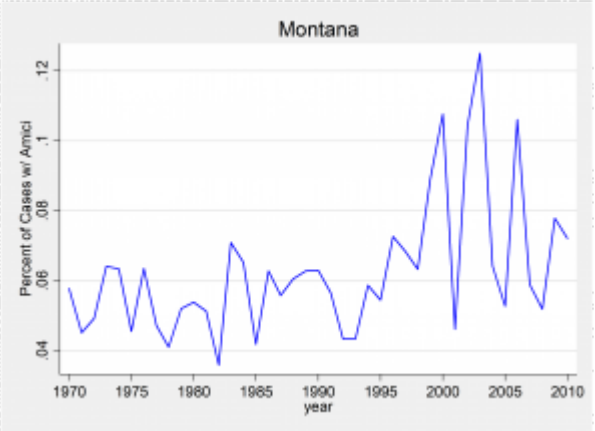
2010
year


Montana
Percent of Cases w/ Amici
.04
.06
.08
.1
.12
1970
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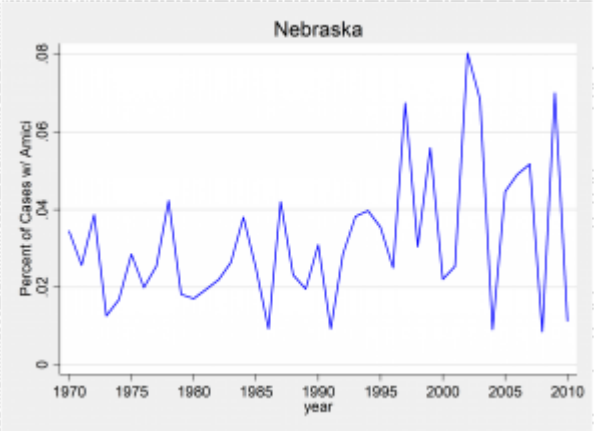
2005
2010
year


Nebraska
Percent of Cases w/ Amici
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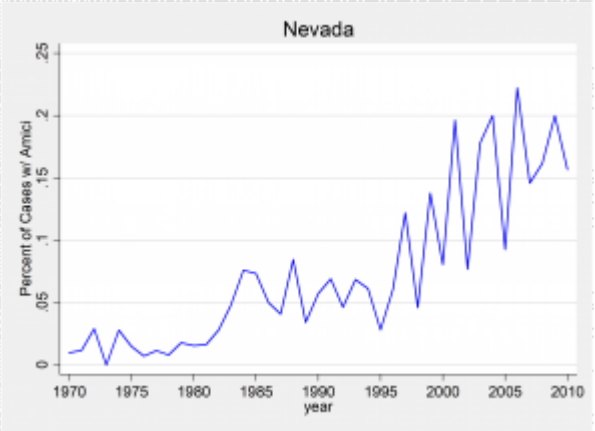
2010
year


Nevada
Percent of Cases w/ Amici
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.05
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1970
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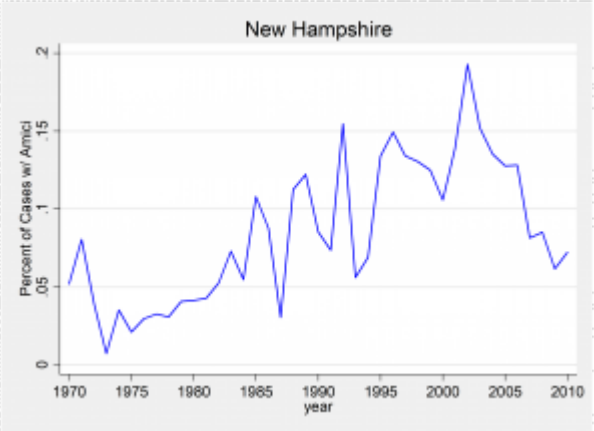
year


New Hampshire
Percent of Cases w/ Amici
0
.05
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1970
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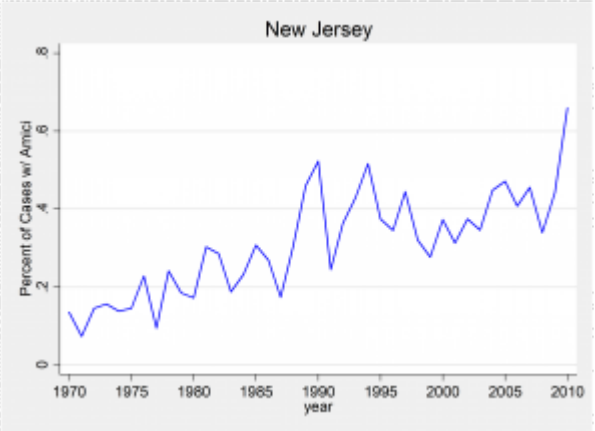
2010
year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Percent of Cases w/ Amici
0
.2
.4
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.8
1970
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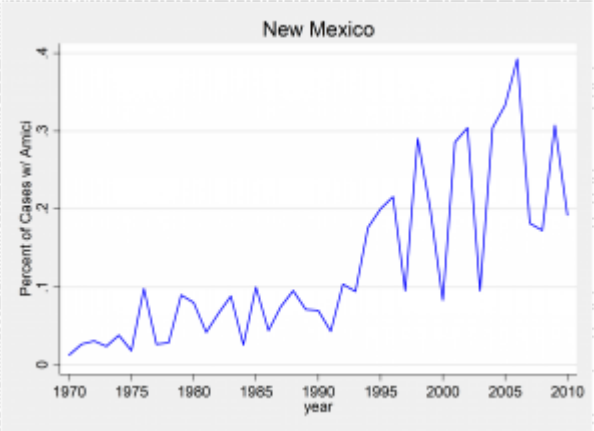
2005
2010
year


New Mexico
Percent of Cases w/ Amici
0
.1
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1970
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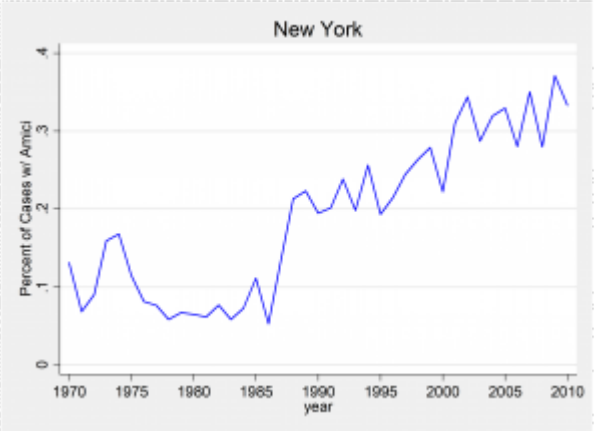
2010
year


New York
Percent of Cases w/ Amici
0
.1
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1970
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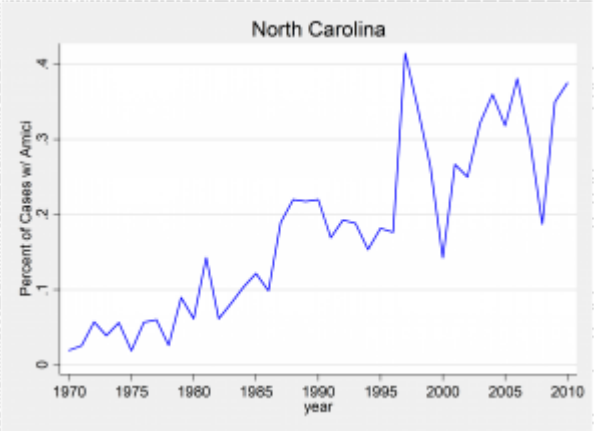
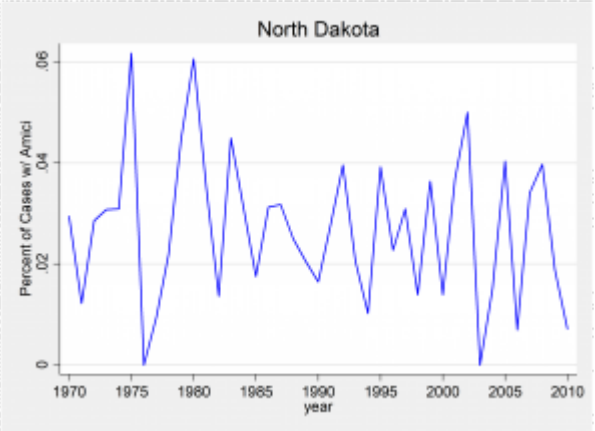
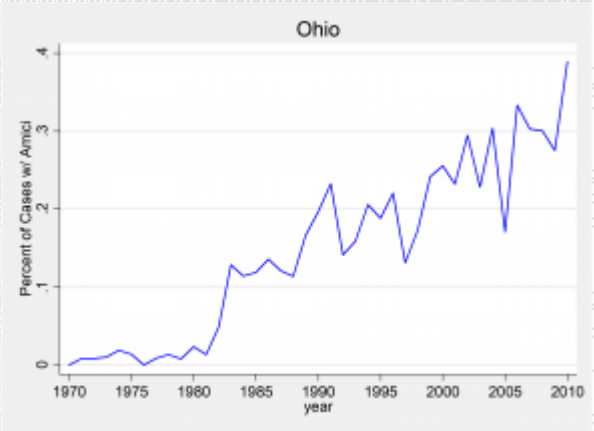
2010
year


North Carolina
Percent of Cases w/ Amici
0
.1
.2
.3
.4
1970
1975
1980
1985
1990
1995
2000
2005
2010
year


North Dakota
Percent of Cases w/ Amici
0
.02
.04
.06
1970
1975
1980
1985
1990
1995
2000
2005
2010
year


Ohio
Percent of Cases w/ Amici
0
.1
.2
.3
.4
1970
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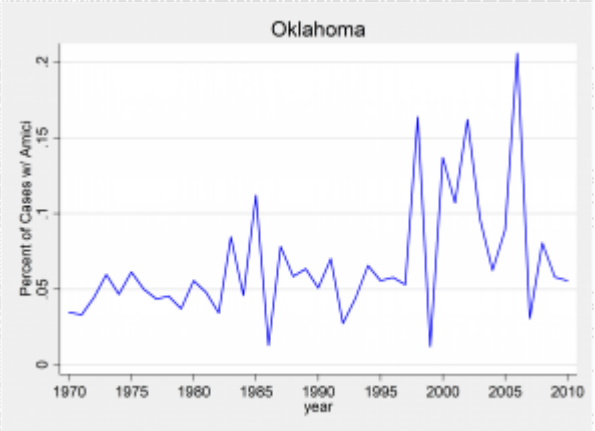
2000
2005
2010
year


Oklahoma
Percent of Cases w/ Amici
0
.05
.1
.15
.2
1970
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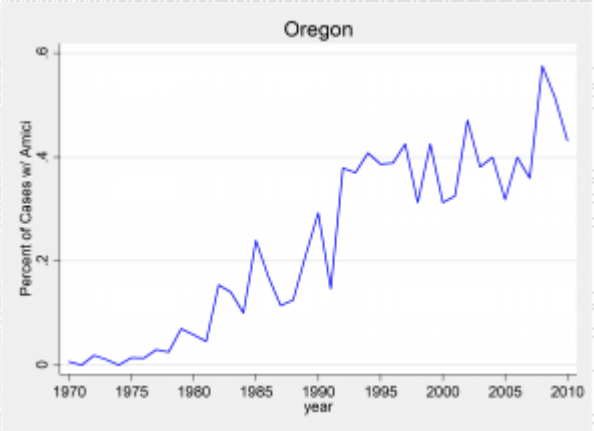
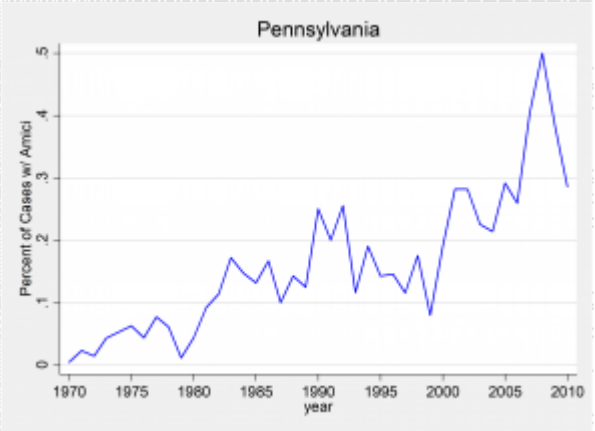
2005
2010
year


Oregon
Percent of Cases w/ Amici
0
.2
.4
.6
1970
1975
1980
1985
1990
1995
2000
2005
2010
year


Pennsylvania
Percent of Cases w/ Amici
0
.1
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1970
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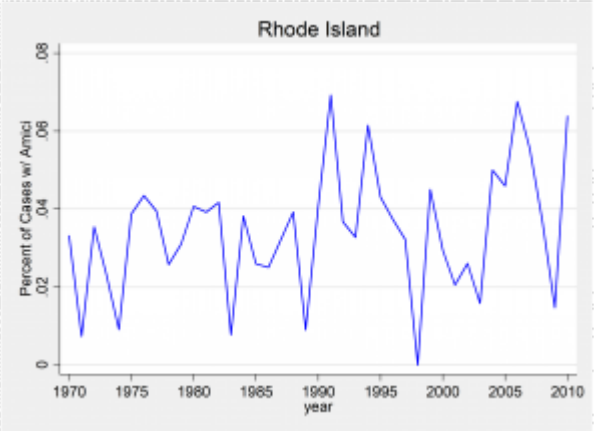
2005
2010
year


Rhode Island
Percent of Cases w/ Amici
0
.02
.04
.06
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1970
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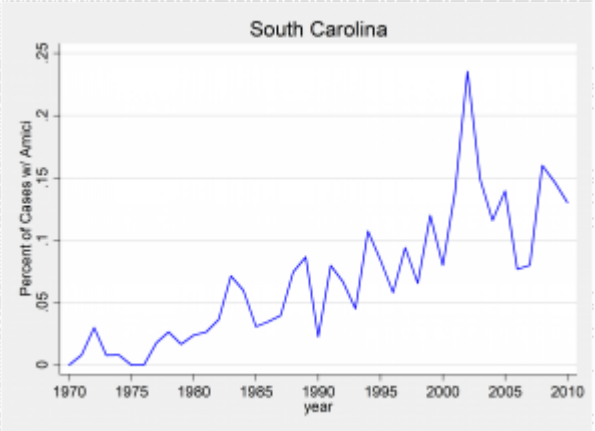
2000
2005
2010
year


South Carolina
Percent of Cases w/ Amici
0
.05
.1
.15
.2
.25
1970
1975
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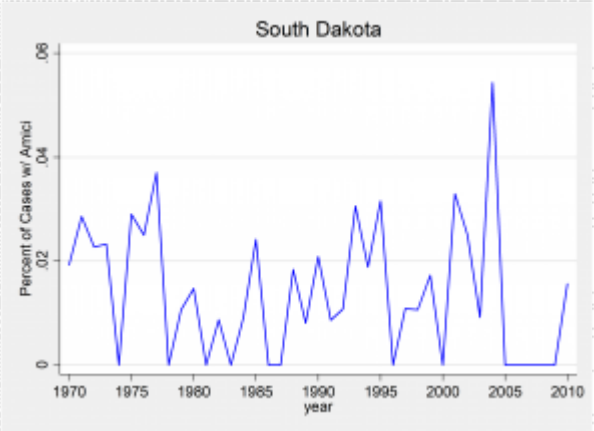
2005
2010
year


South Dakota
Percent of Cases w/ Amici
0
.02
.04
.06
1970
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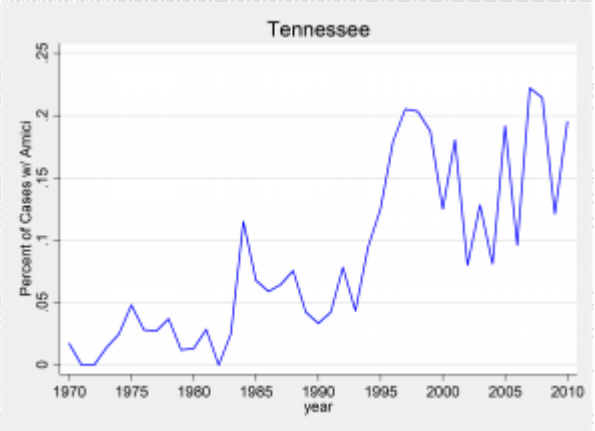
2010
year


Tennessee
Percent of Cases w/ Amici
0
.05
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.25
1970
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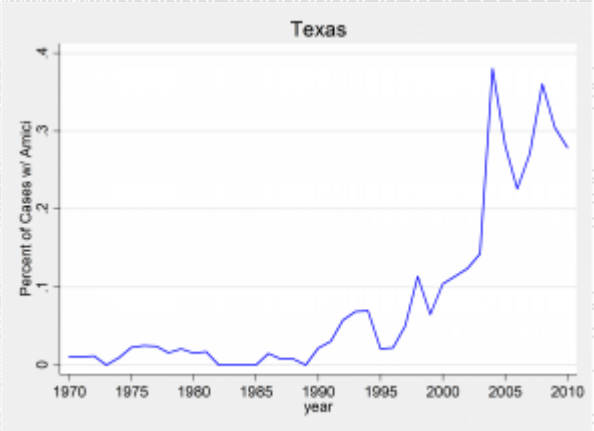
2005
2010
year


Texas
Percent of Cases w/ Amici
0
.1
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1970
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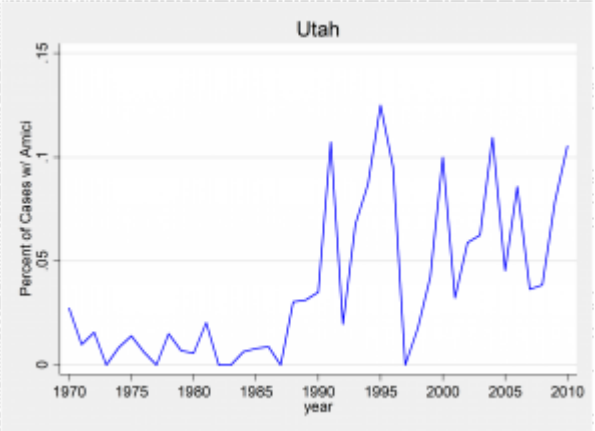
2010
year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Percent of Cases w/ Amici
0
.05
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1970
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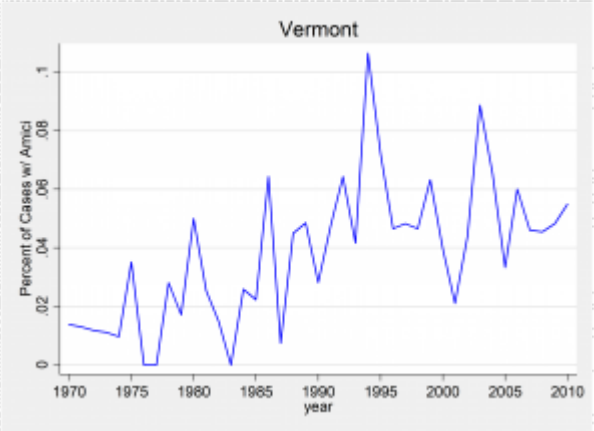
year


Vermont
Percent of Cases w/ Amici
0
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.04
.06
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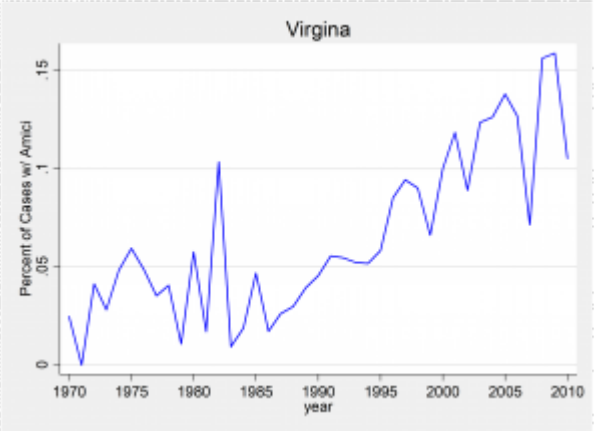
2005
2010
year


Virgina
Percent of Cases w/ Amici
0
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1970
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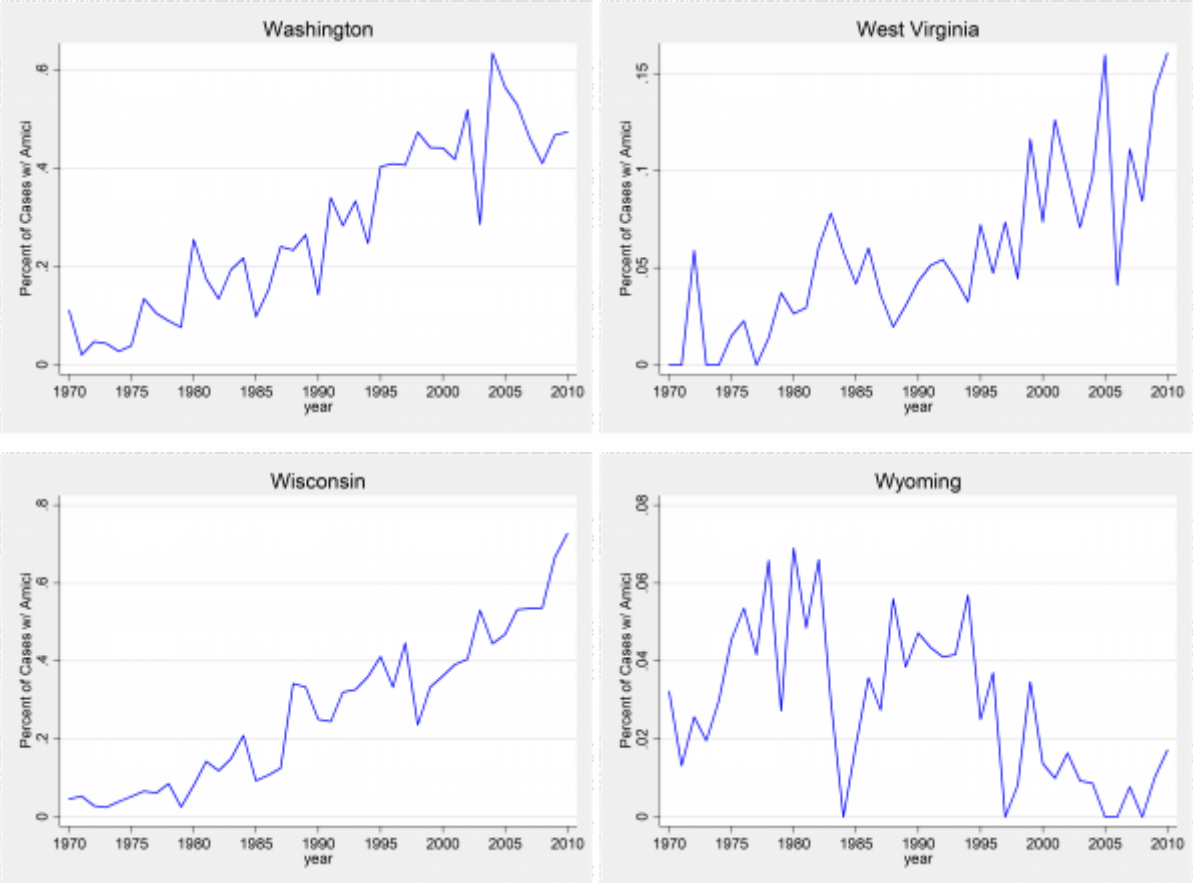
year



Results

Most hypotheses are confirmed by the results of the multivariate models, as shown in table 1. The single largest effect on amicus participation rates in a state's high court is the level of court professionalization. The more professionalized a state supreme court, the greater the amici participation. In substantive terms, a state high court that is one standard deviation above the mean value of court professionalization, such as the Supreme Court of South Carolina, would have an amicus participation rate that is 5.7 percentage points higher than the Oklahoma Supreme Court, with a professionalization score that is approximately one standard deviation below the mean. The Michigan Supreme Court, which has a professionalization score that is two standard deviations above the mean, will witness amicus filing rates that are 11.4 percentage points greater than those witnessed in the North Dakota Supreme Court, which falls two standard deviations below the mean. These results suggest that states with more professionalized high courts are more attractive lobbying venues for interest groups. It appears that interest groups are aware of the level of staffing and resources possessed by state supreme courts and are targeting more

professionalized courts that are better positioned to process and incorporate amici information into their judicial decision-making.

	OLS Model w/ Clustered Robust SEs w/ Year FEs	**Between Effects OLS Model**
State Supreme Court Professionalization Contestably Elected Court	0.197* (0.091) 0.081* (0.027)	0.159* (0.081) 0.074* (0.033)
Retention Elected Court	0.080* (0.032)	0.064 (0.035)
intermediate Appellate Court	0.017 (0.024)	0.037 (0.032)
Court Ideology	-0.0002 (0.0003)	-0.001 (0.001)
Interest Group Density	-0.00001 (0.00001)	-0.00001 (0.00001)
Legislative Professionalization	0.336** (0.094)	0.0331* (0.136)
State Ideology	0.005* (0.001)	0.005* (0.002)
Constant	-0.139* (0.057)	0.003 (0.061)
R^2	0.568	0.679 (between)
N	1740	1740/50 groups

Table 1: Predicting Percent of Cases with Amicus Participation in a State

*p<0.05, **p<0.001

Results of both models show that the method of judicial retention is also significantly and positively related to interest group participation in state high courts, as originally hypothesized. Specifically, states that utilize contestable elections, both partisan and nonpartisan, to retain high court judges attract third-party briefs at rates between 7.4 and 8.1 percent higher than states that appoint high court judges. States that use retention elections to retain high court judges also appear to have amicus filing rates that are 8.0 percent higher when compared to states that utilize

reappointive methods. It should be noted, however, that the results of retention elections fall just short of statistical significance in the between-effects model, though its coefficient is in the expected positive direction. The fact that interest groups are targeting elected judiciaries suggests that groups believe that courts accountable to the electorate may be more easily influenced by the views of outside interests. It is also interesting to note that, counter to expectations, interest groups also appear to be consistently targeting retention-elected courts. While retention elections are often designed to engender judicial independence and decrease public accountability, it appears that organized interests see these courts as more amenable to the views of third-party groups.

Surprisingly, states with intermediate appellate courts do not see greater levels of amicus filings when compared to those states without. In fact, a state that has an intermediate appellate court is no more likely to have greater amicus activity than a state without an intermediate appellate court. This suggests that third-party groups are not specifically targeting state high courts that have greater discretion over their caseloads.

Some of the control variables showed the expected relationships to the dependent variable. Legislative professionalism and state ideology are both positively associated with amicus participation rates in the states. States with more professionalized legislatures promote higher levels of amicus participation than do states with less-professionalized or citizen legislatures. These results may be a product of interest group familiarity with lobbying in the legislative arenas. Groups that regularly lobby more professionalized state legislatures appear to be more willing to enter the judicial arena by lobbying the high courts of those same states. Interest groups are also filing more amici in liberal-leaning states. This may be a result of the growing conservatism in the federal judiciary since the 1960s that propelled many liberal-leaning interest groups to seek greater rights protections in the states. Or perhaps organized groups, both liberal and conservative alike, believe that courts in more liberal-leaning states will be more amenable to the concerns of outside interests. While these explanations cannot be fully tested in this chapter, they leave open avenues for future research.

Contrary to expectations, state supreme court ideology proves to have no significant effect on the amicus participation rate in any of the models. This finding is particularly interesting when considered in conjunction with the positive and statistically significant effects of state ideology on amicus participation. Interest groups are not targeting amicus filings in states with more liberal judiciaries but do appear to be targeting courts in more liberal-leaning states. Perhaps state ideology is more visible to interest groups than the ideology of state high courts, and thus interest groups gauge the receptivity of courts to amicus arguments by the overall ideology of the state. Also surprisingly, the level of interest group density in a state does not have the predicted positive effect on amicus participation. This suggests that state high courts are not being targeted by groups solely because a given state has a particularly active interest group community.

Conclusions

With the relatively few cases being decided each year by the US Supreme Court, state high courts are routinely the final arbiters on most matters of state and federal law. With the policy-making power of these courts long entrenched, it is no surprise that interest groups have taken an interest in lobbying state high courts. This study provides the first comprehensive examination of the trends of interest group activity in state high courts from 1970 to 2010. The results indicate that interest group involvement in state high courts has proliferated in recent decades. However, this growth in amicus filings appears to have occurred unevenly, with some states showing steady increases and others showing erratic patterns of amicus filings over time. Utilizing original data on amicus filings in all noncriminal cases decided by state supreme courts, this study also finds that institutional variations in state court design account for much of the observed variation in amicus participation. Specifically, high court professionalization and contestable elections all serve to increase the rate by which amicus curiae briefs are filed in state high courts.

Results of this study indicate that interest groups view courts with greater access to resources and staff and more docket control as better arenas for presenting their policy expertise. This should not be surprising given the unique nature of lobbying courts. Groups filing amicus curiae briefs often must fit their policy arguments in the legal framework and fact patterns of an existing legal dispute. This affords groups less control over the design of their advocacy efforts than is typical in the legislative or administrative arenas. Given these limitations, the results of this analysis suggest that groups are strategically targeting more professionalized high courts that possess the resources to better equip a court to utilize and evaluate the information provided in third-party briefs.

States with popularly elected judiciaries also prove to be attractive venues for amicus participation by organized interests. Whether states hold contestable elections or use retention elections, interest groups filing amicus curiae appear to be attracted to courts whose judges are publicly accountable. The same elected courts that are often targeted by organized interests in third-party attack advertising during judicial elections are also more likely to be targeted by organized interests filing amicus curiae. Groups seem to be seizing on the electoral connection of these courts in hopes of increasing their chances of litigation success. Whether this affinity to filing amicus curiae in publicly accountable judiciaries is tied to the democratic nature of these courts or the perception that the demands of campaign fundraising erode judicial independence enough to open these elected courts to outside influences, organized interests are targeting elected judiciaries—both contestable and retention-elected judiciaries—at higher rates than their appointed counterparts.

As strategic actors, the study finds that interest groups target state high courts that they believe

will be more amenable to the concerns of third-party and state high courts that have the institutional capacity to make use of the information provided in these briefs. Groups are also targeting courts in more liberal-leaning states and those with more professionalized legislatures. While this type of strategic behavior by interest groups with limited resources may not be overly surprising, it does have implications for the independence of state judiciaries. If judicial elections are designed to create a democratic link between citizens and courts, this link may be eroded if the realities of running for office make these courts more susceptible to the policy arguments of interest groups filing amicus curiae. While the impact of these amicus briefs on state high court decision-making is beyond the scope of this analysis, there definitely appears to be a propensity of organized groups to target publicly accountable courts.

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Class Activity

Guidelines for Instructors

Break students into groups and have them work together to locate and skim an amicus brief submitted to a state supreme court. Briefs are typically available through Westlaw or LexisNexis Academic subscriptions held by many university libraries. Having students locate the briefs is also a good way for them to try a bit of legal research for themselves. However, instructors could also distribute preprinted briefs to the groups if locating them is too time-consuming. If your university library does not have access to a searchable legal database, full-text versions of these briefs filed with the US Supreme Court are available at SCOTUSblog (www.scotusblog.com) and could be used to hold the same discussion with students.

Below are a few case citations from the data set used in this article that contain good full-text amicus briefs filed in state supreme courts. These cases cover products liability, the environment, and free speech, and each was selected because there are multiple amici filed by various groups. This gives the instructor the ability to have each group examine different amicus briefs stemming from the same legal dispute.

Products Liability Cases

- *Advincula v. United Blood Services* (1996) 678 N.E.2d 1009.
- *Johnson v. American Standard, Inc.* (2008) 179 P.3d 905. https://caselaw.findlaw.com/ca-supreme-court/1309537.html
- *Kitchen v. K-Mart Corp.* (1997) 697 So.2d 1200. https://caselaw.findlaw.com/fl-supreme-court/1254858.html

Environmental Cases

- *Clean Wisconsin, Inc. v. Public Service Com'n of Wisconsin* (2005) 700 N.W.2d 768.
- *Eagle Environmental II, L.P. v. PA Dept. of Environmental Protection* (2005) 884 A.2d 867
- *Fafard v. Conservation Com'n of Barnstable* (2000) 733 N.E.2d 66

Free Speech/Expression Cases

- *Bowman v. Heller* (1995) 651 N.E.2d 369
- *Tuite v. Corbitt* (2006) 866 N.E.2d 114
- *Tyne v. Time Warner Entertainment Co., L.P.* (2005) 901 So.2d 802

Discussion Questions

- What types of arguments are the groups making to the court?
- Do you find the group's argument credible? Why or why not?
- What about the arguments submitted by the amici would be helpful to a state supreme court (or courts more broadly)?
- Should courts consider outside arguments other than the legal arguments submitted by the litigants involved in the case? Why or why not?
- Should courts be responsive to interest groups filing amicus curiae briefs? Why or why not?
    - Does responsiveness to interest groups undermine judicial independence?
- This chapter determines that groups appeared to be targeting elected courts more often than appointed courts.
    - Why do you think groups might target elected courts?
    - Is this targeting of elected courts by interest groups problematic? Why or why not?

PART II

COURT PROCEDURES

Civil Courts

Dumas, Tao. “How Much is a Leg Worth? What do Civil Trial Courts do, and Why Should We Care?”

Givens, John Wagner. “On Their Best Behavior? Foreign Plaintiffs in Chinese Administrative Litigation”

15. How Much is a Leg Worth?

What do Civil Trial Courts Do, and Why Should We Care?

TAO DUMAS

Abstract

This essay explores the function and role of state civil jury trials and the political and policy debates surrounding them. The most recent Republican Party Platform calls for additional tort reforms to protect doctors from frivolous lawsuits and reduce consumer costs. Yet while the political conflict over the civil justice system continues, these courts remain severely understudied, largely due to a lack of data availability. Consequently, much of the debate relies on limited empirical evidence. Despite the constrained scholarly attention, especially in political science, state civil trial courts of general jurisdiction are the final arbiters of the law in most civil cases. In order to begin to understand what these critically important courts do, I review legal academic and political science literature related to state court decision-making and case processing. I then use an original data collection of civil jury verdicts in four states (Alabama, Indiana, Kentucky, and Tennessee) to examine variation in docket composition, winners and losers, and institutional design across the states, with specific attention to tort reforms. For example, Alabama has enacted 29 different tort reforms, second only to Texas in total reforms. Meanwhile, Indiana utilizes institutional review boards, a type of reform where groups of medical professionals make a pre-trial determination about the merits of medical malpractice cases, with the proposed intent of reducing meritless malpractice trials. I then discuss possible relationships between institutional variation and jury verdicts.

Although an infrequent topic of discussion, civil trial courts are important and powerful institutions that rely on judges and juries to settle disputes and prescribe (typically) monetary retribution for injuries. By allowing injured parties to access the justice system and seek compensation for harms, the civil courts serve four primary purposes: 1) dispute resolution; 2) creating predictability in societal actors' behavior; 3) deterring misconduct and modifying conduct; and 4) allocating resources (Shapiro 1981). In civil cases, injured litigants, often individuals or groups with limited resources, bring suits against defendants who may possess "deep pockets," asking juries to convert damages to dollars by determining both the winner and the appropriate compensation. Civil trials often pit "have-not" plaintiffs against the "haves" (Galanter 1974). These courts constitute one of the few institutions where ordinary people and groups with

grievances can directly access the government to solve their disagreements, challenge wealthy and powerful businesses and organizations, and obtain a remedy for their injuries through monetary awards. Damage awards also perform the important function of punishing individuals, businesses, and organizations that engage in reckless or negligent behavior that harms others and encouraging them to cease said behavior. Moreover, the use of juries to solve most civil disputes allows members of the local community to determine winners and losers and appropriate compensation for injuries. Although civil trial courts clearly perform a central institutional and societal role, the merits of allowing lay jurors to solve disputes has and continues to be the subject of much deliberation among academics, reformers, and policymakers.

These persistent normative and political tensions regarding the role of civil juries in American society give rise to two empirical questions: First, are there observable differences in the way that civil juries resolve disputes and render damage awards from one community to another? Secondly, if we observe differences across communities, what factors might explain those differences? Civil trial courts operate in a variety of social and political contexts and under varying laws and constraints. This is especially true in the state courts where each state is largely allowed to decide how to organize and structure its courts and develop its own institutional rules. According to Brace and Hall (1993), "Institutional arrangements, which consists of internal and external rules as well as organizational structures, determine the aggregation of individual preferences within any given institutional body (916)." As such, varying institutional court structures and contexts might lead to disparate outcomes for similar cases. In order to better to understand what these critically important courts do, I begin by discussing the debates surrounding the civil justice system and the history of the tort reform movement. Next, I review legal academic and political science literatures related to the actors in civil justice system and state court institutions. I then use an original data collection of civil jury verdicts in four states (Alabama, Indiana, Kentucky, and Tennessee) to examine variation in docket composition, winners and losers, and institutional design across the states, with specific attention to tort reforms and judicial selection methods. I then discuss possible relationships between institutional variation and jury verdicts.

Debating the Civil Justice System

During the ratification debates the Federalists and Anti-Federalists contested the desirability of the constitutional protection of civil juries. The Anti-Federalists, preferring strong local government, argued that civil juries empowered communities to settle disputes themselves based on local standards. "Juries are constantly and frequently drawn from the body of the people, and freemen of the country; and by holding the jury's right to return a general verdict in all cases

sacred, we secure to the people at large, their rightful control in the judicial department (Federal Farmer XV, Storing 1981, 320)." On the other hand, the Federalists maintained that civil juries were outmoded and produced inconsistent applications of the law from one jurisdiction to another, jeopardizing the rule of law. Hamilton argued that, "The capricious operation of so dissimilar a method of trial in the same cases, under the same government, is of itself sufficient to indispose every well regulated judgment towards it…The best judges of the matter [civil juries] will be the least anxious for a constitutional establishment of the trial by jury in civil cases…"(Federalist 83, Goldman 2008, 416).

Although the Framers ultimately included the Seventh Amendment's guarantee of the right to a jury trial in all disputes involving claims greater than $20, the disagreement between the Federalists and the Anti-Federalists closely mirrors the current debate about tort law, a type of civil litigation where an injured party or parties seeks compensation by suing another party or parties for failing to act in a reasonably responsible way and causing an injury. Today's tort reform advocates frequently espouse the need to protect doctors and businesses from meritless lawsuits and limit the amount of money civil juries may award injured parties in order to bring down consumer costs and insurance premiums, especially for medical malpractice litigation. Groups seeking to limit the discretion available to jurors argue that trial verdicts do not represent rational, consistent analyses of the conflicts at bar, and variability in outcomes negatively affects businesses and individuals involved in litigation. Opponents of civil juries maintain that when individuals and groups bring frivolous lawsuits and/or when juries award unwarranted or excessively large damage awards, civil courts drive up the cost of doing business and either force doctors and companies out of business or increase consumer costs.

Conversely, those who trust the constitutional mandate of a trial by jury assert that jurors are capable of equitable resolutions. First, proponents of civil juries argue that juries are more sensitive to community values and are therefore more capable of deciding liability and determining damages regarding complex or conflicting social issues than judges. Additionally, juries serve to localize courts in the federal structure and allow citizens to govern themselves (Chapman 2007). Similarly, Haddon argues that juries provide the opportunity for diverse groups to contribute to legal decision-making and "provide the local knowledge and experience and community connection" that judges and experts lack (1994, 61). Furthermore, juries might better represent the community, since jury verdicts reflect group decisions, rather than the decisions of a single judge (Jonakait 2006). Second, Litan (1993) states that supporters of civil juries maintain that jurors can restrain governmental abuses of power. Finally, Litan states that advocates of civil juries rely on De Tocqueville's belief that civil juries educate citizens about democracy. Marder (2003) maintains that juries fulfill an important political role in addition to educating citizens in the democratic process, because juries also make difficult political decisions regarding complex civil disputes.

In political science, two common definitions of politics include "competition over scares resources" and "who gets what, when, why, and how" (Lasswell 1950). Referring to the politics of tort reform, Burke (2002) states, "[The] battle is highly partisan, with most Republicans taking the anti-litigation side and most Democrats lined up with the plaintiffs. These are struggles over distributional justice—who gets what— (27)." These arguments over civil litigation clearly reflect a disagreement over how resources should be distributed and who should make the allocation decisions, thus representing a classic political debate. Moreover, limitations on individuals' and groups' rights to sue for damages directly affect their ability to seek and obtain justice and have their grievances redressed by a court.

History of the Tort Reform Movement

Although efforts to restrict tort law prominently emerged in the 1980s, the call for reform began in the 1970s and continues. Congress has taken up several tort reform proposals, all unsuccessful to date. Congress enacted the first federal tort reform legislation in 1996; however, President Clinton vetoed both bills (see Allen 2006 for a more detailed discussion of the history of tort reform). President George W. Bush, in his 2004 State of The Union Address,[1] called for enacting caps on medical malpractice damage awards, once again bringing national attention to the issue. Despite congressional failure to enact reforms during the Bush administration, calls for national legislation continued, particularly during the Obama administration's efforts to enact the Affordable Care Act. In fact, in the 2011 State of The Union Address, President Obama suggested medical malpractice reform as a potential way to bring down health care costs, in spite of Democrats' traditional opposition to tort reform. In reference to bringing down health care expenses, President Obama said, "Still, I'm willing to look at other ideas to bring down costs, including one that Republicans suggested last year — medical malpractice reform– to rein in frivolous lawsuits."[2] The 2016 Republican Party Platform again called for tort reform to bring down healthcare costs.[3] Most recently, in June 2017, the House of Representatives passed a bill that would limit the amount injured plaintiffs could receive for noneconomic damages to $250,000 and limit the amount attorneys could collect in medical malpractice cases, but the bill was unsuccessful in the Senate.

1. Office of the Press Secretary. 2004. "Remarks Made by the President in the State of the Union Address." United States Capital, Washington, D.C.
2. Office of the Press Secretary. 2011. "Remarks Made by the President in the State of the Union Address." United States Capital, Washington, D.C.
3. See pg. 44 of the 2016 Republican Party Platform.

Even though tort reform advocates failed to achieve federal legislation, tort reform garnered considerable success in the states, with every state enacting at least one reform.

The Civil Justice System, Purposes, and Processes

A civil case involves four sets of key actors, litigants, lawyers, judges, and jurors who act within specific institutional contexts and arrangements. To better understand the civil justice system, I will begin by discussing the trial process as it relates to each actor and review related scholarly literature. I then discuss how overarching institutional features might affect the behavior of the actors. Although this research focuses primarily on the factors that influence civil litigation outcomes, it should be noted that trials represent only the final stage of the litigation process (Miller and Sarat 1980). "It is well known however, that only a small fraction of disputes come to trial and an even smaller fraction is appealed" (Priest and Klein 1984). Baum (1998) estimates that 62% of all cases settle without a trial. According to Baum trials settle at very high rates because trials present serious drawbacks for litigants: Litigation is expensive; the parties to the dispute lose control of the resolution; judges and juries may deliver unfavorable outcomes; and litigation increases the conflict between the parties. In fact, Engel and Steele (1979) describe the civil litigation process as a pyramid. "The life of a legal case can be conceived in terms of five stages: (1) the primary event, (2) the response decision, (3) pre-judicial processing, (4) judicial processing, and (5) implementation and consequences" (Engel and Steel 1979, 300). Each stage of the pyramid contains fewer claims as disputes are resolved through various means, with trials representing the least common civil disputes.

Litigants

Every civil dispute begins with a plaintiff's alleged accident or injury and the decision on the part of the injured to hire an attorney to represent his/her interests. Civil courts of general jurisdiction process both contractual disputes (cases in which one party argues that the other failed to uphold the terms of a prior legally binding agreement) and torts. Plaintiffs' injuries can result from either intentional or unintentional, negligent behavior. Although the civil justice system technically allows anyone with a legitimate injury to bring a suit, Galanter's now famous party capability theory exposes how the basic architecture of the legal system serves to systematically advantage the "haves" over the "have-nots" (Galanter 1974). Scholarship in this vein generally relies on litigants' status as individuals, businesses, and organizations to serve as proxies for haves and have-nots, and in general, studies examining litigant success before U.S. courts find support

for the notion that well-resources parties such as businesses garner more favorable outcomes when compared to individuals (Farole 1999; Songer and Sheehan 1992; Songer, Sheehan, and Haire 2000). In particular, the government possesses considerable resources and uses them to achieve success rates far greater than other litigant class (Farole 1999; Kritzer 2003). Litigant status appears to consistently impact the likelihood of achieving a favorable ruling before a court (Kinsey and Stalans 1999). Furthermore, disparities in success rates grow as the inequality in resources between the parties increases (Songer, Sheehan, and Haire 1999). Since civil trails routinely pit "have-not" plaintiffs against better-resourced defendants, Galanter's theory predicts that plaintiffs might encounter considerable disadvantages in achieving compensation for their injuries in court.

Lawyers

Once the injured party contacts a personal injury attorney, the attorney must decide whether to take the case. Scholars maintain that plaintiffs' lawyers are important gatekeepers to civil justice system who largely determine whether a plaintiff's grievance becomes litigation (Daniels and Martin 2015; Kritzer 1997-98, 1999; Yeazell 2018). According to Priest and Klein (1984), parties and their attorneys make strategic calculations when deciding to bring a case to trial based on the expected costs and the probability of favorable and unfavorable outcomes based on the decision standards in place, the uncertainty about the relative merits and potential success of any case, and the stakes for the parties involved.[4] Due to attorney strategy, trial courts adjudicate only the most contentious and unpredictable cases.

Most plaintiff attorneys in civil cases utilize contingency fees, a compensation system where lawyers defer payment until the case is successfully settled and receive a portion of their client's winnings, to attract clients. The inherent risk and uncertainty in contingency fee practice (Daniels and Martin 2000, 2002; Kritzer 2004) encourages attorneys to seek speedy case processing (Kritzer 1990) and makes settlement and negotiation central features of the civil practice (Kritzer 1991, 2004, 2015). Whether and how much insurance coverage the defendant possesses largely

4. Priest and Klein's original article argue that the case selection process would result in plaintiff wins rates of around 50%. Although law and economics scholars generally accept the notion that attorneys make strategic assessment of their cases' potential success at trial, tests of the 50% hypothesis produce considerably mixed results with some finding support (Kessler, Meites, and Miller 1996; Siegleman and Donohue 1995; Waldfogel 1995), while others argue that plaintiff win rates diverge considerably from the predicted 50% (Baxter 1980; Eisenberg 1990; Linder 1988; Hylton 1993; Helland, Klerman, and Lee 2017).

dictates whether an attorney will take the plaintiff's case (Yeazell 2018). Although insurance does not determine whether a defendant is or is not liable, insurance policies provide the assets from which damages can be collected, and the policy limits determine whether an attorney can profit from the claim. If a lawyer will need to invest more money in a case than the defendant's policy limits, the case is not profitable and an injured plaintiff is unlikely to obtain legal representation, regardless of the merit of the plaintiff's claim. Yeazell argues that, "In a world where litigants pay their own lawyers and in which money damages predominate as a remedy, few will sue an insolvent, or even a poor, defendant" (2018, 16).

Scholars note that the contingency fee system allows more "have-nots" to participate in the legal system (Karsten 1997; Kritzer and Krishnan 1999), since those with strong cases can obtain high quality representation (Yeazell 2018). Yet plaintiff attorneys routinely face better-resourced defense attorneys who often serve as corporate counsel and typically receive pay regardless of the outcome, which could disadvantage plaintiffs in the negotiation and settlement process. In fact, Heinz et al. (1998) observe that 90% personal injury lawyers who represent plaintiffs practice in small firms or solo practice. However, Dumas, Haynie, and Daboval (2015) uncover evidence that local plaintiffs' lawyers, despite practicing in smaller firms with fewer resources, appear to use their familiarity with the local legal community to offset resource imbalances when pursuing cases against larger out-of-town firms. Overall, the literature suggests that lawyers working on a contingency fee basis must strategically screen cases for profitability, and plaintiffs with strong cases can obtain legal representation, although that lawyer might be outmatched by the defense in terms of resources.

Once an attorney accepts a case, and the attorney files an official a document called a complaint with the court, the case becomes a trial. A complaint states the plaintiff's alleged injury, the defendant's role in causing that harm, and the desired remedy.

Judges & Jurors

While most civil cases end in settlement (Eisenberg and Lanvers 2009; Galanter 2004; Yeazell 2018), those cases that survive the pretrial process without settling then go on to trial. The trial judge plays a key role in shaping the trial and exercises considerable discretion at the trial and pretrial phases of litigation. Judges determine jurisdictional questions, limits on discovery, the trial date, pretrial publicity issues, change of venue requests, and motions to dismiss or for summary judgment, give jury instructions, render judgment notwithstanding the verdict decisions, and make other important decisions that affect a trial's resolution. In *Democracy in America*, Alexis De Tocqueville ascribes a substantial role to judges and their ability to influence juries in civil trials. De Tocqueville states, "It is the judge who sums up the various arguments which have wearied

their [jurors'] memory, and who guides them the devious course of the proceedings; he paints their attention to the exact question of fact that they are called upon to decide and tells them how to answer the question of law. His influence over them [jurors] is unlimited" (Tocqueville 1948, 286). If Tocqueville is correct, the judge presiding over a case likely possess a considerable role in influencing the outcome, which also suggests a role for institutional rules that condition judges' behavior.

The trial concludes after both parties present their arguments, and the judge then instructs the jury on the points of law relevant for the particular case. Judges typically give two types of jury instructions, pattern and general jury instruction.[5] General instructions involve the burden of proof, inferences, demeanor of jurors, unanimous verdicts, and admission of expert testimony. Pattern instructions are specific to the individual case. For example, depending on the case type, judges will provide definitions of negligence, wantonness, or other torts. The judge also informs the jurors of the charge on damages. In other words, the judge tells the jury the type of damages the plaintiff seeks (pain and suffering, future damages, punitive damages, or special damages). For civil cases, the jury must evaluate the severity of the plaintiff's alleged injury. Then, the jury must decide if the defendant's actions or inactions caused the plaintiff's injury.

If the jury deems the defendant liable, the jury must then determine the appropriate compensation. In *Determining Damages* (Greene and Bornstein 2003) outline three broad types of damages that juries consider. Compensatory damages are damages intended to repay the injured party and return him or her to pre-injury levels of function or replace the loss caused by the injury or incident. If the defendant is liable, the jury typically awards compensatory damages. Compensatory damages, also called economic damages, may be awarded for things such as property damage or monetary loss. Plaintiffs may also seek, and juries sometimes award punitive damages. The jury awards punitive damages when the defendant's conduct goes beyond negligence to the extent of reckless or malicious behavior (Ghiaridi and Kircher 1995). Punitive damages awards are often large sums and serve the purpose of punishing the defendant and deterring similar behavior in the future. Most states only allow punitive damage awards when the jury first awards compensatory damages; however, some states, such as Alabama and Kentucky, allow juries to award only punitive damages. Although tort reform advocates generally support limitations on punitive damage awards, academic scholarship suggest that punitive damage awards occur very infrequently (Eisenberg et al. 2002). Plaintiffs may also seek and receive non-pecuniary (non-economic) damages, which include awards for emotional injuries, pain and suffering, and loss of life enjoyment. Punitive and non-pecuniary damage awards often draw ire from tort reform advocates due to their subjective and unquantifiable nature.

5. For more detail concerning jury instructions, each state bar provides state-specific versions.

Institutions

Litigants, lawyers, judges, and jurors all operate within institutional arraignments and societal contexts that structure the decision-making process for each actor. However, since each state controls its own civil courts, institutional arrangements vary by state, and actors in the legal system make choices under very different procedural rules and processes. As such, we might reasonably expect that outcomes will vary across states based on the institutions in place. According to Galanter (1999), tort reform constitutes the most recent and salient change to the civil justice system. Haltom and McCann (2004) maintain that the modern tort reform movement began in the 1970's as response to a number of expansions in access to the courts, the creation of class action lawsuits, a growth in the size of the legal profession, and social reform movements that engaged in strategic legal mobilization through tort law that altered the "cost, risks, and profits" for corporations and service providers, especially doctors, who had previously benefited from restrictions on lawsuits. In addition to lobbying state and national legislatures and other direct attempts at altering tort law, reformers also engaged in mass media campaigns aimed at creating a cultural perception that tort filers are irresponsible, immoral, and greedy and that plaintiff's lawyers are dishonest and self-serving (Haltom and McCann 2004). While reformers seek to address several perceived deficiencies in the civil jury system, reforms generally attempt to address two issues, protecting defendants from "frivolous" lawsuits and limiting the size of awards juries can assess against them.

Despite tort reform's highly salient effect on the civil courts, scholars debate both the causes and goals of the tort reform movement. The American Tort Reform Association (ATRA) is a national organization dedicated to reforming the civil justice system. ATRA's website states that, "ATRA was founded in 1986 by the American Council of Engineer Companies. Shortly thereafter, the American Medical Association joined them. Since that time, ATRA has been working to bring greater fairness, predictability, and efficiency to American's civil justice system."[6] However, Sloan and Chepke (2008) maintain that "[I]t seems unlikely that it [tort reform] is fundamentally about the goals espoused by its proponents, which are said to benefit people in their roles as patients and tax and premium payers (86)." Other scholars are similarly skeptical of reformers purported goals. Yeazell (2018) argues that tort reform emerged in the late 1970s as a partisan political issue due to significant economic changes such as the rise in health care costs and the decline of domestic manufacturing. "Republicans sought to limit civil litigation on the grounds that lawyers and litigation were ruining the country—or at least important swaths of the economy—while Democrats defended litigation and proposed more of it as a solution to one or more problems (83)."

6. Joyce, Sherman. 2007. "A Message from ATRA President, Sherman Joyce." http://www.atra.org/about/

While in actuality, it seems that civil litigation served as a scapegoat for both parties' failure to ensure the public's access to affordable health care and to protect people from global competition and dangerous products. Moreover, in addition to altering the formal rules, tort reform changed public perception of the civil justice system though a massive public relations campaign, altering both the way jurors evaluate torts and how attorneys practice law (Daniels and Martin 2001, 2004).

Although tort reform affects all aspects of tort law, the academic studies that examine the effect of tort reform, like the political debate surrounding the subject, tend to focus on medical malpractice. Baker (2005) describes what he calls the "Medical Malpractice Myth," the idea that the vast expansion of medical malpractice lawsuits and pro-plaintiff jury awards, regardless of the merits of the actual case, drive up health care costs for patients and/or force doctors and health clinics out of business. Although Baker and other academic researchers largely reject the myth, medical malpractice remains at the forefront of the tort reform debate. Although the precise reason for tort reform's focus on medical malpractice is uncertain, it likely stems at least in part from the fact that health care costs continue to rise at rates much higher than average incomes (Buchmueller, Carey, and Levy 2013), and doctor's malpractice insurance premiums continue to experience cost spikes (Sloan and Chepke 2008; Yeazell 2018).

Much like the discussion about the causes of tort reform, scholars and reformers disagree about the effects of reforms on medical practice. Although research finds that tort reforms decrease the number of tort filings (Avraham 2007; Stewart et al. 2011; Yates, Davis, and Glick 2001) and diminish the size of awards successful parties receive (Dumas 2016; Hyman et al. 2009; Shepherd 2008; Yoon 2001; Zeiler 2010), many scholars disagree about whether reforms achieve their stated goals. Some research shows that tort reforms reduce insurance company loses (Born, Viscusi, and Baker 2009), reduce the cost of employer-sponsored health insurance premiums (Avraham, Dafny and Schanzenbach 2012), and bring down medical malpractice premiums (Danzon, Epstein, and Johnson 2004; Kilgore, Morrisey, and Nelson 2006). Additionally, Avraham and Schanzenbach (2010) maintain that tort reforms increase health insurance coverage by bringing down the cost of private insurance. Yet other scholarship finds that reforms do not bring down medical malpractice insurance premiums (Baker 2005; Sloan and Chepke 2008; Yeazell 2018), consumer costs (Paik et al. 2012; Sloan and Shadle 2009; Zeiler 2010), or consumer risk (Rubin and Shepherd 2007; Shepherd 2008). Others argue that the effect of tort reform varies by the type of reform (Currie and MacLeod 2008).

In addition to debate regarding the effectiveness of tort reforms, scholars also question their normative good (Zeiler 2010). For example, Koenig and Rustad (1995) find that women receive non-economic and punitive damages awards at higher rates than men due to gender differences in the types of injuries male and female litigants sustain; therefore, caps on punitive and non-economic damages disproportionately affect women plaintiffs. Additionally, Finley (2004) shows that women and elderly victims are more likely to experience noneconomic injuries, such as

assault, fertility loss, or abuse and are thus disproportionately impacted by noneconomic damage caps, suggesting that tort reforms produce negative consequents for the more vulnerable members of society.

Data and Analyses

Unfortunately, the numerous normative and political debates surrounding civil jury decision-making suffer from a severe lack of reliable empirical data, preventing a rigorous assessment of the claims of either side (Elliot 2004; Galanter 1993; Galanter et al 1994; Saks 1992; Sanders and Joyce 1990; Vidmar 1995). Even though state civil trial courts adjudicate most civil disputes (Galanter 2004), data limitations result in even fewer studies of these courts than their federal district court counterparts. The lack of civil trial court research is especially pervasive in political science where scholars largely study appellate courts, and when political scientists study trial courts, that research typically examines criminal courts. Consequently, these critically important institutions remain under-studied, and policymakers debate and adopt reforms without the aid of comprehensive research.

Unlike all federal court or state appellate court decisions, which are published and publicly available, state civil jury verdicts are often unpublished, unavailable to the public, and not systematically archived at all in several states. Consequently, many studies of civil jury decision-making rely on post-trial interviews and mock jury simulations, or quantitative studies of relatively limited data sources. Although each method of studying jury verdicts contributes to our understanding of trial court behavior, each method possesses benefits and limitations.

Post-trial interviews provide the ability to speak directly with actual jurors; however, these interviews depend on self-reported data that might not adequately reflect jurors' actual decision-making processes and evaluations (Sommers and Ellsworth 2003). Mock trials often seek to observe the influence of individual juror traits on verdicts. However, scholars critique mock jury research for lacking external validity (Breau and Brook 2007), over-reliance on students (Bray and Kerr 1982; Devin, Clayton, and Dunford 2001; Howard and Leber 1988) and for lacking the depth, detail, and authenticity of actual trials (Bray and Kerr 1982). The use of experimental methods also prevents the exploration of actual trials. On the other hand, scholars critique many quantitative studies that rely on available data sources for their inability to control for case facts, injuries, or quality of representation (Saks 2002).

While not immune from flaws, the data collection for this project improves the quality of civil jury verdict research through the creation of a comprehensive trial court database. Jury verdict reporters provide the primary data source utilized in this study. Jury verdict reporters are

independent publications primarily used by attorneys that provide a summary of each civil case, the attorneys for the parties, the judge presiding over the case, the type of case, the type of injury alleged, and the jury verdict. Practicing attorneys use jury verdict reporters to assess what types of cases win, where cases win, and the types of awards juries hand down. The data collection for the volumes runs from November 2008 to November 2009. Alabama, Indiana, Kentucky, and Tennessee Reporters were selected, because the editors of these volumes attempt to consistently report every jury verdict in each state based on actual trial records rather than self-reported data.[7] Although the civil trial courts in Alabama, Indiana, Kentucky, and Tennessee may or may not necessarily represent the nation's civil courts, these data provide the most comprehensive source of civil verdicts available.[8] Additionally, these states provide ample variation at the sub-state level on social, political, and economic indicators. These states also provide the opportunity to explore how civil trial courts operate in four states within relative geographic proximity to each other.

Comparing Civil Courts in Four States: Docket Composition, Win/Loss Rates, and Awards

Variation in civil rules, procedures, and outcomes comprised the Federalist's primary objection to a constitutional mandate protecting civil juries. In Federalist 83, Hamilton highlights the numerous dissimilarities in civil jury selection and civil procedure that existed at the time of the ratification and the potential for inconsistent outcomes. Moreover, current tort reform advocates argue the need for reform to create greater "fairness, predictability, and efficiency (ATRA website)." However, assessing the influences of state-level variation on civil jury verdicts requires previously unavailable comprehensive data. The following research descriptively examines the composition of courts' dockets, verdicts, institutional structures, and litigant characteristics to assess the extent to which case types and outcomes vary across states.[9] Do these courts

7. Scholars have critiqued the use of jury verdict reporters, because some jury verdict reporters rely on self-reported data from attorneys or litigants in the state or focus exclusively on large awards (Eisenberg et al 2002; Marder 1998; Vidmar, Gross, and Rose 1998). Additionally, some reporters focus exclusively on one region or metropolitan area within as state. These types of data collection produce biased data sources and unrepresentative samples; however, the reporters utilized in this study attempt to collect the universe of civil jury verdicts for the entire state in a given time-period.
8. For an overview of the organization and jurisdiction of the civil trial courts and a detailed discussion of how judges are selected in each state, see the Appendix.
9. Although the data reported in the 2009 volume for the four states does not perfectly reflect the 2009 calendar year, and includes part of 2008, I refer to the data as 2009 in the text for ease of discussion. Admittedly, one year of data might not adequately represent the docket composition,

adjudicate similar types of cases and reach similar verdicts? If not, what factor might contribute to the variation?

State	Number of Jury Verdicts	Verdicts of Per Million Persons	Median Award	Maximum Award	% Pro-Plaintiff	% Punitive Damages
Alabama	258	56.1	$30,000	$33,257,694	50%	6.6%
Indiana	244	38.1	$23,380	$157,000,000	62%	1.7%
Kentucky	210	48.8	$42,612	$55,900,000	49%	4.5%
Tennessee	199	32.1	$16,250	$23,600,000	56%	1.5%

Table 1: Civil Jury Verdicts in Four States (November 2008 to November 2009)

Table 1 reports the number of verdicts in each state in 2009, verdicts per one million residents (based on the size of the state's population in 2009 according to the U.S. Census), the median and maximum awards in each state, the percentage of verdicts favoring plaintiffs, and the percentage of verdicts in which the jury awarded punitive damages. In 2009 civil juries in the four states adjudicated 926 civil disputes and awarded $520,491,229 in total damages. Of the five states, Alabama and Kentucky both possess similar population sizes, near 4.5 million residents. Tennessee and Indiana also hold comparable populations near 6.3 million persons. Looking at the verdicts per-million residents indicates that Alabama juries adjudicate more trials per capita than the other three states (56.1 verdicts per million residents), despite having a population smaller than both Tennessee and Indiana. Indiana trial courts rendered the second largest number of verdicts per million persons (48.8). Yet, even in Alabama where civil juries adjudicate the most civil trials, the data show less than 60 trials for every million residents, demonstrating that trials are infrequent events. Overall, a comparison of the number of civil jury verdicts in each state, relative to state population, implies that factors beyond population size determine the number of jury trials in each state.

Awards

Table 1 also reports the median and maximum initial awards compared to the typical award in

the types of cases, or the types of verdicts a court handles over a broader period; however, no obvious reason emerges to suggest that 2009 radically differs from subsequent or future years. At a minimum, the types of cases decided over a given year in a court ought to reflect at least the general pattern of cases and decisions-making in the civil trial courts in that state.

each state. The data reveal the highly skewed nature of awards (awards in 2009 range from zero dollars to $157,000,000).[10] In order the capture the jury's evaluation of litigants' claims, the data set records the jury's initial award in each case. However, jury awards are often reduced post-trial either through settlement, court action, or appeal (Greene and Bornstein 2003; Ostrom, Hanson, and Daley 1993). Additionally, successful plaintiffs often recover little if any of the actual award (Hans 2008). In an analysis of medical malpractice verdicts in New York City, Vidmar, Grose, and Rose (1998) observe that 44% of all verdicts were reduced post trial, and that on average, plaintiffs received 62% of the jury's initial award. Although plaintiffs may not receive the jury's initial award, the median and maximum jury awards provide insight into the typical award in a state and the factors that lead juries to generously compensate plaintiffs.

The smallest median award, only $16,250 occurs in Tennessee. The median award in Alabama is $30,000, while the median awards in Kentucky and Indiana are $42,612 and $23,380, respectively. The median awards in each state suggests that the typical jury award is not especially large. The data also show that juries award punitive damages infrequently. Alabama juries award punitive damages most often of the five states; however, even in Alabama only about 7% of awards include punitive damages. Juries award punitive damages in about 2% of trials in Indiana and Tennessee and in 4.5% of trials in Kentucky.

Obviously, cases involving extremely large awards represent atypical trials; however, the largest award cases provide illustrations of actual litigation where juries delivered million-dollar verdicts, and cases involving very large awards garner the most media attention (Bailis and MacCoun 1996; Garber and Bower 1999). For example, Alabama juries awarded $33,257,694 to the state in *State of Alabama v. Novartis Pharmaceuticals Corp. et al* in which the state claimed that Novartis fraudulently overcharged the state's Medicaid system for drugs (05-219.52) (Miller AJVR 2009, 412). Novartis charged the state of Alabama the average wholesale prices (AWP) or average wholesale acquisitions costs (WAC) for drugs over a 10-year period. However, the state alleged that the true cost paid by pharmacies and providers was significantly less than that paid by the state. In Novartis' defense, the company claimed that the state knew that WAC and AWP did not reflect the actual prices charged to wholesalers. Additionally, Novartis maintained that the state possessed the right to audit pharmacies and should have done so. The trial lasted half a month and was appealed to the Supreme Court of Alabama.

The largest award in Indiana occurred in a product liability case. The jury awarded $157,000,000 to the family of a man who was tragically strangled to death when his treestand collapsed while hunting in the case, *Estate of Simonton v. L&L Enterprises Inc.* (79D01-0602-CT-20) (Miller IJVR 2009, 475). After finding the man hanging from a tree, the plaintiffs, the wife and stepson of the

10. A zero-dollar award occurs when the plaintiff wins but is not awarded damages.

deceased, alleged that the company was liable for the defective treestand. The treestand had been recalled the year before. The company, having previously gone out of business in 2004, did not participate in this litigation. The court granted the estate a default judgment on liability, and the jury issued a verdict on damages only. Although the jury decided to compensate the family, this case presents an example of the type of trial where the plaintiff likely received little if any of the actual award since the business probably possesses few if any resources after going out of business.

Kentucky jurors awarded $55,900,000 ($53,000,000 of the verdict representing punitive damages) to the family of a woman involved in a fatal assault in *Wittich v. Flick* (08-4294) (Miller KJVR 2009, 581). The case began when two business partners in an optometry office had a business disagreement that apparently became violent. Flick, one of the business partners, invaded his colleague's home and shot and killed his girlfriend, Wittich. Flick then waited for his partner to return home and shot him as well before being subdued (a Kentucky jury also resolved a civil suit regarding the second shooting in another trial). Wittich's estate filed suit against Flick, who by this time was serving a life sentence for her murder. However, like the previous example, the deceased's family is unlikely to obtain the amount awarded from a convicted murderer serving a life sentence.

In *Hill v. Moise* (000093-06) (Miller TJVR 2009, 288) a Tennessee jury awarded the plaintiff $23,600,000 in a medical malpractice suit. Hill, a woman in her early twenties in 2003, found a lump in her breast and reported it to her Ob-Gyn. After examining the lump in an office visit by palpating the lump, Dr. Moise concluded that the lump was harmless and ran no additional tests. In 2005, during her pregnancy, Hill noticed that the lump appeared larger and visited a second doctor. At that time, medical tests revealed that Hill had breast cancer that had spread to her liver. Hill's diagnosis at the time of the trial predicted a small chance of survival, and she was physically unable to attend. Hill alleged that Dr. Moise's failure to perform cancer screening on the lump violated the standard of care and lead to a later diagnosis of the cancer, allowing the cancer to spread and preventing early treatment.

Although the cases where juries handed down the largest awards are atypical when compared to most cases, and it is impossible to generalize from a small, non-random set of cases, these four cases have several features in common. Of the four cases involving the largest awards, there is one medical malpractice case, one product liability, one fraud, and one fatal assault claim. All four cases involve severe injuries. Case injuries include two deaths, a high probability of death, and a claim for a large monetary loss. In three of the four cases, an individual (or an individual's estate), presumably a party with limited resources in most cases, alleged an injury against the defendant. Additionally, three of the four cases involve a business defendant. At a minimum these cases support previous research showing that awards amounts are not random and rather are correlated

with the severity of the plaintiff's injury (Bovbjerg et al. 1991; Dumas and Haynie 2012; Greene and Bornstein 2003).

Docket Composition

Do juries in the four states decide similar cases? To explore this question, Figure 1 provides a descriptive overview of the 2009 dockets in Alabama, Indiana, Kentucky, and Tennessee. Cases types are aggregated into the seven most common issue areas including auto negligence, premises liability, fraud, medical malpractice, products liability, uninsured motorist, and breach of contract. A general negligence category captures all other types of negligence claims, while an "other issue" category represents cases not captured by any other category. A comprehensive examination of the cases shaping the dockets in the states demonstrates that civil trial courts handle similar case issues; however, the frequency of case types across states varies considerably.

The general public likely recognizes trials involving automobile accidents and medical malpractice, but other case types might be less familiar. For example, premises liability cases involve a plaintiff's claim that the defendant negligently maintained an unsafe premise. *Felix v. Wal-Mart* (06-0754) (Miller KJVR 2009, 659) provides an example of typical premise liability case in which a woman slipped and fell on a sticky substance on a Wal-Mart floor and dislocated her hip in the fall. Although Wal-Mart prevailed at trial, the plaintiff argued that Wal-Mart failed to maintain a reasonably safe floor. Products liability cases involve an allegation that the defendant failed to provide a reasonably safe product. In the product's liability case, *Maroney v. Taurus International Manufacturing* (07-73) (Miller AJVR 2009, 490), a man sued a gun manufacturer for making and selling an unsafe product when the gun allegedly fired a bullet into the man's buttocks after falling from the man's pocket and hitting a cement floor, despite the engaged safety (the jury awarded Maroney $500,000 in compensatory damages and $750,000 in punitive damages).

Uninsured or under-insured motorist cases involve plaintiffs injured in automobile accidents in which the driver at fault lacked insurance or adequate coverage for all the damages. In these cases, the injured plaintiff sues his or her own insurance company for damages caused by the uninsured or under-insured driver. Civil trial courts also examine economic cases such as fraud and breach of contract. The previously discussed case of *State of Alabama v. Novartis Pharmaceuticals Corp. et al* (Miller AJVR 2009, 412) provides a good example of a fraud trial. A breach of contract trial occurred following the alleged theft of a man's SUV. When the man made a claim with his insurer for the loss of the stolen vehicle, the insurance company found the theft fraudulent and denied that claim. Although unsuccessful at trial, the man made a breach of contract claim against the insurer in *Green v. Allstate Insurance* Company (49D06-0606-PL-27082)

(Miller IJVR 2009, 380), alleging that company failed to uphold its contractual agreement to insure the vehicle against theft.

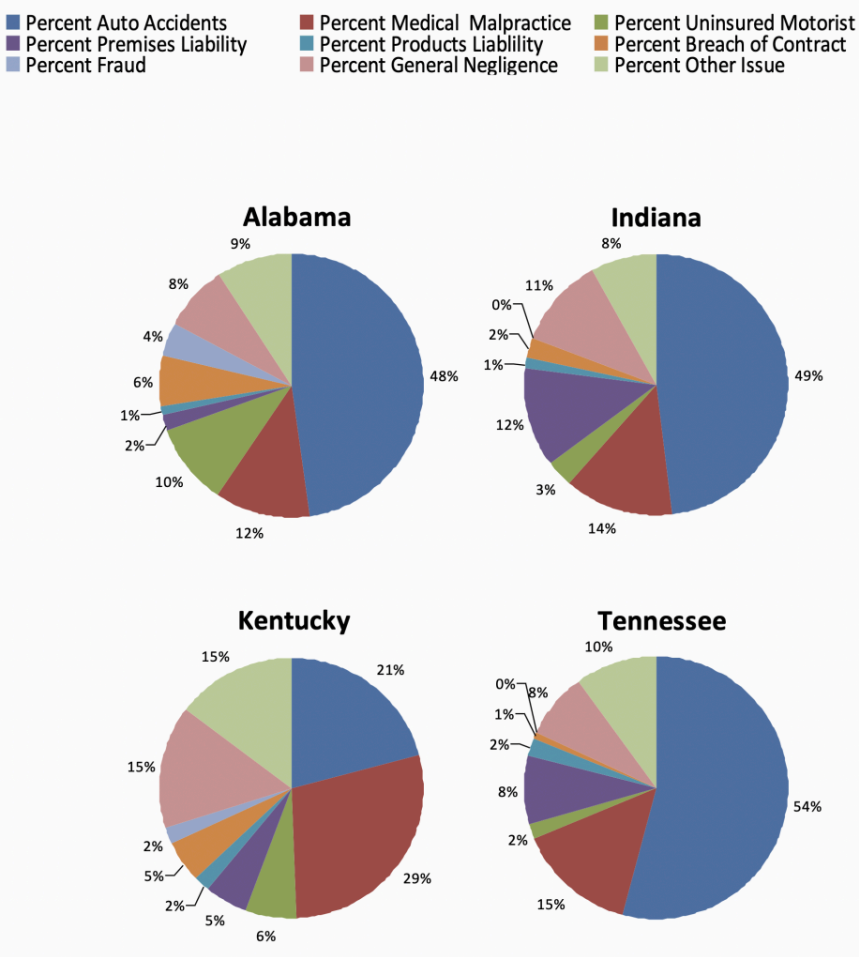

Figure 1: Docket Composition in Alabama, Indiana, Kentucky, and Tennessee

Figure 1 shows that trials involving auto accidents make up close to fifty percent of the docket in Alabama (48%), Indiana (49%), and Tennessee (54%). This is consistent with previous scholarship finding that vehicular negligence cases comprise the majority of civil cases (Langton and Cohen 2008; Ostrom et al. 1996). Unlike the other states, only 21% of the trials in Kentucky entail auto accidents. Medical Malpractice cases make up the second largest proportion of the docket in Alabama (12%), Indiana (14%), and Tennessee (15%), and represent the largest segment of the docket in Kentucky (29%). The next largest category of trials varies by state. The dockets of all four states suggest that products liability cases occur infrequently.

Overall, trials involving auto accidents, medical malpractice, and general negligence cases make up the majority of the dockets in all four states. Kentucky civil trial courts adjudicate almost twice as many medical negligence cases as any of the other states. Indiana courts hear considerably more premises liability cases, and Alabama trial courts resolve more economic (fraud and breach of contract) disputes than any other state. Although these data cannot explicate the underlying causal mechanism that generates cases in each state, clear differences emerge in each state's docket composition.

Outcomes and Awards across Case Issues & Injuries

		Auto Negligence	Premises Liability	Fraud	Medical Malpractice	Products Liability	General Negligence	Uninsured Motorist	Breach of Contract
Alabama	Pro-plaint.	38%	64%	64%	23%	33%	67%	73%	80%
	Median	$0	$35,000	$35,000	$0	$1,250,000	$5,000	$20,500	$18,645
	Avg.	$771,700	$3,139645	$3,139,645	$515,001	$3,250,000	$336,724	$46,343	$696,429
Indiana	Pro-plaint.	84%	0%		36%	33%	48%	75%	33%
	Median	$10,000	$0	N/A	$0	$0	$0	$66,000	$0
	Avg.	$75,348	$19,305		$595,001	$5,230,000	$606,166	$75,589	$43,779
Kentucky	Pro-plaint.	66%	45%	75%	22%	50%	56%	69%	91%
	Median	$4,903	$0	$53,338	$0	$52,500	$1,500	$5,660	$43,623
	Avg.	$278,172	$58,494	$6,666,896	$221,169	$181,275	$54,327	$321,857	$1,053,885
Tennessee	Pro-plaint.	68%	29%		26%	25%	50%	100%	100%
	Median	$6,800	$0	N/A	$0	$1,269,958	$545	$13,500	$0
	Avg.	$37,486	$14,649		$1,453,678	$2,277,479	$660,808	$33,097	$9,717

Table 2: Outcomes by Case Type

Next, Table 2 examines winners and awards across case types and reports the percent pro-plaintiff outcomes and the median and mean awards by case type for each of the four states. First, the data show considerable variation in plaintiff wins rates and median awards across states for the same issue areas. For example, plaintiff win rates in auto negligence cases range from 38% in Alabama to 68% in Tennessee, while median awards range from $0 in Alabama to $10,000 in Indiana. On the other hand, the data show that plaintiffs consistently encounter considerable difficulty when pursuing premises liability and medical malpractice cases in all four states, as evidence by the low percentages of plaintiff wins. Plaintiffs also win over 70% of uninsured motorist cases in all four states. Given that each uninsured motorist case involves an injured individual suing his/her insurance company, the considerably higher win rates in this category might support the "deep pockets" hypothesis, which suggests that juries treat corporate and business defendants more harshly due to their perceived greater ability pay (Bornstein and Rajki 1994; Dumas and Haynie 2012; Hans 2000). Furthermore, the table shows that the median award for several issue areas and states is no award, indicating that half of the plaintiffs in these cases receive no compensation. Interestingly, zero dollars is the median award in medical malpractice cases for all four states, and the average medical malpractice award in each state ranges from $515,000 in Alabama to $1.5 million in Tennessee. Given that medical malpractice cases often feature seriously injured parties, typical jury awards in these cases appear lower than the medical malpractice debate might imply. On the other hand, products liability cases tend to produce low plaintiff award rates, but relatively large awards. Taken together verdicts across the states evidence both considerable variation and consistency. Plaintiff win and award rates differ noticeably across issue areas and across states; however, jurors in each state are most supportive of plaintiffs in uninsured motorist cases and least supportive in premises liability and medical malpractice cases.

Alleged Injury	Alabama	Indiana	Kentucky	Tennessee	Total
Property Loss/Damage	23	6	4	1	34
Monetary Loss	32	10	25	2	69
Emotional	3	2	7	2	16
Broken Bone(s)	8	14	16	17	56
Death	25	22	21	11	82
Injury Required Surgical Repair	22	26	24	11	84
Slip and Fall	1	11	3	9	25
Soft Tissue	32	51	31	84	200
Other Physical Injuries	111	96	76	57	270
Other Non-Physical Injuries	3	6	4	5	92

Table 3: Types of Injuries

To further examine how case facts effect verdicts, I also code for eight injury categories ranging from emotional and soft tissue (scratches, bruises, and whiplash, etc.) to extreme injuries such as paralysis and death. Table 3 reports the frequencies of alleged injuries in cases coming before civil juries across the states. Interestingly, while the data show substantial variation in case occurrence across states, the results suggest that the frequency of alleged injuries in civil trials is relatively evenly distributed. Although previous research finds that soft tissue injuries garner less compensation than other types of injuries (Bovbjerg et al. 1991), suffer from a lack of familiarity among the general public (Hans 2008), and are often viewed as illegitimate (Hans 2008), soft tissue injuries are the most frequent type of injury in civil trials in the five states (195 total cases, combined). While the data cannot explain the prevalence of soft tissue injuries in civil trials, soft tissue injuries might simply occur more commonly than other injuries. On the other hand, the difficulty in proving a soft tissue injury might encourage cases involving soft tissue symptoms to go to trial rather than settling beforehand. The second and third most frequent injuries occur in cases in which the plaintiff underwent a surgery as a result of an accident or died. Injuries involving broken bones are the fourth most common in all states. Combined, physical injuries account for 77.2% of civil trials (712 our 923 cases). The most interesting difference between states is the far greater frequency of property and monetary disputes in Alabama. While the other states appear to decide cases involving economic injuries relatively infrequently, Alabama juries decide a comparatively large number of these cases in a given year.

Litigants

State	Individual v. Individual	Individual v. Business	Individual v. Government	Individual v. Other Defendant
Alabama	54.2%	30%	0	1.2%
Pro-plaintiff	(45%)	(60%)		(66%)
Indiana	62.7%	19.7%	2.7%	2.5%
Pro-plaintiff	(70%)	(46%)	(43%)	(67%)
Kentucky	45.5%	36%	4.7%	1%
Pro-plaintiff	(48%)	(43%)	(10%)	(100%)
Tennessee	62.3%	26.6%	2.5%	1.5%
Pro-plaintiff	(62%)	(53%)	(40%)	(33%)
All States	56%	28%	2%	2%
Pro-plaintiff	(57%)	(55%)	(32%)	(64%)

Table 4: Plaintiff and Defendants Classes

In evaluating who participates in litigation, I code each plaintiff and defendant as an individual, business, or government. Remaining classes of litigants such as organizations or estates are coded as "other." This coding scheme is consistent with prior studies. Examining the types of litigants participating in civil trials and pro-plaintiff verdicts across the states in Table 4, the data demonstrates that the vast majority of all cases involve an individual plaintiff suing an individual defendant.[11] The next largest category of litigants entails individuals seeking damages from business defendants. Only 4% of cases involve an individual challenging the government or any other class of defendant. Individual plaintiffs, Galanter's prototypical "have-nots," account for 88% of plaintiffs in the four states. The distribution of litigant classes across states suggests that the combinations of litigants involved in civil trials are fairly consistent across states.

When we examine how "have-not" plaintiffs fair against "have" defendants, the data shows that "have-nots" appear to do somewhat better than theory would expect. The data also implies

11. Auto negligence cases always involve an individual plaintiff suing an individual defendant. However, the defendant typically relies on legal representation provided by an insurance company. Arguably, these cases might be considered individual v. business; however, all four states under study have non-introduction clauses, preventing the admission of the defendant's insurance or policy limits as evidence. Additionally, jurors are instructed not to consider the defendant's ability to pay.

that the contingency fee system does allow "have-not" plaintiffs to obtain quality representation. Although plaintiffs do not appear to suffer an overwhelming disadvantage in any state, the data supports the dominance of the government in court cases (Kritzer 2003), evidenced by the very low plaintiff success rates when the government if the defendant.

Institutions & Tort Reforms

State	Judicial Selection Method	Punitive Damage Caps	Non-economic Damage Caps	Collateral Source Rule	Joint & Several Liability	Frivolous Lawsuit Penalties	Total # of Tort Reforms Enacted	Institutional Review Board	Comparative Fault
Alabama	Partisan Elections	X	X	X	X	X	29		
Indiana	Mixed	X		X	X		16	X	X
Kentucky	Non-Partisian			X	X		12		X
Tennessee	Partisan	X	X	X	X		25		X

Table 5: State Institutions

Finally, I examine institutional variation across states. While courts in each state appear to adjudicate similar case issues with similar litigants, each court operates under very different institutional frameworks. If institutional rules and frameworks affect the decision calculus for actors in their respective legal systems as previous research suggests (Brace and Hall 1990), variation across states might at least partially explain varying court dockets and trial outcomes across sates. Table 5 reports the institutional arrangements explored in this study. Although the influence of judicial selection and retention methods on trial court behavior remains understudied, previous research demonstrates that judicial selection and retention methods strongly influence decision-making at the state supreme court level, especially in highly salient cases (Brace and Hall 1990, 1993; Brace and Boyea 2008; Caldarone, Canes-Wrone, and Clarke 2009; Canes-Wrone, Clark, and Park 2012). If judges shape jury decision-making through their rulings or courtroom demeanor, jury verdicts might vary across judicial selection and retention mechanisms. In fact, Rowland, Traficanti, and Vernon (2010) argue, that every jury trial is actually a bench trial. "What the constitutional right to a jury trial actually guarantees citizens is the right to a trial in which a jury decides a dispute largely defined and engineered by the exercise of judicial discretion (for a detailed discussion of judicial selection in each state's trial courts, see Appendix A)." (186).

Furthermore, the method states use to determine fault in the jury decision-making process constitutes a significant institutional difference between states. Juries in states utilizing comparative fault can adjust awards to offset the plaintiff's contributing negligence. Defense verdicts can also occur in states that use comparative fault in cases in which the jury assesses plaintiff fault over a certain threshold, usually when the jury assess more than 50% fault to the plaintiff. In Alabama, civil courts rely on the contributory negligence standard to determine fault where jurors use a two-stage process to determine fault. First, jurors must determine if the defendant is negligent. If jurors find the defendant negligent, they then decide if the plaintiff contributed in any way to his or her injury. Under contributory negligence, if the plaintiff was even 1% at fault, the plaintiff cannot recover damages.

State tort reform adoptions seek to deliberately reshape how trial courts reach decisions, as such we would expect that the adoption of various tort reforms to alter trial outputs. Although much of the debate surrounding tort reform focuses on medical malpractice, states largely adopt general reforms that affect outcomes for all tort cases (for more detail about tort reform in these states, see Appendix B). Table 5 reports whether each stated adopted the five most common tort reforms

(Schmidt, Browne, and Lee 1997).[12] On the other hand, the Medical Review Board reform seeks to specifically address medical malpractice cases.

Advocates of tort reform often favor the creation of medical review boards, panels of medical experts, to independently review the merits of medical malpractice claims prior to a formal trial to prevent "meritless" cases from reaching trial. Half of US states have enacted medical malpractice review panels (Nathanson 2004). Review panels vary by state, but panels generally comprise 3-7 members, often one may be an attorney, another a health care provider, and/or judge, and some include lay persons. Although more informal than a trial, panels can subpoena witnesses and documents, hear testimony, and make an initial malpractice ruling (Sloan and Chepke 2008). The state of Indiana requires that all plaintiffs alleging medical malpractice take their claims before an institutional review board prior to trial. Although the board's decision is not binding, the board's determination is admissible as evidence at the trial and likely significantly influences the plaintiff's chances of success at trial. The review board first determines if a breach in the standard of care occurred in the plaintiff's treatment. Then, if the board finds a breach in the standard of care, the board determines whether that deviation in care caused the plaintiff's injury.

Review Board Decision	Plaintiff Verdicts Out of the Total	% Pro-Plaintiff Verdicts
For the Plaintiff	6/7	85.7%
Mixed Decision	1/6	16.7%
For the Defense	4/16	25%

Table 6: Institutional Review Board Decisions

In 2009 Indiana juries decided 33 medical malpractice cases. Of those, the reporter provides the review boards' decision in 29 trials. Table 4 shows the review boards' decisions and the corresponding jury verdicts. The table reports cases in which the review issued a unanimous vote in favor of the plaintiff; in other words, the board determined that the doctor or medical facility breached the standard of care, causing the plaintiff's injury. Mixed decisions occur when the board cannot agree on one or both parts of the decision. Decisions in favor of the defense result when either the board unanimously agrees that the doctor or medical facility upheld the standard of care, or that the breach in the standard of care was causally unrelated to the plaintiff's injury.Overall, plaintiffs in Indiana won 11 out of 29 medical malpractice cases tried in the state in 2009. However, examining the table indicates that of the seven cases in which the review board

12. The five most common tort reforms are, collateral source rules (prevent attorneys from admitting the defendant's insurance coverage into evidence), joint and several liability (limit the number of parties from which a plaintiff can seek and recover compensation), noneconomic damage caps, punitive damage caps, and sanctions on frivolous lawsuits.

found that a breach in the standard of care was causally related to the injury, plaintiffs won 6 (85.7%). Although the board found in favor of the plaintiff in only six cases, the plaintiffs' success rates in those cases are substantially higher than the overall success rates for plaintiffs pursuing medical malpractice claims. On the other hand, the observations suggest that the review board issues considerably more verdicts in favor of the defense and mixed opinions than decisions in favor of the plaintiff. Sixteen decisions of the Institutional Review Board favored the defense while 6 were mixed decisions. However, it appears that even mixed decisions from the review board hurt plaintiffs' changes of success. When the board issued a mixed decision, juries decided only one out six cases (16.7%) in favor of the plaintiff. Interestingly, juries delivered more pro-plaintiff verdicts in trials where the board found against the plaintiff than in cases with mixed decisions from the board. Of cases in which the board found no breach in the standard of care or no injury to plaintiff as a result of the breach, plaintiffs won 4 of 16 trials (25%).

Discussion

These data provide the most comprehensive database of civil trials to date, allowing for an in-depth investigation of the dockets, case outcomes, issues and injuries, and litigants in the civil jury trials in each state. Examining courts' dockets comprehensively shows that the types of cases adjudicated do not vary considerably across the states; however, the percent of the docket allocated to each issue area changes considerably from state to state. Additionally, factors beyond the population size appear to determine the volume of cases adjudicated in each state. Descriptive comparison of jury verdicts across states also provides evidence that considerable variation occurs between states in terms of who wins and who loses, and how much successful parties receive. But, is variation good or bad? Should we continue to rely on juries to make important dispute resolution and resource allocation decisions? The answer depends in part on what society expects from juries. If one is concerned with consistency, like the Federalists, the results provide evidence to support their gravest concerns. On the one hand, those that favor allowing lay people to solve disputes and determine damages argue that juries apply community values. Under this view, one could consider variation from one community to another as evidence that juries are functioning as they should. However, the significant difference in institutional arrangements from one state to the next likely accounts for at least a portion of the observed variation in outcomes. States vary in terms of the tort reforms enacted, the method used to select and retain judges, and the fault standards juries apply, etc. All these factors likely contribute to differences in litigant outcomes across states. Although additional research is need to more fully discern how state institutions affect litigant outcomes, the data provide support for the Federalists' contention that states employ dissimilar systems of civil law, engendering variable outcomes. As long as states adopt widely dissimilar civil justice systems, juries will likely continue

to reach disparate verdicts. Ironically, tort reform, despite its champions' promises of greater consistency, might actually yield the unintended consequence of producing greater variation in court outcomes as states adopt different types and numbers of reforms.

On the other hand, the data evidence several similarities between courts in each state and suggest reasons for optimism, even for those critical of the civil justice system. Despite differences in docket composition, auto negligence and medical malpractice cases encompass most trials in each state. However, plaintiffs garner comparatively few wins in medical malpractice cases in each state. For those concerned that juries award large sums to sympathetic plaintiffs who suffer medical injuries, regardless of the merits of their cases, these results should assuage some of their concerns. On the other hand, the data provide cause for apprehension for those who worry that victims of medical malpractice have little recourse. Moreover, awards appear sensitive to both injury severity and perceived resources. The data suggest that juries' awards are not as capricious as some reformers suggest; however, wealthy defendants may well pay more when the they lose. Investigating the participants in civil litigation shows that individuals are the most frequent participants in civil litigation, and they initiate the majority of civil trials. Fifty-six percent of trials involve an individual suing another individual, and 88% of all trials involve an individual plaintiff. However, plaintiff win rates imply that plaintiffs with strong cases can obtain quality representation and offset at least some of the resource imbalances they might suffer.

Obviously more research is needed to better ascertain the connection between institutions and jury verdicts and explain the causes of case outcome variability. Yet the evidence presented here provides both causes for optimism and trepidation, depending on one's side of the debate. Whether or not we choose to continue to entrust civil juries to settle disputes, right wrongs, and punish wrongdoers with monetary compensation, depends on what we want our civil justice system to do and who we want to make these decisions. Although adoption of national reforms might produce greater consistency in outcomes, to the pleasure of Federalists and tort reformers, taking the authority away from states and local jurors would undoubtably limit the ability for states and community members to settle disputes for themselves as Anti-Federalists initially fearer. Furthermore, if we take decision-making power away from juries, who should we entrust? Ultimately, questions over individuals' and groups' rights to sue for damages and have their grievances redressed by a court are fundamental questions about justice and politics that will hopefully be decided on more comprehensive future research.

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Appendix A. Organization & Jurisdiction of Trial Courts in Alabama, Indiana, Kentucky, and Tennessee

Trial courts of general jurisdiction in Alabama, called circuit courts, comprise 41 geographic circuits, representing 47 counties, and hear cases involving damage claims of $3,000 or more. Alabama Circuit Courts decided 258 civil cases in 2009. Alabama selects residents for jury service from lists of all registered drivers. Judges in Alabama run for reelection in partisan judicial races. Circuits in Indiana represent 91 counties, each with its own circuit, expect for Dearborn and Ohio counties which share a circuit. In 2009 Indiana civil juries decided 244 claims. Both superior and circuit courts in Indiana have general jurisdiction over civil disputes. However, some counties only maintain circuit courts. In counties without superior courts, the circuit courts also hear small claims. Circuit courts in counties with superior courts hear cases involving disputes involving damage claims greater than $6,000 and appeals from superior courts. Of all the states examined in this study, Indiana maintains the most decentralized system and allows individual circuits the greatest discretion in determining the circuits' jurisdiction and judicial selection methods. Counties in Indiana employ partisan, nonpartisan, and retention elections per the preference of the county. The Indiana Supreme Court, Judicial Center, Jury Committee, Department of Revenue (DOR), and Bureau of Motor Vehicles (BMV) create a comprehensive database of potential jurors. The Kentucky circuit courts comprise 57 circuits made up of a county or counties and rendered 210 verdicts in 2009. Kentucky Circuit courts have general jurisdiction over cases involving disputes over $4,000. Circuit judges serve 8-year terms and are retained through non-partisan, circuit-based elections. Kentucky compiles a list of available jurors based on state tax rolls, registered voter lists, and driver's licenses. Tennessee divides its 95 counties into 31 judicial circuits. Tennessee counties determine the jurisdiction of the courts in their corresponding circuits. Judges in Tennessee stand for reelection in partisan elections every eight years. All judges in the state run for reelection at one time. Tennessee civil juries decided 190 disputes in 2009.

Appendix B. The Five Most Common Tort Reforms in in Alabama, Indiana, Kentucky, and Tennessee

Damage caps in some states limit the overall amount a plaintiff may receive on compensatory damages and/or total awards. In states with damage caps, the trial judge enters a post-trial judgment that reduces awards exceeding the statutory maximum post trial. Non-economic damage caps limit the amount parties may receive for injuries such as pain and suffering. Collateral source rules prevent attorneys from admitting the defendant's insurance coverage into evidence. And joint and several liability reforms limit the number of parties from which a plaintiff can seek and recover compensation. For example, if a jury finds three defendants liable and awards a $1,000 verdict, a plaintiff in a state without this reform could attempt to collect $1,000 from each party. In a state with the reform, each defendant would pay a specified portion of the $1,000. Finally, sanctions on frivolous lawsuits punish plaintiffs for brining meritless claims, often by requiring them to pay the defendant's legal fees. Other types of damage caps stipulate that punitive and non-economic damage awards must be within a certain ratio of the compensatory award. Hard caps on punitive damages limit the total amount of punitive damages a jury may award. Indiana limits damage awards in medical malpractice suites to $1,250,000 and awards against municipalities to $500,000. Although lacking strict damage caps like Indiana, defendants in Kentucky can request that judges cap damages to a certain amount on a case by case basis; thereby, giving judges in Kentucky far greater control of the damage awards than judges in other states.

16. On Their Best Behavior?

Foreign Plaintiffs in Chinese Administrative Litigation

JOHN WAGNER GIVENS

From Apple to Walmart, Louis Vuitton to McDonalds, multination corporations increasingly buy, sell, manufacture, and invest all over the world, including in many countries with less-developed legal systems. Along with these multinational corporations come the in-house lawyers and multinational law firms that represent them. According to the theory of legal convergence, this should have a strong positive impact on rule of law in less-developed countries. Legal convergence argues that "'western' business and legal practices are becoming universal as a consequence either of the globalization of capital or the diffusion of professional training and norms" (Appelbaum 1998). Dezalay and Garth, two advocates of legal convergence, see the law firms and foreign lawyers that follow multinationals as "moral entrepreneurs" (1998, 33), the increasing presence of which are "key engines of legal transformation" (Dezalay and Garth 1998, 257). A broader but parallel view holds that "investment by U.S. firms [in countries where human rights are less well defended] may well help move human rights in a positive direction" (Spar 1998, 12). In short, there are good theoretical reasons to believe that multinationals and their legal representation are having a positive impact in countries with less developed legal systems.

In this chapter, I assess whether and how legal convergence is happening in the People's Republic of China (PRC) by examining how multinationals and their foreign legal counsel operate. I will do so by focusing on if, when, and how multinational corporations engage in administrative litigation—that is, suing the Chinese state. This focus is appropriate because the "security of property against arbitrary government confiscation" (Clarke 2003a, 109) is perhaps the most important legal concern of multinationals operating in countries with a weak legal system and administrative litigation is the ultimate legal remedy against such confiscation. Additionally, administrative litigation should be an extremely important venue for protecting the rights of individuals against an overzealous state. If multinationals and their law firms are contributing to the development and convergence of China's administrative law system, it then follows that they would also be contributing, at least indirectly, to strengthening China's human rights regime.

If the theory of legal convergence holds, the growing presence of foreign companies and their legal staffs should be pushing China to converge on international standards of rule of law and perhaps even human rights (Halverson 2004; Hung 2004; Potter 2001). In some sectors, such progress is clearly visible—for example, in a specialist intellectual property (IP) court in Beijing. There, representatives of multinational companies routinely bring suits against China's trademark

and patent review and adjudication boards, and litigation mostly follows international standards.[1] Yet in any given year, outside of this single tribunal in a single court in a single city in a country of over a billion people, only a handful of foreign actors will directly challenge the Chinese state in court, and their impact does not meet the expectations of legal convergence.

My data demonstrate that disagreements between foreign multinationals[2] and other parts of the Chinese state are generally resolved through extralegal negotiation with officials. Foreign companies are anxious not to endanger relationships with local governments, and local officials are eager to encourage international investment, which should help advance their careers (Minzner 2009b, 66). Parties prefer to avoid litigation in most contexts (Nader and Todd 1978), but multinationals in China generally will not even consider suing the state. Even when the situation would seem to call for litigation, they prefer to turn to extralegal resources and tactics, and many multinationals take advantage of special treatment to skirt Chinese law. These findings cast doubt on legal convergence and the contributions of globalization, development, and foreign involvement in countries with developing legal systems.

The Case: The People's Republic of China

In this chapter, I use the case of the PRC to investigate how foreign companies actually interact with the legal systems of developing countries. China is an incredibly large and fast-developing economy with an already substantial and ever-increasing pool of foreign investors (Hannon and Reddy 2012), companies, and legal professionals but relatively weak rule of law. This makes China a particularly important case for several reasons.

First, coming out of the Mao era and in particular the Cultural Revolution (1966–76), the PRC had one of the least developed legal systems in the world. During the Cultural Revolution, China's legal system almost entirely ceased to function. This means that China, especially early in its reform era, is a good example of a country with relatively poor rule of law (Lubman 1999).

Second, China's tremendous size makes it an important case for almost any area of research. With a population of approximately 1.4 billion people in 2019, China makes up almost a fifth of the world's population. Its sheer size means that even when findings apply only to the PRC, they still explain a system and reality that affect the lives of more people than live in the entire rich world.

1. Interviews: WG01-FL, BJ07-PA, SH04-PA. See also Clark (2011, 17–20, 75–78).
2. This chapter uses the term multinational rather than the common abbreviation MNC, as I believe this to be more immediately intelligible and in line with common nontechnical language.

Third, China's increasing prominence on the world stage and its miraculous economic growth make it an exceptionally important case, especially once we consider a conspicuous lack of political liberalization. The PRC is a crucial example for anyone interested in developing legal systems because it has achieved almost three decades of economic growth at unprecedented rates. This has made China something of a model, with some arguing that a new Beijing Consensus[3] (Ramo 2004) provides developing countries with an attractive authoritarian alternative to the liberal-democratic and free-market Washington Consensus.[4] The PRC will likely overtake the United States as the world's biggest economy in the next two decades (Kennedy 2018), and with its central position in global supply chains, its legal system has major implications for the world. China's prominence also means that it receives a great deal of international scrutiny.

Finally, China's size and the unevenness of its growth and reform mean that it is not necessarily a single case. Comparing Shanghai and rural Hunan, for example, is not unlike comparing a developed country to a developing one. This analysis draws comparisons between Beijing's IP court and other administrative courts, developed coastal cities and more remote areas, domestic companies and multinationals, and civil and administrative litigation. Thus China is the perfect case for investigating whether multinational firms have been helpful in integrating Western legal practices.

Outline

The empirical investigation that makes up the remainder of this chapter takes the following format. First, I consider my data sources. I go on to show that although administrative litigation is a viable mechanism for both individuals and firms to resolve problems with local governments, multinationals rarely resort to suing the Chinese state. An example helps demonstrate that while foreign firms may have difficulty litigating against the Chinese government, on balance the process is no more problematic for them than most other classes of plaintiffs. I consider the following reasons that multinationals tend not to litigate: (1) their perceptions of administrative litigation in China are founded on a familiar criticism of Chinese rule of law rather than on

3. The term Beijing Consensus refers to China's economic and political policies in the post-Mao era. These are seen both as a likely cause of China's unprecedented economic success and as a possible alternative, especially for developing countries, to the Washington Consensus of market-friendly economics and liberal politics promoted by the International Monetary Fund, World Bank, and the United States.
4. For doubts about this, see Givens (2011) and Scott Kennedy (2010).

empirical reality or experience, (2) they often have attractive extralegal alternatives, and (3) their activities are sometimes of dubious legality. Finally, I conclude that while the reluctance of multinationals to engage the Chinese state in litigation is understandable, their unwillingness to make use of administrative courts, preference for extralegal special treatment, and inclination to skirt inconvenient laws severely limit their potential contribution to rule of law in China.

Data Sources

The data for this chapter are drawn primarily from interviews and email interactions conducted by the author from 2010 to 2011. Most importantly, in the spring of 2011, I conducted twenty-nine semistructured interviews with lawyers and other business support staff at foreign law firms that have a presence in China and with high-profile Chinese law and intellectual property firms.[5] These international and elite domestic Chinese firms were most likely to have contact with multinational companies. Twenty-three of these interviews were achieved by soliciting interviews at all the firms present in the prestigious buildings and districts in which such firms are clustered in Shanghai and Beijing. This was a form of convenience sampling (Salkind 2007, 186–87), and I make no assumptions about how representative the sample is of Chinese firms generally. However, it is likely more or less representative of elite and foreign firms. Additionally, I conducted six interviews, remote interviews, or email interactions outside mainland China. These were with lawyers who had special insight into foreign involvement, or lack thereof, in Chinese administrative litigation.[6] I also sent emails seeking information to at least one lawyer at each of fifty foreign law firms in Hong Kong that deal with PRC law. I received thirteen responses, none of which implied experience with administrative litigation.

As part of a larger project on administrative litigation, I also conducted semistructured interviews with 126 lawyers from randomly selected law firms from official registries[7] in Beijing, Shanghai, Ningbo, Changsha, Guilin, and a prefecture in rural Hunan.[8] Finally, these interviews were

5. Intellectual property firms in China specialize in assisting clients with intellectual property issues such as patent registration and may also represent clients in IP-related litigation. They employ lawyers and nonlawyer patent agents, both of whom may represent their clients in IP litigation.
6. Interviews: HK01-L, HK02-L, HK03-L WG01-L, WG02-L.
7. Because these websites are updated fairly regularly, many of the lists I used may no longer be available. However, a typical example may be found in Guilin Judicial Bureau (2011).
8. At four of the sites, twenty firms were chosen at random from official registers of all local law firms in the area. In Beijing thirty firms were chosen, and in rural Hunan every firm was included in the sample because of the small number of law firms in the prefecture. The response rate was 68.5

supplemented by an additional nineteen interviews with former government officials, former judges, legal scholars, legal workers, and actual as well as potential plaintiffs. While these interviews provided a wealth of knowledge about administrative litigation in China and an important point of comparison, the vast majority of Chinese law firms never interact with foreign parties, and my random sample of firms therefore yielded little direct information about even the possibility of foreign-involved administrative litigation.

Interviews ranged in length from twenty minutes to four hours depending on the experience and availability of the informant. With the exception of some foreign lawyers, all interviews were conducted in Mandarin. To facilitate more honest conversation and to protect the anonymity of informants, no audio recordings were made of any of these interviews.

While most sections of this chapter rely primarily on data gathered through these interviews, I also use official PRC data from national and provincial legal yearbooks to support the interviewees' assertions that multinationals rarely sue the state. Official data published by the Chinese government are justifiably treated with skepticism. Data on litigation is no exception. Empirical research has suggested that Chinese courts exaggerate the number of cases they hear to make themselves look more productive and that this is primarily true of less busy courts in poorer areas (Clarke 2003b; He 2007, 357–58). However, there is no reason to believe that the yearbook data have been falsified in order to reinforce my finding that foreign firms engage in less administrative litigation. In fact, the Chinese state would prefer to give the opposite impression. Since my data come from national as well as provincial yearbooks from Guangdong and Hubei and cover a span of over twenty years, any bias would have to be both systematic and long lasting to seriously affect

percent. To increase efficiency, if a sampled firm shared a building with other firms, additional interviews were sought with up to three of those firms, chosen with a random number generator on my smartphone if more than three were present. The inclusion of these firms had the additional advantage of capturing at least one firm that was too new to be on the official register, though these registers were never more than a year and a half old. I have conducted various statistical tests to confirm that these additionally sampled firms are not statistically different than those drawn from my original sample. Because the two variables most relevant to lawyers' experience with administrative litigation, "number of administrative cases handled in the last year" and "number of administrative cases handled in career," are not normally distributed, I conducted a rank sum Mann-Whitney-Wilcoxon test (a significance test similar to a t-test, but for which the samples do not need to be normally distributed) to confirm that the original sample and additional sample were not statistically different. Mindful of the large number of zeros contained in these variables, I also conducted two simple zero-inflated negative binomial regressions with these variables as the dependent variables and their presence in the original versus additional sample as the dependent variable. Both methods confirm that my additionally sampled interviews are not significantly different from my original sample (Gibbons 1992; McElduff et al. 2010).

my findings. Unless the PRC someday makes publicly available all past cases, they are the only representative statistical data available on the subject. I therefore proceed with the understanding that while they are less than perfect, there is no reason to believe that these data are biased in favor of my conclusions.

The issue of how multinationals behave in China can be obscured by the fact that many of them are not technically multinationals. In the early stages of China's reform era, many foreign firms could only get access to China by setting up joint ventures with Chinese partners. By 1997, wholly foreign-owned enterprises (WFOEs) had become the investment format of choice, and since then, more and more foreign investment has taken this form (Puck, Holtbrügge, and Mohr 2008, 388–89). New difficulties arise, however, from the variable interest entity (VIE; Schindelheim 2012), or "Sina structure," that "has been used for years primarily to circumvent China's rules that ban foreigners from investing in certain sectors such as internet and telecommunication" (Shaw, Chow, and Wang 2011). Nevertheless, the multinationals in this study are broadly comparable to multinationals in the broader literature for two reasons. First, most of these companies discussed here are WFOEs that are fully controlled by their multinational parent company. Second, this study focuses on the perspective of the foreign portion of joint entities and draws much of its data from international law firms; domestic companies and the Chinese side of joint ventures rarely consult international law firms on domestic issues.

Nonlitigiousness

Aside from cases in Beijing's IP tribunal, foreign firms generally do not sue the Chinese state. This assertion is not controversial, and in international business and legal circles in China, it is the received wisdom. As the China counsel of a large foreign multinational with a long history in China puts it, "As a matter of principle, we would not think about resorting to administrative litigation."[9] This section examines both interviews and official data to provide the first empirical verification of this received wisdom.

First and foremost, my interviews with foreign lawyers who have experience in China and with Chinese lawyers who regularly represent foreign clients confirm that foreign companies are extremely unlikely to involve themselves in administrative cases in China. While there was some variation in my informants' views on whether administrative litigation was ever advisable for multinationals, they were essentially unanimous that it was extremely rare. Indeed, despite an extensive search for lawyers with experience representing multinationals in Chinese

9. Interview: WG02-FL.

administrative court, only two of my informants had direct experience with a non-IP administrative case involving a foreign company.[10]

It is difficult to find statistics that would help establish the frequency of foreign involvement in administrative litigation. But the available data confirm that multinationals engage in relatively little administrative litigation, using administrative courts less than their domestic peers and less than civil courts. From 1987 to 1998, out of 474,708 administrative cases in the PRC, only 168 (0.035 percent) were foreign involved (Supreme People's Court Research Office 2000a).[11] It is unlikely that these low numbers are the result of downward manipulation, since Chinese courts prefer to highlight foreign use of the legal system rather than downplay it.[12] These statistics cover a period before Beijing's IP tribunal was created, and it is therefore unsurprising that they contain only two foreign-involved IP cases. This further demonstrates how unique Beijing's IP tribunal and its large number of foreign-involved administrative cases truly are.

While I am not aware of any national-level statistics after 1998, provincial statistics from Guangdong corroborate the same general trend. From 1998 to 2009, only 114 out of 56,535 (0.20 percent) administrative cases in the province of Guangdong involved foreign parties. Yet Guangdong during this period is certainly a "most likely" case. That is, considering the tremendous presence and history of foreign firms and capital in Guangdong, the province's high level of development, and Guangdong's relative economic and political liberalism (Economist 2011), it

10. Interview: HK01-FL, HK02-FL.
11. As is the case with many categories in Chinese yearbooks, exactly what is meant by foreign-involved cases is not defined but presumably follows the administrative litigation law by including "foreign nationals, stateless persons, and foreign organizations (外国人、无国籍人、外国**组**织)." Some additional clarification is provided by Article 15 of the interpretation of the Supreme People's Court, which states that "any party to joint operation enterprises, sino-foreign equity joint ventures, or contractual joint ventures (联**营**企业、中外合**资**或者合作企业的联**营**、合**资**、合作各方) which deems that its rights and interests are impaired by a specific administrative action may initiate an action in its own name" (Administrative Litigation Law 1989; Supreme People's Court Research Office 2000b).
12. A briefing session by the Beijing First Intermediate People's Court on "10 Exemplary Foreign-Related IP Cases" that were decided between 2006 and 2010, two of which were administrative, clearly demonstrate this fact: "A total of 2,691 foreign-related IP cases were accepted by the IP Tribunal of the Court from 2006 to October 2010, accounting for 28.4 percent of all IP cases accepted by the tribunal, with the object in suit amounting to RMB330 million yuan [about $50 million in 2010]." Additionally, cases decided "in favor or partially in favor of the foreign claims accounted for 55.2 percent of all the foreign-related IP cases," resulting in over 48 million RMB (about $7.2 million) being awarded to foreign parties. The fact that the report felt the need to highlight the level of foreign involvement speaks to the importance of foreign pressure in the creation of this tribunal and its high standards (China Patent Agent 2010).

is undoubtedly one of the areas in which we could expect to find more foreign-related administrative litigation. The case of Guangdong demonstrates that even in China's most developed coastal areas with the largest foreign presence, multinationals rarely involve themselves in administrative litigation. Yet both legal practitioners[13] and international experts (World Bank 2006) acknowledge that rule of law is far better developed in these large cities.[14] Lawyers see their local governments as less likely to let administrative litigation affect relationships with plaintiffs.[15] This could be taken as evidence that multinationals are unwilling to use even relatively well-developed courts to litigate against more professional local governments even though retaliation seems unlikely. However, in my interviews, it was more common to hear—especially from Chinese lawyers—that multinationals in Shanghai or Beijing rarely sued these jurisdictions because they seldom had problems with their more sophisticated and rule-abiding local governments.

When considering administrative litigation, and especially when evaluating statistics on foreign involvement, it is important to take third-party participation into account. Because administrative litigation is specifically litigation against a part of the government, a private party, such as a multinational, cannot be a defendant in an administrative lawsuit. Article 27 of the Administrative Litigation Law, however, states that "any other citizen, legal person or any other organization who or which has interests in a specific administrative act against which an action is initiated may apply to participate in the action as a third party" (Administrative Litigation Law 1989). In general, third parties to administrative cases are on the side of the Chinese state. They are often companies that the government has treated favorably in some way, such as companies that have won a contract or, according to the perspective of plaintiffs, have been allowed to violate regulations. For example, a mobile phone company in Lanzhou sued the local communications department for not enforcing regulations that limited the prizes such companies could offer in promotional contests; the third party in this case was a rival mobile phone company that had offered a car as a grand prize.[16] Third-party involvement may actually account for the majority of cases of foreign involvement in administrative litigation in China; one Beijing patent lawyer reported that representing foreign companies as third parties in administrative litigation made up a majority of the cases he took in 2009.[17]

13. Interview: SH05-L.
14. Interview: SH05-L. When I refer to more developed coastal cities with better rule of law, I generally mean Shenzhen, Guangzhou, Shanghai, and Beijing, but a number of second-tier cities, such as Qingdao, Hangzhou, Suzhou, and Ningbo, could also be included.
15. Interview: SH03-L.
16. Interview: LZ03-L.
17. Interview: BJ07-PA.

Obviously, standing on the side of the government in administrative litigation is very different than litigating against it. In contrast to the difficulties of representing a plaintiff in an administrative case, a Beijing patent lawyer described such work as "much more relaxed."[18] Similarly, a lawyer representing a third party said, "From the government's perspective, this was a tough case, but not from my perspective."[19]

Foreign firms in China are generally reluctant to litigate even in civil cases. Compared to the 28.4 percent of IP cases in Beijing's First Intermediate Court that involved foreign parties (China Patent Agent 2010), the percentages of all types of foreign-involved cases in Guangdong is miniscule (Guangdong High Court Various Years). However, foreign parties are more likely to engage in civil litigation than administrative litigation, as is shown by the following statistical tests using data from Guangdong. I use an independent group t-test, a simple statistical test used to determine whether there is a significant difference between the means of two groups. This t-test compares the mean percentage of foreign-involved administrative cases and the mean percentage of foreign-involved tort and contract cases. Although the percentage of overall cases is tiny, the results in table 1 show that foreign parties were involved in an average of .4 percent of contract cases versus .17 percent of administrative cases and that this difference was statistically significant at the .05 level.

	# of Observations	**Mean**	**Standard Error**	**Standard Deviation**
Percentage of Tort and Contract Cases Involving Foreign Parties	18	0.40%	0.06	0.24
Percentage of Administrative Cases Involving Foreign Parties	11	0.17%	0.04	0.13
Difference		0.23%	0.08	
	Assuming Equal Variance		Assuming Unequal Variance	
P Value	0.01		0.00	
Degrees of Freedom	26		25.99*	
*Satterthwaite's degrees of freedom test				

Table 1: Foreign Involvement in Administrative vs. Tort and Contract Cases

Independent Group T-Test: % of Cases in Guangdong Involving Foreign Parties 2000-2009

Table 2 is similar to table 1 except that it compares administrative cases exclusively to contract

18. Interview: BJ07-PA.
19. Interview: NB05S.

cases. Again, we see that although foreign parties make up only a tiny percentage of both types of litigation in China, foreign parties still make up a larger share of civil litigation, and the difference is significant at the .05 level. Specifically, foreign companies litigated an average of .32 percent of contract cases versus .17 percent of administrative cases.

	# of Observations	**Mean**	**Standard Error**	**Standard Deviation**
Percentage of Contract Cases Litigated by Foreign Firms	10	0.32%	0.06	0.18
Percentage of Administrative Cases Litigated by Foreign Firms	10	0.17%	0.04	0.13
Difference		0.25%	0.07	
	Assuming Equal Variance		Assuming Unequal Variance	
P Value	0.02		0.02	
Degrees of Freedom	18		16.13*	
*Satterthwaite's degrees of freedom test				

Table 2: Foreign Involvement in Administrative vs. Contract Cases

Independent Group T-Test: % of Cases in Guangdong Involving Foreign Parties 2000-2009

Both foreign and domestic firms, especially larger domestic firms, tend to prefer to rely on connections with local governments and officials to resolve problems (Oi and Walder 1999; D. Wank 2002; D. L. Wank 1995). But several pieces of evidence suggest that domestic firms are not nearly as reluctant as their foreign counterparts to turn to administrative litigation. First, a recent analysis of a 2002 survey conducted by several state organs in combination with the Chinese Academy of Social Sciences demonstrated that 5 percent of entrepreneurs would regularly rely on administrative courts to resolve disputes (Zhang and Li 2013, 6–9). While this number is not high in absolute terms, it shows that some private Chinese firms see administrative courts as a viable possibility, whereas their foreign counterparts tend not to entertain the option.

Second, data from Hebei Province demonstrates that firms make up a large percentage of the total number of administrative cases. As figure 1 shows, litigation brought by companies (i.e.,

legal persons[20]) as opposed to individuals makes up a reasonably large and apparently increasing percentage of administrative cases.[21]

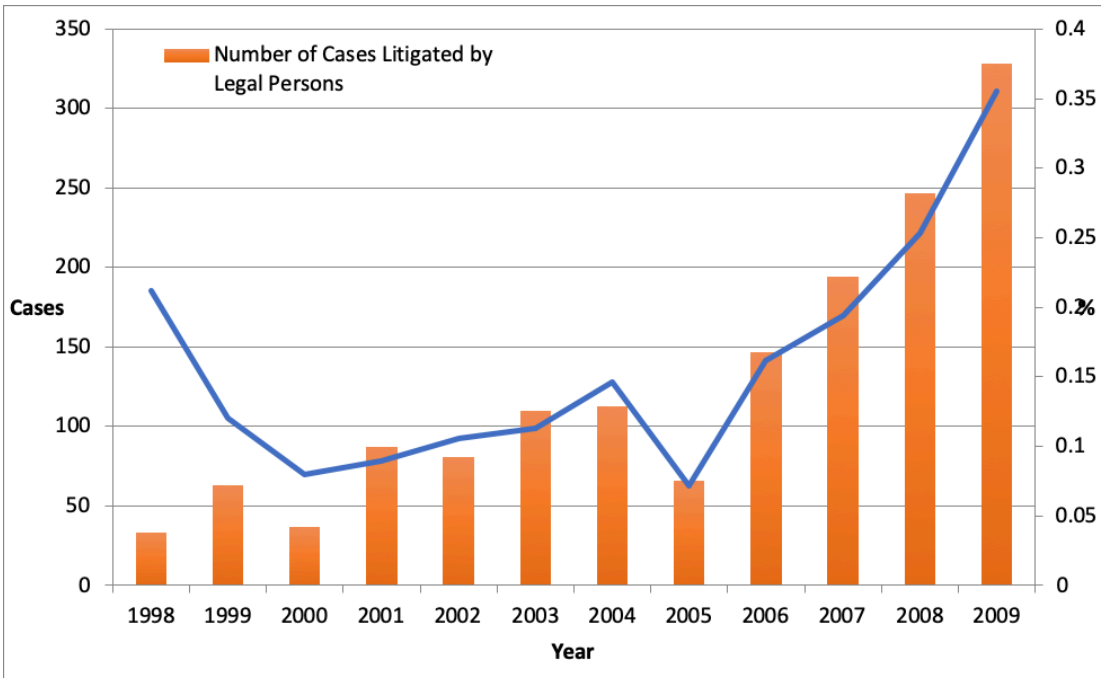

Figure 1: Administrative Cases in Hebei Litigated by Legal Persons About Here

Finally, and most importantly, while my interviews with foreign lawyers who advised multinationals in China revealed a universally negative perception of administrative litigation, my much larger sample of Chinese lawyers who advised domestic firms and individuals had a far more varied outlook. Indeed, 72 percent of the lawyers in my random sample expressed a willingness to represent a plaintiff in administrative litigation. Many Chinese lawyers told me that administrative litigation was a perfectly viable option for companies, and some had direct experience with administrative cases brought by Chinese companies.[22] Similar to Hendley's (2013) finding that despite a negative opinion of them, Russians frequently turn to their courts to settle

20. While there are types of legal persons other than companies that may be included in these data, this is not a major concern. Nongovernmental organizations (NGOs) and other noncommercial organizations famously have trouble getting legal status in China. Even when they do, they often have difficulty having their standing recognized in administrative courts (Peerenboom 2002, 420).
21. Other sources have corroborated the data's suggestion that companies make up a large share of plaintiffs in administrative litigation. See Peerenboom (2002, 478).
22. Interview: BJ26S, SH19S, SH15S, SH11N, SH07S, SH01S, NB18S, NB01S.

disputes, domestic Chinese lawyers and plaintiffs are aware of the shortcomings of their legal system but still make use of it. Foreign firms, on the other hand, may be scared away by a belief that Chinese courts are completely corrupt and ineffective, a viewpoint similar to the one Hendley cast so much doubt on in the post-Soviet context.

The findings from my interviews and official data examined in this section serve to corroborate received wisdom, and the overall picture leaves little doubt that multinationals in China rarely engage in administrative litigation, whether in absolute terms or in comparison to civil litigation or domestic companies. This calls into question the idea of legal convergence by showing that multinationals neither seem to require effective judicial remedies against the state nor appear to facilitate the improvement of such remedies.

A Rare Example

To better understand why foreign companies and the Chinese and foreign law firms that represent them are reluctant to recommend litigation against the state, it is instructive to examine more closely one of the few examples of a non-IP foreign-involved administrative case.

In the early 2000s, a foreign company's joint venture with a Chinese firm had run into trouble with the customs department in a large Chinese port.[23] A few million US dollars' worth of product that the company had imported had gone missing in the port and was then sold on the local market.[24] The joint venture requested an administrative review of the local customs agents' action, which was conducted by the national customs agency because the port city's customs was directly under their supervision.[25] The national agency upheld the local customs department's decision, so the joint venture contacted the large multinational law firm that was its Hong Kong–based counsel. The firm recommended three potential Chinese law firms in the port city to represent them in the matter, and the joint venture chose the largest firm. Assisted by its Hong Kong counsel and represented in China by the local firm, the joint venture took the national customs department to administrative court.

Despite having devoted significant funds to legal fees, especially for the Hong Kong firm, both

23. My data are drawn from two separate interviews with lawyers who worked on the case. Interviews: HK01-FL, HK02-L.
24. The name of the firm, the nature of the product, the name of the city, and the law firms are all intentionally omitted to protect the anonymity of my informants.
25. For more on the administrative review system, see Peerenboom (2002, 417–19).

the first instance and appellate courts ruled against the joint venture. As is relatively common in Chinese administrative cases, the judge found an informal opportunity to explain that the political situation would not allow him to rule for the plaintiff: "We cannot let you win this case, because this is linked to . . . [a large smuggling] case."[26] The officials in question in the administrative suit had turned out to also have been defendants in a highly publicized criminal smuggling case, and apparently this made the joint venture's lawsuit too sensitive for the administrative courts to handle. Additionally, because the case had already gone through administrative review and the national customs agency had made some modifications to the initial decision, ruling for the plaintiff would have meant ruling against a national-level department (Administrative Litigation Law 1989 Article 25), something administrative courts are very reluctant to do.

Nevertheless, a compromise was reached. The joint venture agreed not to pursue the case any further, and the customs department agreed not to take any action against the company in an apparently unrelated issue that was pending against the joint venture. This case displays many of the problems that are common in Chinese administrative litigation, especially the difficulty of suing certain parts of the state and a preference for informal resolutions. Yet it seems unlikely that a domestic firm would have fared any better under the same circumstances, so it also shows that the problems faced by multinationals in China are not necessarily any different than those of any other administrative plaintiff.

Helping or Hurting? Foreign Involvement

Despite numerous flaws in China's administrative courts, it is not immediately apparent why multinationals engage in less administrative than civil litigation or why they engage in less administrative litigation than domestic companies. This section will show that multinationals, if anything, are in a stronger position in regard to administrative litigation than are their domestic counterparts.

For the most part, both foreign and domestic plaintiffs face the same problems that plague administrative litigation in China (Givens 2013; He 2010; Kinkel and Hurst 2011; O'Brien and Li 2004). However, there may be areas in which foreign firms have advantages or disadvantages. The involvement of a foreigner in any litigation in China tends to make a case more sensitive. In one instance, an otherwise banal case was rejected simply because the involvement of a foreigner made judges fear it was too sensitive to handle.[27] Unlike judges in more independent judicial

26. Interview: HK02-L.
27. Interview: SH15S.

systems, Chinese judges may be penalized for what their superiors consider an "incorrect ruling," and the more sensitive or important the case, the more damaging the potential consequences for a judge (He 2009, 13–14; Lam 2008; Minzner 2009a; Stern 2013, 136). Additionally, multinationals are more likely to have disputes with higher-level administrative agencies than their domestic counterparts, and suing a higher level of government can increase the level of sensitivity, and therefore the difficulty, of a case.[28]

On the other hand, multinationals seem to have some advantages over domestic plaintiffs. In terms of cases being accepted, a regulation issued by the Supreme People's Court in 2002 allows "foreign investors, to institute litigation in the courts to request judicial review of any 'concrete' act of a government authority in connection with a WTO-related [World Trade Organization] matter" (Halverson 2004, 360–61). This should mean that multinationals in China have more of a basis from which to challenge administrative decisions. Foreign-involved cases also start one level higher up the judicial system than totally domestic litigation (Woo 2012, 54). For example, first-instance cases that would normally be heard in a lower-level court will start in an intermediate court. Because higher-level judges are usually better qualified and less prone to corruption and local protectionism, this can help foreign companies (Roos 2010, 35–36). Some informants even suggested that courts would be more conscientious in cases involving foreign parties, perhaps being extra polite and patient.[29] Another suggested that they might receive favorable treatment in courts outside Beijing and Shanghai where foreign presence is rarer.[30]

Further assisting foreign parties in administrative litigation is the possibility of diplomatic influence. Embassies, chambers of commerce, and other international and home-country institutions can sometimes be mobilized to put pressure on parts of the Chinese state, especially in bigger cases.[31] While this option can be utilized in conjunction with administrative litigation, we will see that it is more often used as part of an alternative strategy of direct negotiation.

Alternatives to Litigation for Multinationals

Multinationals and their legal representation tend to lack experience with and have misconceptions about administrative litigation, but they do have resources that can be mobilized to solve their disputes with the state by extralegal means. In most cases, foreign firms prefer to

28. Interview: BJ09-L.
29. Interview BJ14-L, SH03-L.
30. Interview: SH05-L.
31. Interview: SH03-L.

rely on their connections and/or to negotiate directly with the state because they expect, and often receive, special treatment that is at best informal and extralegal and at worst a violation of Chinese law. As my focus here is specifically administrative litigation, this section examines these extralegal alternatives briefly, but the topic is important and should lead to future research.

One reason multinationals do not sue is that they have recourse to other means that would not be available to ordinary small or medium domestic Chinese enterprises—or in some cases, even to large Chinese companies. Foreign companies often have extra influence with local government officials seeking promotions because such officials want the multinationals' investment and the prestige that accompanies a foreign presence (Minzner 2009b, 66). A Shanghai lawyer describes how she is able to negotiate with government departments on behalf of her clients. Generally, litigation is never mentioned. Instead, she suggests that "this company pays so much tax in your district, if you don't fix this, we will move." This has worked because her clients tend to be large companies, and it works even better if they are foreign ones.[32]

Another recourse that is available to foreign parties is the use of diplomatic pressure to resolve a dispute with the Chinese government. While mobilizing the resources of a smaller, "less-important" country may not have much of an impact, pressure through channels of large and powerful actors, such as the US or EU, can be very effective.[33] Large multinationals may also use their connections with high-level officials in China and at home to accumulate personal and institutional support.[34] Finally, multinational institutions like the WTO may be of assistance.[35] Academics, lawyers,[36] and businesspeople sometimes argue that this strategy of relying on connections, networks, and relationships is an adaptation to a local culture of Guanxi, preferring informal relationships to a reliance on rules and formal institutions.[37] Whatever the truth of this, it is exactly the kind of behavior that theories of legal convergence would expect foreign lawyers and businesspeople to help change rather than adopt.

At least one informant suggested that litigation and negotiation were not necessarily mutually exclusive alternatives: "Administrative litigation is a great way to get business done even in China and even from a pragmatic perspective. However, it is worth noting that you do not need to win a case to achieve your purpose. Filing a case itself may increase your negotiating power, and then you can do the government a favor by withdrawing the case if they finally agree with your

32. Interview: SH21S.
33. Interview: BJ15-FL.
34. Interviews: WG02-FL, SH03-L.
35. Interview: BJ15-FL.
36. Interview: SH14-L.
37. For a treatment of gaunxi, see Gold and Guthrie (2002) and Yang (1994, 2002).

position."[38] This point of view stands in dramatic opposition to those lawyers who would not consider even filing a case and were convinced that doing so would hurt their relationship with the government.[39] It also reminds us that litigation should be a last resort but is still useful and important as such.

Another alternative to litigation is to find a "business way" to work around problems with the state—for example, by cooperating with a Chinese company and using its license to enter into activities or areas for which official approval was not granted.[40] These types of solutions are often of dubious legality. The best-known examples are the VIEs that are used by 64 percent of Chinese companies listed on the New York Stock Exchange and 92 percent listed on NASDAQ (Liu 2018). "Although the Chinese government has not explicitly disapproved the VIE structure,[41] it is clear that VIEs were established to subvert the PRC prohibitions or restrictions on foreign direct investment" (Schindelheim 2012, 201). If problems with VIEs arise, therefore, litigation is unlikely to be a good option "because those contracts [that make up a VIE] carry little legal weight, if any, in China" (Shaw, Chow, and Wang 2011). VIEs are, therefore, a clear example of multinationals preferring to take advantage of loopholes in Chinese law rather than contributing to its improvement.

Conclusion

This chapter does not mean to suggest that representatives of multinationals—be they lawyers, businesspeople, or others—are negligent or unethical when they decline to sue the Chinese state. They are following the common wisdom that is shared by their colleagues and taking the action they think is in the best interest of their clients or shareholders. Nor would it be fair to conclude that foreign participation in China's legal system and markets has resulted in no progress toward legal convergence or the development of rule of law in China. If the Chinese state devoted more resources toward improving its courts and allowed them greater independence, multinationals would almost certainly be more willing to use them. At the same time, however, it is clear that

38. Email interaction: SZ01-L.
39. Interview: WG02-FL.
40. Interview: BJ15-FL.
41. A recent announcement by the Ministry of Commerce was "the first time that the VIE structure has been expressly mentioned by a PRC authority." While the announcement forbids the use of a VIE structure in this instance, it "does not expressly say the use of such structure is illegal" (Chan, Ip, and Yue 2012).

foreign firms and governments and multilateral institutions have not put significant pressure on reforming China's administrative legal system.

In opposition to theories of legal convergence, multinationals are not having the positive impact on China's legal system that they could because they prefer extralegal solutions that they regard as less risky. Multinationals cannot contribute to the development of best-practice institutions if they do not follow best practices. The PRC has made this difficult by erecting legal barriers against the participation of foreign enterprises in many areas and then allowing extralegal methods of subverting them. Multinationals and the law firms that advise and represent them are profit-driven entities, and there is no reason they should act as "moral entrepreneurs" if the more profitable route is to take advantage of the system.

The PRC has been able to build and maintain its legitimacy through investment that keeps its economy growing and increases its prominence on the world stage because multinationals are willing to invest without strong legal guarantees and may opt for extralegal solutions. Yet even a few noteworthy administrative cases could promote change.

Appendix: Interviews

Each of the 178 interviews I conducted for my larger research project on administrative litigation is represented by a code that identifies and provides some basic information about each interview. The first two letters of each interview code indicate the field site, with "WG" referencing those interviews that were conducted outside of China. The number indicates the order in which the interviews were conducted. Each field site, randomly sampled, and nonprobability sampled interviews are all numbered separately. For the randomly sampled interviews, the letter at the end of the code indicates that the informant's firm either was selected in my original sample (S) or was included through my additional sampling technique (N). For my nonprobability sampled interviews, the letters after the dash indicate the position(s) of the informant: "PL" for plaintiff, "FL" for foreign lawyer, and so on. The lists below provide basic information on each interview and should clarify the codes for each field site and position. The exact date of interviews is suppressed in order to better protect the anonymity of my informants.

Interview Code	Location	Time of Interview	Description[1]
AL01-L	Withheld	August, 2010	Prodigious administrative litigator
BJ01-P	Beijing	April, 2010	Professor of law
BJ02-J	Beijing	November, 2010	Retired judge
BJ03-LW	Beijing	November, 2010	Legal worker, law student
BJ04-LW	Beijing	November, 2010	Legal worker
BJ05-LW	Beijing	November, 2010	Legal worker, law professor
BJ06-L	Beijing	March, 2011	Lawyer at a specialized IP firm
BJ07-PA	Beijing	March, 2011	Patent agent at patent agency
BJ08-L	Beijing	March, 2011	Lawyer and partner
BJ09-L	Beijing	March, 2011	Of counsel lawyer
BJ10-PA	Beijing	March, 2011	Patent agent
BJ11-FL	Beijing	March, 2011	Foreign lawyer
BJ12-L	Beijing	March, 2011	Lawyer
BJ13-L	Beijing	March, 2011	Chinese lawyer at a foreign firm
BJ14-L	Beijing	March, 2011	Lawyer at IP firm
BJ15-FL	Beijing	March, 2011	Foreign lawyer at Chinese firm*
CS01-PL	Changsha, Hunan	November, 2010	Potential administrative plaintiff
CS02-PL	Changsha, Hunan	December, 2010	Potential administrative plaintiff
LZ01-L	Lanzhou, Gansu	May, 2010	Lawyer
LZ01-L	Lanzhou, Gansu	May, 2010	Lawyer
LZ03-L/J	Lanzhou, Gansu	May, 2010	Lawyer, former judge
LZ04-L	Lanzhou, Gansu	May, 2010	Lawyer
QD01-L/O	Qingdao, Shandong	June, 2010	Lawyer, former official
QD02-L	Qingdao, Shandong	June, 2010	Partner lawyer
QD03-L	Qingdao, Shandong	June, 2010	Lawyer
QD04-L	Qingdao, Shandong	June, 2010	Partner lawyer, founder
TJ01-P/L	Tianjin	January, 2010	Law professor, lawyer
TJ02-L	Tianjin	January, 2010	Lawyer
TJ03-L	Tianjin	January, 2010	Partner, law professor
TJ04-P/J	Tianjin	January, 2010	Law professor, former judge
SH01-L	Shanghai	May, 2010	Lawyer

Interview Code	Location	Time of Interview	Description[1]
SH02-M	Shanghai	May, 2010	Marketing executive foreign law firm
SH03-L	Shanghai	May, 2010	Chinese lawyer at Hong Kong firm
SH04-PA	Shanghai	May, 2010	Patent agent at a Hong Kong patent agency
SH05-L	Shanghai	May, 2010	Lawyer at a foreign firm
SH06-L	Shanghai	May, 2010	Foreign lawyer at a foreign firm

Table 3: Nonprobability Sampled Interviews

1 Unless otherwise specified firms and lawyers are domestic Chinese.

* These interviews were either partially pr completely conducted through e-mail or other remote communication.

Interview Code	Location	Time of Interview	Head or Assistant Head of Firm	Partner	Original or Additional Sample
BJ01N	Beijing	July, 2010	No	Yes	Original
BJ02S	Beijing	July, 2010	No	No	Additional
BJ03N	Beijing	July, 2010	Yes	Yes	Original
BJ04S	Beijing	July, 2010	No	No	Original
BJ05S	Beijing	July, 2010	No	Yes	Additional
BJ06N	Beijing	July, 2010	Yes	Yes	Original
BJ07S	Beijing	July, 2010	No	No	Original
BJ08S	Beijing	July, 2010	Yes	Yes	Additional
BJ09N	Beijing	July, 2010	No	No	Additional
BJ10N	Beijing	July, 2010	No	No	Additional
BJ11N	Beijing	July, 2010	No	No	Original
BJ12S	Beijing	July, 2010	No	No	Additional
BJ13N	Beijing	July, 2010	No	No	Additional
BJ14N	Beijing	July, 2010	No	No	Additional
BJ15N	Beijing	July, 2010	No	No	Additional
BJ16N	Beijing	July, 2010	No	No	Additional
BJ17N	Beijing	July, 2010	No	No	Additional
BJ18N	Beijing	July, 2010	No	No	Additional
BJ19S	Beijing	July, 2010	No	No	Original
BJ20N	Beijing	July, 2010	Yes	Yes	Additional
BJ21S	Beijing	July, 2010	Yes	Yes	Original
BJ22S	Beijing	October/ November, 2010	No	No	Original
BJ23S	Beijing	October/ November, 2010	No	No	Original
BJ24N	Beijing	October/ November, 2010	No	No	Additional
BJ25N	Beijing	October/ November, 2010	Yes	Yes	Additional
BJ26S	Beijing	October/ November, 2010	Yes	Yes	Original
BJ27S	Beijing	October/ November, 2010	No	No	Original

Interview Code	Location	Time of Interview	Head or Assistant Head of Firm	Partner	Original or Additional Sample
BJ28S	Beijing	October/ November, 2010	Yes	Yes	Original
BJ29S	Beijing	October/ November, 2010	No	No	Original
BJ30S	Beijing	October/ November, 2010	Yes	Yes	Original
BJ31N	Beijing	October/ November, 2010	Yes	Yes	Additional
NB01S	Ningbo, Zhejiang	August, 2010	No	No	Original
NB02S	Ningbo, Zhejiang	August, 2010	No	No	Original
NB03N	Ningbo, Zhejiang	August, 2010	No	No	Additional
NB04S	Ningbo, Zhejiang	August, 2010	Yes	Yes	Original
NB05S	Ningbo, Zhejiang	August, 2010	No	No	Original
NB06S	Ningbo, Zhejiang	August, 2010	No	No	Original
NB07S	Ningbo, Zhejiang	August, 2010	Yes	Yes	Original
NB08S	Ningbo, Zhejiang	August, 2010	No	No	Original
NB09S	Ningbo, Zhejiang	August, 2010	No	No	Original
NB10N	Ningbo, Zhejiang	August, 2010	No	No	Additional
NB11S	Ningbo, Zhejiang	August, 2010	No	No	Original
NB12N	Ningbo, Zhejiang	August, 2010	No	Yes	Additional
NB13S	Ningbo, Zhejiang	August, 2010	Yes	Yes	Original
NB14S	Ningbo, Zhejiang	August, 2010	No	No	Original
NB15N	Ningbo, Zhejiang	August, 2010	No	No	Additional
NB16S	Ningbo, Zhejiang	August, 2010	No	No	Original

Interview Code	Location	Time of Interview	Head or Assistant Head of Firm	Partner	Original or Additional Sample
NB17S	Ningbo, Zhejiang	August, 2010	No	No	Original
NB18S	Ningbo, Zhejiang	August, 2010	No	No	Original
NB19S	Ningbo, Zhejiang	August, 2010	No	Yes	Original
NB20S	Ningbo, Zhejiang	October, 2010	Yes	Yes	Original
NB21S	Ningbo, Zhejiang	October, 2010	Yes	Yes	Original
NB22S	Ningbo, Zhejiang	October, 2010	Yes	Yes	Original
SH01S	Shanghai	October, 2010	No	No	Original
SH02N	Shanghai	October, 2010	No	Yes	Additional
SH03S	Shanghai	October, 2010	Yes	Yes	Original
SH04S	Shanghai	October, 2010	Yes	Yes	Original
SH05S	Shanghai	October, 2010	No	No	Original
SH06S	Shanghai	October, 2010	No	Yes	Original
SH07S	Shanghai	October, 2010	No	No	Original
SH08S	Shanghai	October, 2010	No	No	Original
SH09S	Shanghai	October, 2010	No	No	Original
SH10N	Shanghai	October, 2010	No	No	Additional
SH11N	Shanghai	October, 2010	No	No	Additional
SH12N	Shanghai	October, 2010	No	Yes	Original
SH13N	Shanghai	October, 2010	Yes	Yes	Additional
SH14S	Shanghai	October, 2010	No	Yes	Original
SH15S	Shanghai	October, 2010	No	Yes	Original
SH16S	Shanghai	October, 2010	No	No	Original
SH17S	Shanghai	October, 2010	No	No	Original
SH18N	Shanghai	October, 2010	No	No	Additional
SH19S	Shanghai	October, 2010	No	No	Original
SH20N	Shanghai	October, 2010	No	No	Additional
SH21N	Shanghai	October, 2010	No	No	Original
SH22N	Shanghai	October, 2010	No	Yes	Additional

Interview Code	Location	Time of Interview	Head or Assistant Head of Firm	Partner	Original or Additional Sample
XX01S	Rural Hunan	December, 2010	No	No	Original
XX02S	Rural Hunan	December, 2010	Yes	Yes	Original
XX03S	Rural Hunan	December, 2010	No	Yes	Original
XX04S	Rural Hunan	December, 2010	No	N/A*	Original
XX05S	Rural Hunan	December, 2010	No	N/A*	Original
XX06	Rural Hunan	December, 2010	Yes	N/A*	Original
XX07S	Rural Hunan	December, 2010	No	Yes	Original
XX08N	Rural Hunan	December, 2010	No	No	Additional
XX09S	Rural Hunan	December, 2010	No	Yes	Original
XX10S	Rural Hunan	December, 2010	No	No	Original
XX11S[1>]	Rural Hunan	December, 2010	Unknown	Unknown	Original
XX12S	Rural Hunan	December, 2010	No	No	Original
XX13S	Rural Hunan	December, 2010	No	Yes	Original
XX14S	Rural Hunan	December, 2010	Yes	Yes	Original
XX15S	Rural Hunan	December, 2010	No	No	Original
CS01S	Changsha, Hunan	November, 2010	No	No	Additional
CS02N	Changsha, Hunan	November, 2010	No	No	Original
CS03S	Changsha, Hunan	November, 2010	No	No	Original
CS04S	Changsha, Hunan	November, 2010	No	No	Original
CS05S	Changsha, Hunan	November, 2010	No	No	Original

Interview Code	Location	Time of Interview	Head or Assistant Head of Firm	Partner	Original or Additional Sample
CS06S	Changsha, Hunan	November, 2010	No	Yes	Original
CS07S	Changsha, Hunan	November, 2010	Yes	Yes	Original
CS08S	Changsha, Hunan	November, 2010	No	Yes	Original
CS09N	Changsha, Hunan	November, 2010	No	Yes	Additional
CS10S	Changsha, Hunan	November, 2010	No	No	Original
CS11S	Changsha, Hunan	November, 2010	Yes	Yes	Original
CS12S	Changsha, Hunan	November, 2010	No	Yes	Original
CS13S	Changsha, Hunan	November, 2010	No	No	Original
CS14S	Changsha, Hunan	November, 2010	No	No	Original
CS15N	Changsha, Hunan	November, 2010	No	No	Additional
CS16N	Changsha, Hunan	November, 2010	No	No	Additional
CS17S	Changsha, Hunan	November, 2010	No	Yes	Original
CS18N	Changsha, Hunan	November, 2010	No	No	Additional
CS19N	Changsha, Hunan	November, 2010	No	No	Additional
CS20S	Changsha, Hunan	November, 2010	Yes	Yes	Original
CS21N	Changsha, Hunan	November, 2010	No	No	Additional
CS22N	Changsha, Hunan	December, 2010	Yes	Yes	Additional
CS23N	Changsha, Hunan	December, 2010	No	No	Additional
CS24S	Changsha, Hunan	December, 2010	Yes	Yes	Original
GL01S	Guilin, Guanxi	February, 2011	No	No	Original

Interview Code	Location	Time of Interview	Head or Assistant Head of Firm	Partner	Original or Additional Sample
GL02S	Guilin, Guanxi	February, 2011	No	No	Original
GL03S	Guilin, Guanxi	February, 2011	Yes	No	Original
GL04S	Guilin, Guanxi	February, 2011	No	No	Original
GL05S	Guilin, Guanxi	February, 2011	No	No	Original
GL06S	Guilin, Guanxi	February, 2011	No	Yes	Original
GL07S	Guilin, Guanxi	February, 2011	No	No	Original
GL08S	Guilin, Guanxi	February, 2011	No	No	Original
GL09S	Guilin, Guanxi	February, 2011	No	No	Original
GL10L	Guilin, Guanxi	February, 2011	Yes	No	Additional
GL11S	Guilin, Guanxi	February, 2011	No	No	Original
GL12S	Guilin, Guanxi	February, 2011	Yes	Yes	Original

Table 4: Randomly Sampled Interviews

1 This interview was terminated almost immediately as the informant had to leave unexpectedly. Instead, I interviewed XX12S, a more junior lawyer at the same firm.

* As state-owned or quasi-state-owned institutions, these firms do not have a partnership structure.

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Appellate Courts

Many appellate, unlike trial courts, have the capacity to pick and choose which cases they will hear and decide. The presence or lack of discretionary jurisdiction has been shown to greatly affect the institutional norms and decision-making of these courts, as well as the actors who appear before these benches. Here we offer two sides of this coin. First, Professors Elizabeth Lane, Jessica Schoenherr, Rachel Schutte and Ryan Black use archival data to reveal how interest groups influence the agenda of the U.S. Supreme Court—a court with nearly limitless discretion over its docket. Supporting earlier work, these scholars show that interest group efforts at the docketing stage remain extremely effective signals and significantly increase the likelihood of a case obtaining scarce space on the Court's docket. On the other side of the coin, we have a state supreme court that has no discretion over its docket and therefore hear and decide every qualifying case. This leads to a very different mix of cases and concerns. Professor William McLauchlan provides us with a case study of the Montana Supreme Court's workload and its high level of mundane cases in direct contrast to the picture painted of the U.S. Supreme Court docket by Pacelle and Pyle or Lane, et al.

Lane, Elizabeth, Jessica Schoenherr, Rachel Schutte, and Ryan Black. "Judicial Discretion and US Supreme Court Agenda Setting."

McLauchlan, William. "An Empirical Examination of the Business of the Montana Supreme Court"

17. Judicial Discretion and US Supreme Court Agenda Setting

ELIZABETH A. LANE, JESSICA A. SCHOENHERR, RACHEL A. SCHUTTE, AND RYAN C. BLACK

The scene is familiar to anyone who has watched a movie or read a book about a lawsuit: the sympathetic protagonist loses his case, and his attorney promises him they still have one more chance to win. The attorney then shoves his files into his briefcase, storms out of the courtroom, and announces to the waiting crowd (filled with reporters) that they will be taking their case "all the way to the Supreme Court!" Attorneys representing Barbara Grutter, a forty-three-year-old white woman aiming to enter the University of Michigan Law School, found themselves in a less-dramatic version of this exact position following their loss before the Sixth Circuit Court of Appeals. Grutter sued the law school for using a race-based admissions policy that she claimed discriminated against her and therefore violated her rights under the Equal Protection Clause of the Fourteenth Amendment (Morfin et al. 2006; Perry 2007). Like many litigants in modern history, Grutter and her attorneys turned to the Supreme Court in a last-ditch effort to find a favorable resolution to her case. Yet the odds of the Court hearing the case were long. Despite growing demand for the Court's attention on constitutional issues, the justices deny review to 99 percent of the litigants who ask the Court to consider their cases (Lane and Black 2017). Grutter's appeal made it past the cut, however, and the Court agreed to hear arguments in her case, now known as *Grutter v. Bollinger* (2003).

Why did the Court agree to hear Grutter's case but not somebody else's? One possible answer to this question is that the justices saw an opportunity to move policy closer to their preferences (Black and Owens 2009a; Caldeira, Wright and Zorn 1999). Supreme Court justices are not simply motivated by the law; like other political elites in Washington, they have policy preferences and want to use their powerful positions to move policy toward their ideal points (Epstein and Knight 1998). When a justice considers whether to grant review in a case, she thinks about the future and considers how the final outcome on the merits can shift policy and if that policy will be closer to her preferences (Black and Owens 2009a; Caldeira, Wright and Zorn 1999). With affirmative action in higher education, for example, the Court had already ruled in *Regents of the University of California v. Bakke* (1978) that race was a permissible consideration in admission decisions because schools had a compelling interest in ensuring diversity in classes. Given this explanation, conservative justices might have anticipated they had the chance to overturn or weaken *Bakke*, a ruling with which many of them disagreed, and thus they finally agreed to review law school admission policies in *Grutter* (Toobin 2008).

A more legalistic explanation of the justices' decision is the presence of conflict. The Supreme

Court has a duty to ensure universal interpretation of the law throughout the country, which means stepping in when the lower courts disagree (C-SPAN 2010; Ulmer 1984). Despite the Court's original ruling in *Bakke*, circuit courts struggled to implement the decision in the face of lawsuits from angry students who felt they lost their spots at dream schools to less-qualified minority candidates. The Fifth Circuit Court of Appeals, which covers federal appellate cases in Texas, Louisiana, and Mississippi, ruled in *Hopwood v. Texas* (1996) that the law school at the University of Texas lacked a "compelling justification" for using affirmative action (Burka 1996). Further west, the massive Ninth Circuit, which oversees district courts in California, Oregon, Washington, Idaho, Montana, Nevada, Arizona, Alaska, and Hawaii, ruled in *Smith v. University of Washington Law School* (2000) that the University of Washington Law School's affirmative action admissions program met the *Bakke* standard (Gearan 2001). The Sixth Circuit's ruling in favor of the University of Michigan Law School in Grutter added to the conflict, and the cacophony might have pushed the Court to finally agree to review one of these affirmative action cases and resolve the problem.

A third possible explanation is that Grutter's case was important and the justices therefore felt obligated to weigh in on it. Just as the Court has an obligation to ensure uniformity in the law, it also has a responsibility to answer unsettled legal questions that the public considers important (Perry 1991). Affirmative action programs undoubtedly met that requirement. Universities' decisions to consider race in admissions were controversial when the justices decided *Bakke* in 1978, and they remain controversial today (Coyle 2013). Even if the justices failed to notice public attention toward the issue, they still knew the case was important because Grutter's petition came with a signal attached to it: three different interest groups filed amicus curiae ("friend of the Court") briefs in the *Grutter* case. These briefs described how a decision in this case would extend far beyond Barbara Grutter and the University of Michigan Law School, impacting states, law schools, and employers who all had an interest in knowing if affirmative action programs were constitutional. The fact that interest groups and public interest law firms dedicated time and resources to submitting these amicus briefs before the Court even agreed to hear Grutter's case sent a powerful signal that this case was important enough to deserve the justices' attention.

In this chapter, we set out to explain the Supreme Court's agenda-setting process and then examine the roles that policy, the law, and organized interests can play in influencing the justices' decisions in that process. The Supreme Court has a discretionary docket, allowing the justices to select the cases they want to hear (Perry 1991). The justices have agreed to hear fewer cases since the late 1980s, but the shrinking docket has not stopped litigants from appealing to the Court in record numbers (Lane and Black 2017; Owens and Simon 2011). The end result of this mismatch is a mound of petitions through which the justices must sort each term. Litigants and interest groups can attract the justices' attention by sending cues about a case's ideological impact, its involvement in a lower court conflict, or its importance. After walking through the process and explaining what research shows to be true about it, we narrow our focus to one particular part of the process: interest groups' submission of amicus briefs that support or oppose a petitioner's

request for review. We use new data to show that interest group participation in agenda setting can influence the Court's ultimate decision to hear a case, confirming Caldeira and Wright's (1988) seminal work on agenda setting and signaling in the process. Finally, we end our analysis by offering our thoughts about where the literature can go from here.

Setting the Supreme Court's Agenda

History

Supreme Court justices have not always had a say in the cases they review. Article III of the Constitution established the Supreme Court and outlined the limited circumstances under which the Court could act as a trial court, which hears testimony and makes factual determinations. The founders intended the Supreme Court to mostly act as an appellate court, which focuses on questions of law, but the Constitution gave Congress the power to determine the Court's appellate jurisdiction. Originally, Congress required the justices to hear every case appealed to them, but that caseload grew to be unmanageable, and after some polite urging by Chief Justice Fuller, Congress agreed in 1891 to give the justices some discretion over their docket (Sternberg 2008). In the thirty years that followed, the caseload quickly returned to unwieldy status, driving Justice McReynolds and Chief Justice Taft to plead with Congress to give the Court more discretion over its docket (Stevens 1983). Congress subsequently passed the Judiciary Act of 1925, which required all plaintiffs appealing to the Supreme Court to file petitions for the writ of certiorari (Latin for "to be more fully informed"). These petitions request that lower court documents be sent to the High Court, along with a legal brief describing why their case is worthy of the justices' review (Perry 1991). When the Court's docket reached historic highs in the 1970s and 1980s, all nine justices wrote to Senator Kastenmeier and asked for even more discretion over the Court's docket. Congress again provided it, removing virtually all of the Court's mandatory jurisdiction via the Case Selections Act of 1988 (Owens and Simon 2011).

As the justices gained more autonomy over their agenda, they established two rules to govern their decision to grant review in a case. The first is Supreme Court Rule 10, originally established in 1954. Rule 10 lists the circumstances under which the justices are more likely to grant review in a case, specifically when one of the following occur: (1) conflict between lower courts, whether it is between two circuit courts or between a state court of last resort and a circuit court; (2) conflict between a state supreme court or circuit court and a past Supreme Court decision; and (3) an important matter of federal law that has not previously been addressed by the Supreme Court. Rule 10 is purposefully vague, but it provides the litigants with direction about the information

worth highlighting in their petitions (Perry 1991). The second rule governing the decision to grant certiorari, more commonly known as "cert," is the Rule of Four, established by the Judiciary Act of 1925 (Cordray and Cordray 2004). According to this rule, the justices place a case on the docket if four of the nine justices vote to grant review. The Rule of Four is the only countermajoritarian act in which the Court engages. Of course, securing four votes to grant cert is very different from securing a five-vote majority on the merits, which leads to the justices engaging in forward-looking behavior when deciding whether to review (Black and Owens 2009a; Caldeira, Wright and Zorn 1999).

Process

The agenda-setting process begins with somebody losing a case involving a federal issue in either a federal circuit court or a state court of last resort. After losing, litigants have the opportunity to appeal to the Supreme Court if they so choose; if they decide to petition the Court to review the case, they file a petition for certiorari, as shown in the top left corner of Figure 1. Here the litigant, now known as the petitioner, writes an explanation of how his or her case meets the Rule 10 requirements and requests all case documents from the lower court be sent to the Supreme Court for review. After the petitioner files the documents with the Court, the lower court winner, now known as the respondent, has the opportunity to respond to the petition for certiorari by writing a brief in opposition and explaining why the justices should pass on this particular case. During the filing and responding stage, interest groups can file amicus curiae briefs, also known as "friend of the Court" briefs, that offer support for or opposition to the petitioner's request.

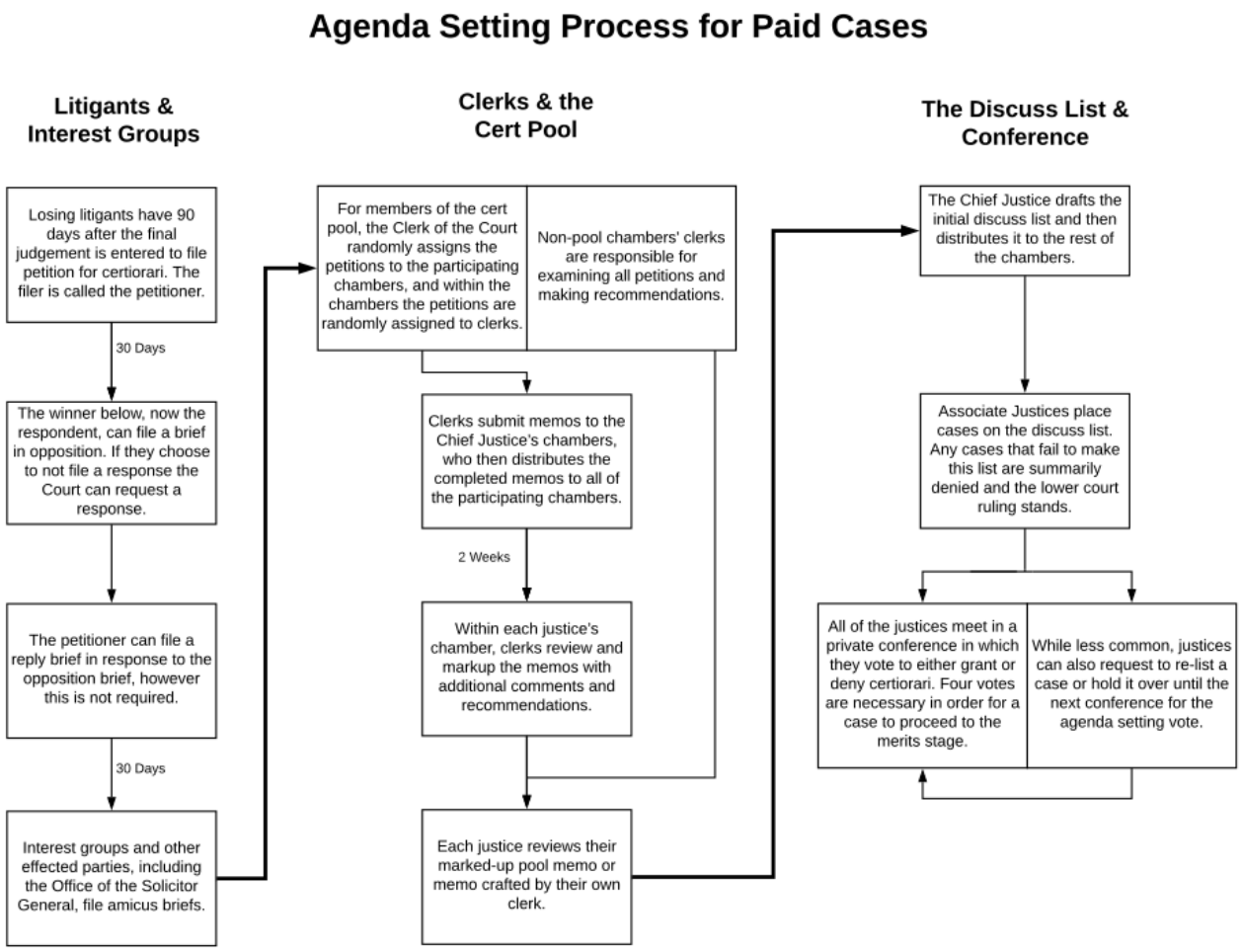

Figure 1: The flow chart above maps out the typical path or paid case petitioning the Court for review. Unpaid cases, or cases filed in forma pauperis by indigent defendants have different rules governing their review, and therefore can follow a different path.

Once the petitioner and respondent have submitted all their materials to the Clerk of the Court, the Clerk is responsible for distributing all case materials to the chambers so that each justice can begin the review process. As the middle section of Figure 1 shows, the Clerk goes through two different distribution processes. Most of the justices participate in the cert pool, meaning they "pool" their collective resources to make it through the thousands of cert petitions the Court receives each term (Perry 1991). Rather than ask each chamber to review every cert petition individually, the Clerk of the Court randomly assigns each cert petition to one of the participating justices' chambers, and that justice then assigns the petition to one of his or her law clerks (Ward and Weiden 2006). These law clerks are recent graduates of elite law schools who spend a year of their lives working as legal aides to the justices (Black, Boyd and Bryan 2014). The law clerk responsible for the petition drafts a pool memo that reviews the petition, discusses

the "certworthiness" of the case, and makes a recommendation to either grant or deny review. After drafting a pool memo, the law clerk submits it to the Chief Justice's chambers, where it is then redistributed to each participating justice for review and markup (Black and Boyd 2011). Alternatively, justices can remain out of the cert pool, in which case the Clerk distributes every cert petition to those justices for their own review. As of the October 2018 term, Justices Alito and Gorsuch do not participate in the pool, so they (or their law clerks) must review every petition submitted to the Court and identify certworthy cases on their own (Mauro 2018).

The justices make their first decisions regarding the agenda-setting process when they receive the cert memos and their accompanying documentation. After reading through a cert memo, the justices decide if they personally want the full Court to formally consider that cert petition. Cases that a justice deems worthy of conversation get added to the "discuss list," which, as its name implies, is a list of all the cases the justices will eventually discuss and vote at conference. As shown by the third and final section of Figure 1, the Chief Justice starts the list and circulates it. An associate justice can add any cases he or she feels the Chief missed, but no justice can remove a case once it appears on the list. Any case that does not appear on the discuss list is summarily denied review and the lower court's ruling stands. Making it onto the discuss list is the first step toward making it to the Supreme Court, though few litigants realize this, as the justices guard the discuss list and refuse to publicly release it (Perry 1991).

The justices go through the discuss list and identify the cases worth reviewing at their weekly conference (Perry 1991). While seniority typically dictates who speaks first on an issue, that is not always the case when it comes to cert petitions; the justice who placed the case on the discuss list leads the conversation about it. After talking about each petition, the justices vote to grant or deny review, starting with the Chief, then going around the conference table in order of seniority (Black and Owens 2012c). According to the Rule of Four, if a case receives four votes, the justices will schedule it for oral arguments. If a case does not get four votes to grant review or three votes to grant and a neutral "join-three" vote,[1] the justices deny review and the lower court's ruling stands. The final step of the agenda-setting process is the release of the order list, the official document announcing each petition's resolution. Cases that failed to make the discuss list and cases that failed to garner four votes in favor of review all go under the populous "Certiorari Denied" section, while all petitions that made it off the discuss list and onto the docket get listed under "Certiorari

1. While Supreme Court justices typically cast up or down votes on cert petitions, they have the option of voting to "join three," meaning they will provide the fourth vote to grant cert if three other justices want to hear the case (Black and Owens 2009b). Perry (1991) explains that justices typically engage in this behavior when they are ambivalent about a case but are willing to hear it if enough colleagues view it as certworthy. Stras' (2010) analysis of Justice Thurgood Marshall's papers suggests this happened about 12 percent of the time between 1979 and 1990. See also O'Brien (1997).

Granted." The order list does not disclose the justices' conference vote regarding any case. The only method of releasing these votes in real time is if a justice releases a dissent from denial of cert. Dissents from denial have increased in frequency in recent terms but are still uncommon.

The order list is the only public record that exists of the justices' agenda-setting decisions. From the minute the petition reaches the Clerk to the morning the justices release their order list, all decisions regarding cert petitions take place under a veil of secrecy. The justices are firm that clerks cannot take materials outside of the building or talk to the press about the Court's proceedings, and the justices forbid anyone other than the nine from entering their conference room (Woodward and Armstrong 1979). Consequently, no one sees the discuss list or sees how the justices voted on a cert petition in real time. Besides dissent from denial, the only way the discuss list or conference votes are disclosed is through the release of justices' personal papers. The availability and accessibility of archival data, specifically from Justice Harry A. Blackmun, transformed research and the public's understanding of the agenda-setting process (Lane and Black 2017).

The Decision to Grant Review

Starting with the 2000 term, the justices and their clerks review, on average, about 150 cert petitions a week and about 8,000 petitions a term. They narrow these 8,000 petitions down to the 500 cases that make the discuss list and then narrow those 500 cases down to the 80 or so that make the Court's agenda (Lane and Black 2017).[2] Even with clerks' help, the justices spend a considerable amount of time reviewing cert petitions while still trying to fulfill their other courtly duties. Justice Scalia colorfully described the time-consuming task as "undoubtedly, to my mind, the most, what shall I say, onerous and, for the most part, uninteresting part of the job" (C-SPAN 2010), and Justice O'Connor compared the task to doing exercise every day (Ward and Weiden 2006). The justices consequently look for ways shorten the time it takes to make it through the mountain of petitions they receive. They know what makes a case certworthy—policy, legal conflict, and importance—but they need help finding certworthy cases in the noise of so many petitions. Cues or informational shortcuts that can be found in petitions are proven valuable resources, and litigants and interest groups can help send these signals (Tanenhaus et al. 1963).

First and foremost, petitioners grab the justices' attention by offering them a case that will advance their ideological interests in the long term (Perry 1991). Supreme Court justices are, after all,

2. Justice Kennedy, speaking at a student forum at the University of California Washington Center, suggested the Court places about five hundred cases a term on the discuss list (Bravin 2013).

motivated in large part by their policy preferences; more specifically, they are motivated by their ability to influence the Court's final merits decision (Epstein and Knight 1998). The justices watch for cases that are "good vehicles" for change and they are more likely to grant review to those types of cases (Perry 1991). Supreme Court justices ask themselves if a case will help them move policy in their preferred direction (Black and Owens 2009a, 2012c; Caldeira, Wright and Zorn 1999). This is because the justices are forward thinking and attempt to see how their cert vote will play out at the merits stage, given they make a decision on the merits with the help of the eight other justices (Black and Owens 2009a, 2012c; Caldeira, Wright and Zorn 1999). So, for example, a conservative justice will not want to vote to grant review on a case if he expects the liberals will win on the merits and move the policy further from what he thinks it should be. In this scenario, he is better off voting to deny review and let a liberal decision stand for one circuit as opposed to the entire country if the Supreme Court were to rule.

Although justices are motivated by their ideology, they are not simply politicians in robes. Legal and institutional factors do influence agenda-setting decisions and can constrain the justices' behavior (Perry 1991). First and most obviously, the justices follow their own rules and look for the presence of lower court conflict when they evaluate petitions (Stern et al. 2002). Attorneys consequently seek to identify the conflict in their case, alleging in their petition that it exists in order to get the justices' attention. At the same time, however, the justices and clerks can also investigate these claims and the magnitude of the conflict (Black and Boyd 2013). Past research has found that the presence of legal conflict is one of the strongest predictors of a case being granted review (Black and Owens 2009a; Caldeira and Wright 1988; Caldeira, Wright and Zorn 1999; Schoenherr and Black 2019). In fact, the presence of conflict can even increase the likelihood that a justice who would otherwise be ideologically predisposed not to grant cert casts a grant vote in that case.

The justices also consider the parties involved in a case, especially when the US government is involved. When the federal government appears as a petitioner, the justices are significantly more likely to place a case on the discuss list and eventually grant it review (Black and Owens 2011; Black and Owens 2012a). The Solicitor General, who represents the United States before the Court, is often referred to as the "Tenth Justice" because of his expertise and frequent participation at the Marble Palace (Black and Boyd 2012; Caplan 1988; Wohlfarth 2009). The justices have a general trust in the Office of the Solicitor General at the agenda stage because he is selective, meaning he only brings the best cases to the justices for their review (Bailey, Kamoie and Maltzman 2005; Black and Owens 2012b; Perry 1991; Zorn 2002). Even when the United States is not a party to the case, the justices might call for the views of the Solicitor General (CVSG) and ask him to weigh in on a case's certworthiness (Anders 2017; Black and Owens 2012a; Thompson and Wachtell 2009). The Solicitor General's involvement sends a bright signal to the justices about a case's potential for making the docket.

The number of amicus briefs filed at the agenda stage is another strong predictor of whether a case appears on the discuss list and also on the Court's agenda. These briefs signal the vast importance of the answer to the legal question(s) raised by the case. The signal's strength comes, at least in part, from the group's willingness to endure the cost associated with amicus briefs. Amicus participation is intimately tied to a group's funds; interest groups with larger budgets are more likely to submit amicus briefs than are groups with less money to use (Solberg and Waltenburg 2006). Amicus briefs are costly enterprises for outside interests, and these groups will therefore only sacrifice resources when they have a vested interest in the outcome (Caldeira and Wright 1988; Schoenherr and Black 2019). These briefs consequently send a strong signal to the justices that a case deserves their consideration. Amicus briefs filed by the Solicitor General send a particularly strong signal about a case's importance (Bailey, Kamoie and Maltzman 2005; Black and Owens 2012b), suggesting that combining some of these signals increases their magnitude.

The justices evaluate these cues differently depending on the stage of the process, however. As Black and Boyd (2013) explain, the justices look for low-cost cues about a case's certworthiness when considering it for the discuss list. The justices are more likely to place a case on the discuss list if a circuit court judge published a dissent in the case, if conflicts exist in the lower court's record, if the Solicitor General gets involved in a case, or if interest groups file amicus briefs regarding the petition for certiorari (Black and Boyd 2013). They are also less likely to place a case on the discuss list if the circuit court did not publish its decision or if the district and circuit courts sided with the same party (Black and Boyd 2013). The justices begin their review by looking for basic facts that might indicate the case is interesting to them.

When the justices evaluate whether cases should move from the discuss list to the docket, they change their evaluation strategy. The justices are less dependent on low-cost, low-information cues at this point (Black and Boyd 2013), at least in part because they have the time to evaluate petitions more closely when they only have ten or so a week to consider (Baum 2015). They instead pay more attention to high-information cues. While the presence of conflict (weak or strong) influences the likelihood that a case makes the discuss list and the docket, the effect is larger at the docket stage, when the justices have time to confirm the strength of the conflict (Black and Boyd 2013). The same is true for other high-information cues, such as the presence of the Solicitor General in a case and the number of amicus briefs submitted with the petition (Black and Boyd 2013).

The general substantive point we want to make here is that there are two stages in the Court's agenda-setting process: the creation of the discuss list and the final agenda-setting vote. In the pages and eventual quantitative analysis that follows, we opt to focus on the final decision to grant or deny review conditional on the fact that a case has already made it to the discuss list. We do so for both substantive and practical reasons. In terms of substance, the question of interest is whether a case is granted review. Some are; most are not. This variation is what ultimately

influences the content of law. Simply making it on the discuss list is a necessary but not sufficient condition. One might wonder, why not simply consider both at the same time? This is a great observation, but for the scope of the chapter, please take us at our word that what seems to be a straightforward tweak would open up a colossal can of worms that we seek to avoid.[3]

Amicus Briefs and Agenda Setting

As the previous section suggests, a multitude of factors can influence the justices' decision to grant review in a case. In the empirical analysis that follows, we focus on one of the many: amicus briefs submitted before the Court agrees to hear a case. We do this because everything we understand about agenda setting and signaling, from low-cost name recognition to high-cost validation of conflict, stems from a seminal piece by Caldeira and Wright (1988) about amicus briefs and agenda setting. Caldeira and Wright suggested that interest groups can signal a case's importance by filing an amicus brief alongside a litigant's petition for certiorari. Importantly, it does not matter if the brief supports the petitioner or opposes the petitioner—any filing by an interest group increases the likelihood of the Court granting cert. The signal is what Black and Boyd (2013) later call a low-cost, high-information cue; it is easy for the justices to see that someone filed an amicus brief at the agenda-setting stage, and its presence provides the justices with information about the petition's importance. Amicus briefs submitted during the agenda-setting stage are powerful because they initially appear illogical—interest groups have limited time and resources to spend on amicus briefs (Hansford 2004), so they typically wait for a case to make the docket before they put together a brief. If organized interests invest their time and resources into a case before the Court has even put it on its agenda, however, then they must be doing so because the case is that important. Just as the justices pay attention to the existence of conflict when reviewing cert petitions, they also pay attention to a case's importance. So, do amicus briefs send this signal to the justices? Our research question is simple: Does the number of amicus briefs submitted in a case at the agenda-setting stage increase the likelihood the Court agrees to hear that case?

As Black and Boyd (2013) point out, amicus briefs influence the justices most when they are considering moving a case from the discuss list to the docket. That is, research shows that amicus

3. By looking at this footnote, you absolve us of complaining about being overwhelmed. The general type of problem this two-stage process presents is what we call selection bias. The two stages are clearly related. In fact, they are actually too closely related for the statistical methods developed for these general types of problems to work. Want to know more? Go take a look at Heckman selection models and the problem of identification—but don't say we didn't warn you.

briefs exert their largest influence when a case is already on the discuss list; when justices are curating the list, they are more likely to consider low-cost, low-information cues, such as the presence of conflict or lower-court dissent. For the sake of this study, then, we restrict our focus to the potentially certworthy cases and examine the cases that made the discuss list. Of course, studying anything involving the discuss list requires obtaining a copy of said list, and the Court does not release information about it. As we mentioned previously, however, scholars have successfully used the justices' private papers to collect discuss lists and study agenda setting (Black and Boyd 2012; Black, Boyd and Bryan 2014; Black and Owens 2009a; Epstein, Segal and Spaeth 2007; Schoenherr and Black 2019). Justice Harry Blackmun's papers, specifically, are the papers that most scholars use. Blackmun, who served on the Court from 1970 to 1994, meticulously documented his life as a member of the Court and saved everything, which he donated to the Library of Congress (Greenhouse 2005). Epstein, Segal, and Spaeth (2007), armed with a National Science Foundation grant, digitized the papers from the 1986 to 1993 terms and made this treasure trove of internal documents (including discuss lists) available to the masses. As Black and Owens explain, the Blackmun papers "offer an unprecedented view of the Supreme Court's agenda-setting decisions" (2009b, 254), and scholars have taken full advantage of the offerings to better understand how the Court sets its agenda (Black and Owens 2009a, b; Black and Boyd 2013; Schoenherr and Black 2019). Following in that tradition, we use Black and Owens's (2009a) agenda-setting data for our analysis. The data set covers a random sample of 360 paid, non–death penalty petitions from the federal courts of appeals that made the discuss list between the 1986 and 1993 terms.[4]

Our dependent variable is a dichotomous indicator of the Court's announced decision to grant or deny review in a case. The variable takes the value of 1 if the Court grants review in the case and takes the value of 0 otherwise. Because this variable can only take two possible values, we use probit models for our analysis (Long 1997).

Our key independent variables are the number of amicus briefs filed (1) in favor of the petitioner and (2) in favor of the respondent at the agenda-setting stage. This means we believe that each additional amicus brief will increase the likelihood of the Court granting review.

Because we want to focus on amicus briefs' influence on agenda setting, we also have to consider other factors that could influence the justices' decision to grant review. That is to say, we have to control for all the factors we discussed in the previous section in our model. We do this

4. 4. We exclude state supreme courts from our analysis because it is not, at this time, possible to put state courts in the same ideological space as the US Supreme Court. Scholars are working on it (see Bryan and Owens 2017; Caughey and Warshaw 2018), but currently, the lack of data prohibits a wider analysis. In any event, in terms of the cases ultimately granted review that receive a signed opinion, only about 20 percent of them come from state courts (Spaeth et al. 2018).

by including variables for conflict (alleged, weak, and strong), Solicitor General involvement, lower court conflict, and case importance as signaled by amicus briefs. Table 1 lists the control variables that we employ as well as how we measure them, how the literature suggests they should influence the likelihood the Court agrees to review the case, and what our research finds to be statistically significant.

Alleged Conflict	Coded as 1 if the petitioner's mentions conflict between two lower courts or a lower court and the Supreme Court.	+	No
Weak Conflict	Coded as 1 if the petitioner alleges conflict, but the clerk discounts the actuality of this conflict in his memo.	+	No
Strong Conflict	Coded as 1 if the petitioner alleges conflict and the clerk agrees this conflict exists in his memo.	+	Yes
U.S. Supports	Coded as 1 if the United States is a petitioner in a case or files an amicus brief supporting review.	+	Yes
U.S. Opposes	Coded as 1 if the United States is a respondent in a case or files an amicus brief in opposition to review.	-	Yes
Appellate Reversal	Coded as 1 if the last court to hear the case reversed the previous court's ruling.	+	Yes
Appellate Dissent	Coded as 1 if a dissent was authored by a judge in the lower court.	+	No
Law Unconstitutional	Coded as 1 if the lower court strikes down a federal statute as unconstitutional.	+	Yes
En Banc Panel	Coded as 1 if the lower court decision is reviewed by the entire circuit in an *en banc* review.	+	No
Appellate Unpublished	Coded as 1 if the lower court did not publish an opinion on their decision.	-	No
U.S. *Law Week* Coverage	Coded as 1 if the circuit court's decision is mentioned in U.S. *Law Week*.	+	No
Ideological Congruence	Surpreme Court median's Judicial Common Space score if the lower court's ruling was liberal. Inverse of the Supreme Court median's Judicial Common Space score if the lower court's ruling was conservative.	-	No
Petitioner Amicus Briefs	Count of the number of amicus briefs filed in support of review.	+	Yes
Respondent Amicus Briefs	Count of the of amicus briefs filed in opposition to review.	+	Yes

Table 1: Control Variable Measurement

Results

With the content of our model explained, we turn now to examining the model estimates to learn more about how amicus briefs influence the Court's decision to grant review. The table of coefficients can be found in the appendix. Because our model is nonlinear, we used maximum likelihood estimation techniques, which produce coefficients that are difficult to interpret on their face (Long and Freese 2006). We thus use predicted values to aid us in interpretation. Figure 2 addresses the probability the Court will grant review in a case as the number of amicus briefs filed in support of the petitioner (top) and in opposition to the petitioner (bottom) increases.

On the horizontal axis of Figure 2 is the number of amicus briefs filed supporting and opposing the petitioner, respectively. The vertical axis shows the estimated probability the Court will grant a petition review. Turning first to the top of Figure 2, the line illustrates that the more briefs filed in support, the higher the likelihood the Court will grant review in a case. The most common value in our data set is for a petition to have no supporting amicus briefs, with 83 percent of the petitions we examine falling into this category. These petitions have a 32 percent chance of being granted review. If you move right along the horizontal axis and examine petitions with a single brief in support of it, you see that likelihood increases to 36 percent, and the likelihood of being granted review continues to increase with each additional amicus brief. A petition with five supporting amicus briefs, which is in the ninety-ninth percentile of our sample data, has a 55 percent chance of being granted review by the Court. Importantly, notice that as you move from left to right on the graph, the shaded area that surrounds the line gets wider, which indicates less precision in our results. This is because most of the cases in our data set (83 percent) go to the justices without a single amicus brief attached to them, while only about 1 percent of cases went to the justices with four or more amicus briefs attached. Essentially, we have less data to help explain the Court's behavior, so we are less able to distinguish our results. Even with this imprecision, however, these results suggest that as more interest groups show interest in a case by filing briefs, the justices are more likely to hear the case.

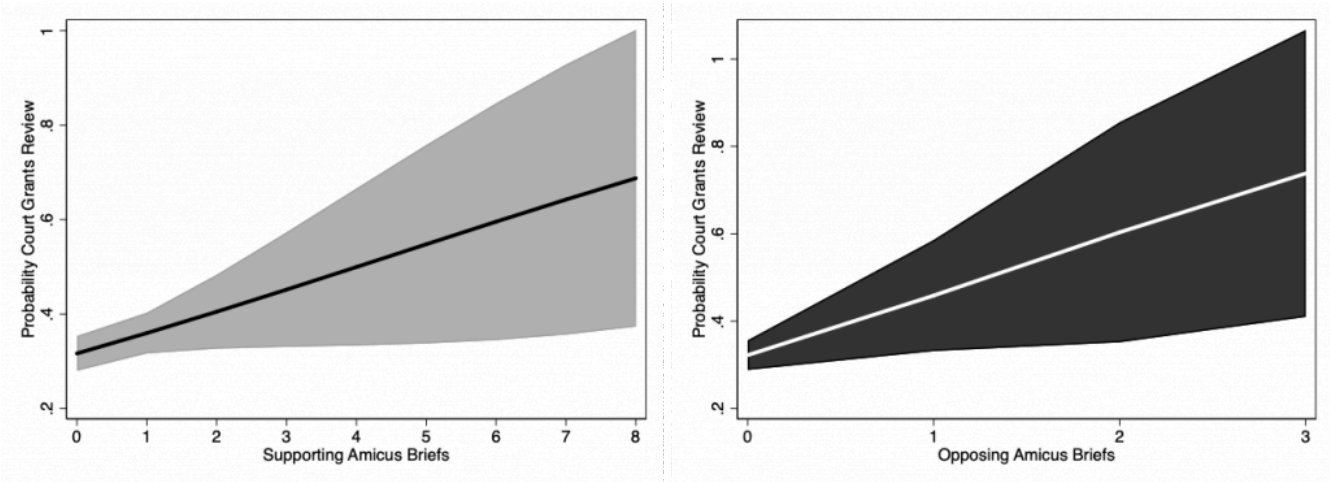

Figure 2: Effect number of amicus briefs that support (left) and oppose (right) review on probability the Supreme Court grants review of a petition. The gray and black shaded areas identify 90% confidence intervals. All other variables held constant at their median values.

The line running through the graph on the bottom half of Figure 2 shows how the probability of the Court granting review in a case changes as the number of amicus briefs opposing the petitioner increases. Interestingly, we see the same trend that we saw in the top half—the more amicus briefs filed in opposition, the more likely the Court is to grant review. While a case with no amicus briefs attached to it has a 32 percent chance of being granted review, a case with a single opposing amicus brief has a 46 percent (31 percent, 61 percent) chance of review. Importantly, a single-brief increase for opposing briefs has a larger magnitude than the one for supporting briefs. The relative effect of a single-brief increase for an opposing brief is about 44 percent, while a single-brief increase for a supporting brief is only 12 percent. On the whole, Figure 2 suggests that filing an amicus brief at the agenda-setting stage increases the likelihood the Court grants review in a case regardless of the brief's support or opposition of the petitioner. In short, we show that amicus briefs influence the likelihood the Court moves a case from the discuss list to the docket and that the more amicus briefs there are, the better the chance of making that happen.

But what do these results mean more generally and in comparison with other factors that we and previous research have identified as being important? Recall our opening case anecdote, which involved the plight of the would-be law student, Barbara Grutter. At the onset, we posited three possible explanations for the Court's ultimate decision to grant review in the case. There were politics: a conservative-leaning court wanted a chance to reconsider a liberal legal status quo. There were legal considerations: the federal courts of appeals had arrived at conflicting answers on the question of whether incorporating racial preferences in admissions was constitutional. And last, there was the aspect we have devoted quite a few words to in the preceding pages—namely, the underlying policy importance of the case.

The chief benefit of adopting an otherwise complex statistical approach such as we have done here is that it allows us to examine a host of explanations at the same time. Table 1 gives a summary of these results, and Table 2 in our appendix provides the full tale of the tape for those who like looking at lots of numbers. As for what these values mean for our three candidate explanations, they allow us to say a number of things. First, the results of our study provide only limited support for the role of ideological considerations. To assess this, we looked at the level of agreement (or disagreement) between the median Supreme Court justice and the ideological direction of the lower court's decision. If ideology mattered, then we would expect that liberal-leaning courts would want to review (and probably reverse) conservative lower court rulings. The empirical results fall in something of a statistical no-man's-land. By this, we mean they are not strong enough to confidently say that an effect exists, but at the same time, we would be uncomfortable shouting from our ivory towers that ideology is not a factor. We realize this is not terribly satisfying. Welcome to science. What we think this should mean for how you understand Supreme Court agenda-setting is that ideology is not the only factor that matters. We suspect other chapters in this book will come to the same conclusion—or at least they should because, well, that is the right answer.

If it is not all ideology, then what about the law? Legal factors matter. A lot. Big time. The presence of a clear legal conflict within the court system is the single most important factor with respect to the chance of a case being granted review. A typical case in our data has roughly a one-in-three chance of being selected. This typical case does not have clear legal conflict in it. If we use our magic wand and "give" conflict to this typical case, however, we would predict that the likelihood of review would jump—nay, skyrocket—to 69 percent. That's right, sports fans, it would more than double. As for the underlying importance of the case, we already gave you those numbers a few paragraphs ago, but in case you forgot, a case that is super-duper (highly technical) important has about a 55 percent chance of being selected for review. That ultimately means that although policy importance is quite important, it still takes the silver medal compared to the undisputed heavyweight champion of the world, the law. Importance fought the law and, as the song suggests, the law won—but not by a lot.

Conclusion

The Supreme Court's process of selecting cases for its dockets is complicated, with only the strongest (or most appealing) cases making it onto the Court's agenda. Clerks and justices review petitions to build a short list of cases, and then the justices review them again before finally selecting the cases they want to hear. They look for lower court conflict, for signals of confusion among lower court judges, for known entities like the Solicitor General to vouch for a petitioner,

and for interest groups to help signal a case's overall importance. The entire process occurs behind a curtain of secrecy, with the public only ever seeing the final result of "Certiorari Denied" (for most cases) and "Certiorari Granted" (for the lucky 1 percent). Yet there are certain tools that interested parties—the petitioners and organized interests, specifically—can use to make their case stand out to the justices. One of those tools, as we show here, is filing amicus briefs in support of or opposition to a cert petition. Such an action signals a case's importance to the justices, and they respond to the cue (Caldeira and Wright 1988). Supreme Court justices are more likely to move a case from the discuss list to the docket if it has amicus briefs filed alongside the cert petition.

When Caldeira and Wright (1988) originally examined this phenomenon, they were some of the first to write about signaling theory and its importance to the agenda-setting process. They pointed out that the justices need help sorting through the thousands of cases to find the good ones and that interest groups can help the justices do that. Later work suggested that litigants could do the same (Baird 2004; Black and Boyd 2012a; Perry 1991), including specific information in their cert petitions that could attract a justice's attention while simultaneously burying the information that could hurt it. While all these signals are obviously important (and we control for their presence in our analysis because research shows they all matter), we turned our analytical focus to amicus briefs because they are the external signals of a case's importance. Obviously, litigants want to show the justices why they need to hear a case; in fact, it is a requirement that they explain a case's certworthiness to the justices when they file an amicus brief (Stern et al. 2002). Amici, on the other hand, have no obligation to speak, and their voluntary action makes them worthy of discussion and additional attention.

One limitation to our work here, which actually stems from the necessity of using archival data, is the time-bounded nature of the results. We have eight terms' worth of discuss list data, but those eight terms' worth of data are at least twenty-five years old. Since 1993, the Court has lost and replaced seven members and dealt with a deluge of cert petitions that reached an all-time high of more than ten thousand in the 2006 term (Lane and Black 2017). If the Court has undergone any institutional changes since 1993 that affected the agenda-setting process, scholars cannot study them until another justice releases his or her papers. Given many of the current justices' advanced age, this might not look like a problem, but recent justices have voiced a strong preference for releasing papers long after they have left the Court (Mauro 2016; Watts 2013). Some scholars, such as Feldman and Kappner (2016), work around this problem by studying the information in the cert petitions and the order lists, which can provide interesting descriptive information about agenda setting. Hypothesis testing is more challenging, however, as determining whether legal conflict exists is time consuming. Of course, as more papers become available (Justice Souter's will be available fifty years after his death, for example; see Mauro 2016), future scholars can study the current Court much like we analyzed the Rehnquist Court here.

Another limitation of our work, and all work in this area, is that it neglects one of the most important aspects of review: the lower court's opinion. While scholars can typically identify the direction of a lower court's opinion, they understand very little about its content. Can judges write opinions in a way that insulates them from review—the same way Supreme Court justices write opinions to avoid congressional interference (Owens, Wedeking and Wohlfarth 2013)? Anecdotal evidence suggests the justices do not worry about review (Songer, Sheehan and Haire 2000), but other work suggests judges care about their standing in the profession and with their peers (Baum 2010) and therefore should seek to avoid review and consequent embarrassment. Future work should address the content of the lower court's opinion, if judges are writing in a way that avoids review, and if the justices understand the signal.

The Supreme Court agenda-setting process is one of the most interesting and least understood parts of the Court's overarching process. As Clarence Thomas once explained, many people think they have a right to present their cases to the justices (C-SPAN 2010), and people do threaten early on to fight their case "all the way to the Supreme Court," as the National Collegiate Athletic Association (NCAA) did in 2013 when former basketball players filed a class-action lawsuit against them for using their likenesses in video games (Le 2013). But as the NCAA discovered in 2016, Supreme Court justices decide which cases they want to hear, and most cases end before ever reaching the justices' ears. Society has high expectations for the Court's capacity to hear cases, but in reality, the justices are incredibly selective about the cases that actually end up on their docket. Because the justices make these decisions in private, they do little to help the public understand this process. Thankfully, archival research and data analysis like those employed in this chapter can help unwrap this mystery and provide context for when the justices might agree to hear certain cases.

So why are amicus briefs so worthy of study? Because they offer external groups the chance to influence a uniquely insular process. Supreme Court cases involve a surprisingly limited number of people—the parties to the case, their attorneys, and the nine justices—and the justices make their decisions based on the specifics of the case. But those specifics lead to opinions, and those opinions contain legal reasonings that apply to everyone, not just the parties involved (Clark and Lauderdale 2010; Hansford and Spriggs 2006). When Barbara Grutter sued the University of Michigan, she sued to get herself admitted to the school. But when the Court announced its decision in *Grutter v. Bollinger* (2003), the decision impacted the millions of students applying to college each year too. Understandably, then, outside interests want their needs considered when the justices hear a case. Of course, interest groups cannot voice their needs if they do not have a case in which to do it. We study amicus briefs submitted at the agenda-setting stage because they show that external interests can (and do) influence the Supreme Court's processes too, right down to which cases the justices decide to hear in the first place. True, the parties certainly have their reasons for wanting the justices to hear a case, but noting that outside interests do as well is important for understanding how the Court goes about its work.

Appendix

Variable	Coefficient Standard Error
Conflict Alleged	0.061 (0.240)
Weak Conflict	0.313 (0.211)
Strong Conflict	1.251** (0.204)
U.S. Supports	0.782** (0.230)
Appellate Reversal	0.477** (0.166)
Appellate Dissent	0.218 (0.204)
Law Unconstitutional	0.896** (0.373)
En Banc Panel	0.061 (0.344)
Appellate Unpublished	-0.599 (0.409)
U.S. Law Week Coverage	0.160 (0.173)
Ideological Congruence	0.862 (0.576)
Petitioner Amicus Briefs	0.162* (0.090)
Log Likelihood Pseudo R2 BIC	-166.90 0.27 422.08

Table 2: Probit Estimates of the Court's Decision to Grant Review

N=360. Table entries are regression coefficients and robust standard errors in parentheses.

** and * denote p < 0.05 and p < 0.10, respectively (two-tailed tests)

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Class Activity

Agenda-Setting Simulation

Writing Assignment

- Using twelve-point font and double spacing, your paper should be three to four pages long. It should be well written using appropriate grammar and correct spelling. You must produce a works cited page that conforms to the APSA Style Manual for Political Science: https://connect.apsanet.org/stylemanual/wp-content/uploads/sites/43/2018/11/Style-Manual-for-Political-Science-2018.pdf. This includes using in-text parenthetical citations! You *must* cite the source where you've found your information, whether you are using quotation marks to indicate a direct quote or paraphrasing someone else's argument. If you have any questions about plagiarism, see your instructor before the assignment is due because any academic honesty violation will result in an automatic zero.
- This does not need to adhere to a typical essay structure. You will not need to include an introduction or conclusion. Your paper should be divided into four primary sections (for consistency, use the headings in bold in your paper):

◦ Biographical background: This will be the shortest section of your paper that highlights where the justice is from and any other information that you deem relevant (e.g., religious affiliation or marital status).

◦ Legal background: In this section, you are to highlight relevant work experience. Where did he or she get her law degree? What was he or she doing before becoming a justice? What year did he or she join the Court? What president nominated the justice and what was the Senate confirmation like?

◦ General approach to the decision-making: This is the meat of the assignment and will likely be longer than the preceding sections. Your description should include some direct quotations from the justice's own writings, on and/or off the bench. Your critical evaluation should include some comparative references—that is, some discussion of how your justice's understanding of the Court's role differs from the understanding of some other justices.

- Check out this list of speeches by a number of the justices available here: http://www.supremecourt.gov/publicinfo/speeches/speeches.aspx

- And this handy tool for finding opinions written by particular justices: http://www.law.cornell.edu/supct/justices/opinions.html

- And this site, which compiles materials on recent nomination hearings for the justices: http://www.loc.gov/law/find/court-confirmed.php

- Some questions you might consider in this section: Does the justice favor judicial restraint or is he or she an activist? (You will encounter these things in your research, so a good scholar would make sure to define what this means.) Does a justice prefer deference to majoritarian political institutions or is he or she more inclined to protect minority rights? Does the justice adhere to the original intent of the framers or does he or she view the Constitution as a living document that must change with the times? How closely does the justice follow precedent?

  ◦ Ideological predisposition: This ties in directly with the analysis in the preceding section. That is, in the previous section, you discuss how a justice claims to make decisions, while in this section, you assess whether the justice is observationally a political conservative, liberal, or moderate justice on the Court. In other words, how does a justice's voting behavior tie into his or her judicial philosophy? Is this justice's vote consistent with the president that nominated him or her, or were there surprises in the justice's behavior after he or she joined the bench? Who are your justice's most usual allies on the Court?

In Class

- To get credit, you *must* be in class.
- The class will be divided into five separate Supreme Courts that correspond to the group number on the assignment sheet.
- At the start of class—roughly the first fifteen to twenty minutes—you will have an opportunity to tell the rest of your "Court" about the justice you are assigned to play. You should be prepared to highlight the most important information.
- Next, you will be given a stack of writs of certiorari to review. Your job will be to (1) determine whether it's in the best interest of the justice to grant review in the case, (2) convince the other justices of your position, (3) listen to the views of your colleagues, and finally, (4) vote on the treatment of the cert petition.

Student name: _____

Justice name: _____

Agenda-Setting Simulation

*Materials from summaries and analyses are available on SCOTUSblog.com and directly from actual writs of certiorari and response briefs.

Instructions for Class Activity

1. Divide into your assigned Supreme Courts.
2. Spend no more than fifteen minutes introducing your assigned justice to the other members of the Court. It would be helpful if you sat in a circle in descending order of seniority, clockwise from the Chief Justice's left: Chief Justice Roberts followed by Justices Thomas, Ginsburg, Breyer, Alito,

Sotomayor, Kagan, Gorsuch, and Kavanaugh. You might wish to also make a name tag to help your colleagues remember who you are.

3. Take a quick look at the structure of this cert petition packet to familiarize yourself with its layout.
4. Each case contains a brief statement of facts, the basic arguments of the parties, the holding of the lower courts where applicable, and the questions/issues before the Supreme Court.
5. Each case is followed by a docket sheet, where you will note your vote selections. In the "Defer" category, you may elect to "Relist" the case, which functionally holds the case for another discussion, or you may CVSG, which is calling for the views of the Solicitor General when you think the federal government should weigh in. In the "Cert." category, you could choose to grant (G), deny (D), or grant, vacate, and remand (GVR).
6. It is on this docket sheet that each one of you should record the vote selections for every member of your Court. Beneath the table, there is space for you to justify your own vote choice. That is, you are justifying the Court's decision, but you are explaining why you / your justice voted the way you did.
7. Before you vote and write your justification, discussion should proceed as follows:
8. Everyone should read the very short case summary / cert petition.
9. The chief justice should then ask if everyone understands the basics of the case. At this point, you are functioning not as justices but as student colleagues, so puzzle through any questions that arise together.
10. Then you should discuss the case. At the Supreme Court, this happens in descending order of seniority, and you might wish to loosely follow that structure here. Each of you should talk in every case. As you're debating, consider the following: what your justice would sincerely want the outcome of this case to be, whether your justice is likely to prevail on the merits, and if the case satisfies Rule 10 and presents a legal conflict or an important unsettled question of law. Your job should be to convince your colleagues of your viewpoint.
11. Once discussion is concluded, take a formal vote in descending order of seniority. Then write a couple of sentences about why you voted the way you did, noting whether it was a sincere or strategic choice and why.
12. On the bottom of the page, determine as a group what happened to your case. Was it granted? Denied? Something else?
13. Write your name and that of your justice on the front of this packet and submit the entire thing at the end of class.

Blagojevich v. United States

Docket no.: 17-658

Lower court: Seventh Circuit

Basic Facts / Relevant Precedent

Petitioner Rod Blagojevich was convicted of eighteen crimes, including corruption and fraud, all committed while he was the governor of Illinois. The district court sentenced him to 168 months' (fourteen years)

imprisonment. Blagojevich appealed his sentence to the circuit court on the grounds that (1) the sentence was excessive for the crimes committed (i.e., there were no violent offenses, and Blagojevich contends that he will be meaningfully rehabilitated in less time) and, more importantly, (2) the government did not prove that the defendant made an explicit promise in exchange for a campaign contribution.

The circuit court first remanded the case back to the district court to ask them to consider whether the sentence was appropriate. The district court reaffirmed the initial sentence, and Blagojevich went back to the circuit court. This time, the circuit court upheld the lower court's sentence and took up the burden of proof question. The Seventh Circuit Court of Appeals used the precedent set in McCormick v. United States (1991) and joined two other circuits to require "only . . . that a public official has obtained a payment . . . knowing that [it] was made in return for official acts" rather than siding with five circuits that use the precedent set in Evans v. United States (1992), which holds that the government must prove the defendant made an "explicit promise or undertaking" in exchange for the contribution.

Petitioner's Main Arguments

The precedent set in Evans, which is a newer and more relevant case, should control in government corruption cases, as the preponderance of circuits hold. The government failed to reach that exacting burden of proof. Additionally, there is a clear circuit split that only the Supreme Court can reconcile.

Justice demands that like cases are treated alike. A sentence of fourteen years for nonviolent crimes is inconsistent with nationwide trends for white-collar and/or political crimes. Only two circuits—the seventh and the tenth—decline to hear defendants' requests for lesser sentences to avoid "unwarranted sentence disparities."

Respondent's Main Arguments

There is valid precedent (see McCormick) to use a lower burden of proof when there is evidence that a public official abused his or her power in office. The sentence does not exceed federal sentencing guidelines, and there is no official law that requires any court to conform to national sentencing trends, so it is within the court's power to decline the defendant's request to consider whether there's a sentencing disparity.

Issues before the Supreme Court

1. Clarify whether McCormick or Evans is controlling precedent in corruption cases. In particular, what burden of proof does the government bear? Does it need to prove that the public official explicitly traded political favors for a campaign contribution, or is it sufficient that the public official knows that the donation was made in expectation of favorable political treatment?
2. Can a district court decline to address a defendant's nonfrivolous argument that a shorter sentence is necessary to avoid "unwarranted sentence disparities" for crimes of a similar nature?

Procedural History

The Seventh Circuit Court of Appeals sided with the government and against Blagojevich twice.

Blagojevich v. United States

	Defer Relist	Cert. CVSG	G	D	GVR
Roberts, Ch. J.					
Thomas, J.					
Ginsburg, J.					
Breyer, J.					
Alito, J.					
Sotomayor, J.					
Kagan, J.					
Gorsuch, J.					
Kavanaugh, J.					

Justification for vote choice:

Cert petition outcome: _____

Carpenter v. United States

Docket no.: 16-402

Lower court: Sixth Circuit

Basic Facts / Relevant Precedent

In United States v. Miller (1976), the Supreme Court ruled that bank records of a man accused of running an illegal whiskey-distilling operation were not obtained in violation of the Fourth Amendment even though law enforcement officials did not have a warrant because the bank records contained "only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business." Three years later, in Smith v. Maryland, the justices ruled that no Fourth Amendment violation had occurred when, without a warrant and at the request of the police, the phone company installed a device to record all the phone numbers that a robbery suspect called from his home, leading to his arrest.

These cases are cited as examples of the "third-party doctrine"—the idea that the Fourth Amendment does not protect records or information that someone voluntarily shares with someone or something else. But does the third-party doctrine apply the same way to cell phones, which became commercially available after those precedents were set?

Timothy Carpenter was accused of being the mastermind behind a series of armed robberies in Ohio and Michigan. Law enforcement officials asked cell phone providers for Carpenter's phone records, relying on the Stored Communications Act of 1986, which allows phone companies to disclose records when the government provides reasonable cause to believe that the phone has been used to commit a crime. Using several months of phone records, investigators linked Carpenter's cell to towers in the vicinity of the robberies.

At his trial, Carpenter argued that the police should have obtained a warrant for his phone records because he had a reasonable expectation of privacy. Therefore, those records should not be admitted as evidence. The district court disagreed and allowed the phone records to serve as key evidence in the trial, which

ultimately resulted in a conviction of 116 years in prison. Carpenter appealed to the Sixth Circuit Court, where he lost.

Petitioner's Main Arguments

On appeal to the Supreme Court, Carpenter is supported by various privacy interest group amicus curiae briefs, and all contend that the old rules are outdated for this technological age. In particular, people carry their cell phones everywhere, including in the home, where the Court has consistently ruled that people have a reasonable expectation of privacy. The data about a person's whereabouts are not voluntarily given, the petitioner argues, because it happens automatically whenever the phone is turned on.

Respondent's Main Arguments

The government argues that the old rules apply no matter the technological innovation. There's precedent and statutory law to support the lower court's treatment of evidence obtained without a warrant, and there is no Fourth Amendment violation.

Issue before the Supreme Court

1. Does the warrantless search and seizure of historical cell phone records, revealing the location and movements of a cell phone user over the course of 127 days, violate the Fourth Amendment?

Procedural History

Both the district and circuit courts relied on the "third-party doctrine" and the Stored Communications Act to conclude that the search was legal and did not require a warrant.

Carpenter v. United States

	Defer Relist	Cert. CVSG	G	D	GVR
Roberts, Ch. J.					
Thomas, J.					
Ginsburg, J.					
Breyer, J.					
Alito, J.					
Sotomayor, J.					
Kagan, J.					
Gorsuch, J.					
Kavanaugh, J.					

Justification for vote choice:

Cert petition outcome: _____

Missouri et al. v. California

Docket no.: 220148

Original jurisdiction of the US Supreme Court

Basic Facts / Relevant Precedent

Together with twelve other states, Missouri is suing the state of California over regulations on the treatment of farm animals. In this case, Missouri contends that California imposes stricter regulations on the treatment of chickens than federal law requires, which in turn has the effect of inflating "egg prices for every egg consumer in the nation." California's law requires that farms raising egg-laying hens must ensure that the chickens are able to move around freely. California counters that its law impacts only farms and eggs sold within the state's borders and should not have an impact on chickens in Missouri or anywhere else in the nation. Missouri and the other states argue that California doesn't exist in a vacuum, and when the price of eggs goes up in California, the price goes up throughout the rest of the country. Additionally, California sends inspectors to other states if farmers sell their eggs in California, which the petitioners contend violates state sovereignty.

This is similar to a second case on appeal to the Supreme Court, Indiana v. Massachusetts, where another group of thirteen states (not identical to the first group of state plaintiffs in the first case) challenges a Massachusetts law that imposes similar restrictions by barring sales within that state of eggs, pork, and veal from animals that were "confined in a cruel manner." Like California, Massachusetts argues that its law applies only to sales within the state's geographical territory and therefore does not violate any federal laws or the US Constitution.

In both the Missouri and Indiana cases, the petitioners are filing suit directly with the Supreme Court under its original jurisdiction (because remember, when one [or more] state sues another, the Supreme Court acts as a trial court). California argues that Missouri should sue in a federal district court, but the respondents fail to identify what district court would have jurisdiction over such an interstate dispute. Missouri goes a step further to argue that the Supreme Court must take the case because the Constitution doesn't specify that the Court has discretion over such cases (and that there is an absence of federal law giving the Court discretion over its original jurisdiction, unlike the Supreme Court Case Selection Act of 1988, which gives the Supreme Court almost unlimited discretion over its appellate jurisdiction).

The petitioners assert that the California and Massachusetts laws violate the Commerce Clause of the Constitution, which gives Congress the exclusive authority to regulate interstate commerce. Because these farm restrictions trigger higher prices everywhere, the plaintiffs argue, California and Massachusetts are unfairly impeding interstate commerce.

Issues before the Supreme Court

1. Does this case fall under the Supreme Court's original jurisdiction?
2. Does the Supreme Court have discretion to opt out of hearing cases filed under its original jurisdiction?
3. Does California's (and Massachusetts's) law regulating the treatment and sale of farm animals and their products violate the Commerce Clause of the US Constitution?

Missouri et al. v. California

	Defer Relist	Cert. CVSG	G	D	GVR
Roberts, Ch. J.					
Thomas, J.					
Ginsburg, J.					
Breyer, J.					
Alito, J.					
Sotomayor, J.					
Kagan, J.					
Gorsuch, J.					
Kavanaugh, J.					

Justification for vote choice:

Cert petition outcome: _____

Azar v. Garza

Docket no.: 17-654

Lower court: DC Circuit

Basic Facts / Relevant Precedent

A seventeen-year-old pregnant woman was caught at the US-Mexico border trying to enter the United States illegally. She was held in a detention facility where she had a medical exam that confirmed she was pregnant. "Jane Doe" tried to schedule an abortion, but the Trump administration blocked her request, which prompted a lawsuit in federal court.

On appeal to the US Court of Appeals for the District of Columbia, which had jurisdiction in this case, on October 24, a full panel of judges cleared the way for Doe to obtain an abortion. The circuit court remanded the case to the district court, where the judge declared that Doe should be allowed to have an abortion "promptly and without delay." Doe's abortion was scheduled for October 26 after receiving counseling on October 25; pursuant to Texas law, she had undergone one counseling session on October 19.

The Trump administration, represented by Solicitor General Noel Francisco, planned to submit a petition to the Supreme Court to ask the Court to issue a hold to delay Doe's abortion until the Court could hear arguments in the case. Rather than give the federal government time to file a writ of certiorari, Doe and her legal team changed her abortion appointment to October 25 without informing the federal government of their plans. The solicitor general filed suit at the Supreme Court on October 26.

Petitioner's Main Arguments

The petitioner in this case is the Trump administration, presented by the office of the solicitor general. They are asking the Supreme Court to vacate the DC circuit's decision so that it does not set precedent even within that specific circuit. In particular, the petitioners argue that the federal government has a vested interest to avoid facilitating abortions. The government asked the Supreme Court to do two things:

First, it urged the justices to vacate the DC circuit's ruling in favor of Jane Doe and to instruct the DC circuit to send the case back to a federal trial court, where that district court would have to dismiss the claims relating to "the government's treatment of a pregnant unaccompanied minor" because Jane Doe is no longer pregnant. That is the correct answer, contends the petitioner, because the government's efforts to appeal the DC circuit's decision became moot as a result of the conduct of Doe's lawyers.

Second, the government suggested that the Supreme Court could take the additional step to "discipline" Doe's attorneys for misleading the federal government about when Doe would obtain an abortion, which led to the delay in the filing of their cert petition so that there was no chance for the federal government to block the abortion.

Respondent's Main Arguments

Doe is represented by the American Civil Liberties Union (ACLU), and her lawyers argue that their job was to "see that she wasn't delayed any further . . . [and they] acted in the best interest of [their] client in full compliance with court orders and federal and Texas law. That the government lawyers failed to seek judicial review quickly enough is their fault, not ours."

Issues before the Supreme Court

1. Since Doe is no longer a pregnant illegal alien, should this case be dismissed as moot and the lower court's decision thereby vacated?
2. Did Doe's attorneys have a legal duty to inform the federal government when the abortion was to occur? Given their failure to do so, should the ACLU be subject to disciplinary action?

Procedural History

The DC Circuit and the district court on remand sided with Doe and held that illegal immigrants (including minors) were entitled to constitutional protection.

Azar v. Garza

	Defer Relist	Cert. CVSG	G	D	GVR
Roberts, Ch. J.					
Thomas, J.					
Ginsburg, J.					
Breyer, J.					
Alito, J.					
Sotomayor, J.					
Kagan, J.					
Gorsuch, J.					
Kavanaugh, J.					

Justification for vote choice:

Cert petition outcome: _____

National Institute of Family and Life Advocates v. Becerra

Docket no.: 16-1140

Lower court: Ninth Circuit

Basic Facts / Relevant Precedent

In 2015, California lawmakers enacted the Reproductive Freedom, Accountability, Comprehensive Care, and Transparency (FACT) Act. The act responded to concerns that crisis pregnancy centers—nonprofit organizations, often affiliated with Christian groups that are opposed to abortion—were posing as full-service reproductive health clinics and providing pregnant women with inaccurate or misleading information about their options.

The act imposes two different sets of requirements. Nonprofits that are licensed to provide medical services (such as pregnancy tests and ultrasound examinations) must post notices to inform their patients that free or low-cost abortions are available and provide the telephone number of the state agency that can put the patients in touch with providers of those abortions. Centers that are not licensed to provide medical services—but try to support pregnant women by supplying them with diapers and formula, for example—must include disclaimers in their advertisements to make clear, in up to thirteen languages, that their services do not include medical help. California's attorney general and local government lawyers can sue facilities that don't comply with the law; the penalty is a $500 fine for the first offense and $1,000 for any later violations.

Petitioner's Main Arguments

The centers are represented by lawyers for the Alliance Defending Freedom, which also played key roles in (among others) two recent high-profile cases: Masterpiece Cakeshop v. Colorado Civil Rights Commission, the case of a Colorado man who says that requiring him to create custom cakes for same-sex weddings would violate his religious beliefs, and Zubik v. Burwell, a challenge by religious nonprofits to the workarounds offered to those who objected to the Affordable Care Act's birth control mandate. They argue that the Ninth Circuit should have used the most stringent test—known as "strict scrutiny"—to review the

FACT Act's constitutionality because the law is based on the content of the centers' speech and discriminates based on their viewpoint.

When that standard is used, the petitioners contend, the law cannot survive. It places enormous burdens on the centers even though California has not provided any evidence suggesting that the centers are actually causing any harm, and it applies to all pregnancy centers even if they are not doing anything misleading. If the state were truly concerned that pregnant women aren't getting information about state-funded options, the centers conclude, it could publicize that information itself.

Respondent's Main Arguments

California counters that the act targets two problems: women who can't afford medical care aren't aware of the publicly funded options available to them, and when they go to these centers, they are often confused about whether they are getting care and advice from medical professionals. The notices that the medical centers are required to provide, the state argues, fall "well within the First Amendment's tolerance for the regulation of the practice-related speech of licensed professionals." And the notices that the unlicensed centers must provide, the state continues, are permissible to prevent confusion about the nature of their care.

Issue before the Supreme Court

1. Whether the disclosures required by the FACT Act violate the protections set forth in the free speech clause of the First Amendment, applicable to the states through the Fourteenth Amendment.

Procedural History

The district and circuit courts agreed with the state of California and found that the FACT Act did not violate the First Amendment.

National Institute of Family and Life Advocates v. Becerra

	Defer	Cert.			
	Relist	CVSG	G	D	GVR
Roberts, Ch. J.					
Thomas, J.					
Ginsburg, J.					
Breyer, J.					
Alito, J.					
Sotomayor, J.					
Kagan, J.					
Gorsuch, J.					
Kavanaugh, J.					

Justification for vote choice:

Cert petition outcome: _____

Evans v. Mississippi

Docket no.: 17-7245

Lower court: Mississippi Supreme Court

Basic Facts / Relevant Precedent

Timothy Evans is a lifelong alcoholic. Upon release from a state penitentiary for a felony conviction of driving under the influence, Evans moved in with his ex-girlfriend, Wenda Holling. Evans made attempts at employment, but he was an unreliable employee even when working for friends. As a result, he was unemployed and relied entirely on Holling for financial support.

On New Year's Day 2010, Evans and Holling got into an argument when Holling said she would no longer subsidize Evans's drinking problem. Evans strangled Holling to death, concealed her in the trunk of her car, and disposed of her body in an isolated place in a neighboring county, where it was discovered weeks later. Meanwhile, Evans told Holling's family that she was on vacation in Florida, but he actually stole Holling's car and drove to Florida himself, where he used her credit cards to purchase gasoline, food, and lodging. Upon the discovery of Holling's body, police tracked the credit card usage in Florida, found Evans, and arrested him. He confessed to the murder and the theft.

A unanimous jury convicted him of robbery-based felony capital murder. The prosecution sought the death penalty, and the same jury delivered that sentence a couple hours after delivering the guilty plea.

Petitioner's Main Arguments

The petitioner contends that the sentence is unconstitutional because the fact that Evans "is sitting on death row . . . is a product primarily of geographic accident." The criminal court that controls where Evans committed his crime imposes the death penalty at a substantially higher rate than any other court in the state. The petitioner argues that this is evidence that the death penalty is arbitrarily applied within the state; were it not, the death penalty should be proportionately applied across the state for the same types of crimes.

The petitioner relies on various Supreme Court precedents to emphasize the historical focus on the seriousness of such a sentence. They also provide evidence that there is "widespread [national] consensus against the death penalty," pointing to the fact that thirty-one states have either formally or in practice abandoned the practice. Moreover, 85 percent of executions in the last five years are concentrated in five states: Texas, Oklahoma, Florida, Missouri, and Georgia. A majority of those are issued in only a handful of counties. All of this, according to the petitioner, suggests that this creates inconsistencies and injustice in the application of the death penalty, which is no longer viable under the Constitution's Eighth Amendment protections.

Respondent's Main Arguments

The Supreme Court has current precedent that allows states to determine whether the death penalty is a permissible sentence. The state of Mississippi is acting in accordance with established Constitutional law. This is a state's rights issue. It doesn't matter, then, how frequently or infrequently the death penalty is across the nation.

Issue before the Supreme Court

1. Does the death penalty in and of itself violate the Eighth Amendment's prohibition of cruel and unusual punishment in light of the contemporary standards of decency and the geographic arbitrariness of its imposition?

Procedural History

The Supreme Court for the State of Mississippi denied a rehearing, affirming the sentence and declining to review the federal question about the constitutionality of the death penalty.

Evans v. Mississippi

	Defer	Cert.			
	Relist	CVSG	G	D	GVR
Roberts, Ch. J.					
Thomas, J.					
Ginsburg, J.					
Breyer, J.					
Alito, J.					
Sotomayor, J.					
Kagan, J.					
Gorsuch, J.					
Kavanaugh, J.					

Justification for vote choice:

Cert petition outcome: _____

Dassey v. Dittmann

Docket no.: 17-1172

Lower court: Seventh Circuit

Basic Facts / Relevant Precedent

After Teresa Halbach disappeared on October 31, 2005, her family called local law enforcement, who quickly zeroed in on the Avery Auto Salvage Yard because Steven Avery had contacted Halbach to take photos for *Auto Trader* magazine that very day. Brendan Dassey, the nephew of Steven Avery, was sentenced to life in prison after being convicted of rape, murder, and mutilation of Halbach's corpse based solely on his confession; no physical evidence linked him to those crimes. Dassey was sixteen and borderline intellectually disabled when he confessed on videotape. His confession came after four separate two-on-one (i.e., two police officers to one defendant) interrogations over a forty-eight-hour period. Throughout the interrogations, Dassey gave many wrong answers about the crimes. The law enforcement officials provided Dassey with the "right" answers, assuring him that he would be treated with leniency if he confirmed their statements. Ultimately, Dassey did what they asked: he confessed to serious crimes.

In Withrow v. Williams (1993), the Supreme Court determined that whether a defendant's confession was indeed voluntary is based on an evaluation using a totality-of-the-circumstances test. However, not all circumstances are equally important. In particular, the Court has long recognized that juveniles and those with intellectual deficits are at particular risk of confessing involuntarily under the strain of coercive police tactics. As a result, in In re Gault (1967) the Court held that "the greatest care must be taken to assure that [a minor's confession] was voluntary." Similarly, in Colorado v. Connelly (1986), the Court set precedent that "evaluation[s] of [a] juvenile's age . . . and intelligence" are required for voluntariness analysis.

Petitioner's Main Arguments

The Seventh Circuit failed to faithfully implement Supreme Court precedent and did not fully evaluate the defendant's age or mental limitations. Merely "noting" these characteristics does not constitute a fair analysis. If precedent means anything, the petitioner argues, the Supreme Court should grant Dassey writ of

habeas corpus, which translates roughly to "show me the body." In this case, that would mean the Court would declare that the taped confession is involuntary—both because Dassey was a juvenile and because he had a borderline mental disability—and the state would bear the burden of providing other evidence linking Dassey to the crimes.

Respondent's Main Arguments

Supreme Court precedent sets the standard that confessions are voluntary taking into account the "totality-of'-circumstances." Some factors would tend to support a finding that Dassey's confession was not voluntary: his youth, his limited intellectual ability, some suggestions by the interrogators, their broad assurances to a vulnerable suspect that honesty would produce leniency, and inconsistencies in Dassey's confession. Many other factors, however, point toward a finding that it was voluntary. Dassey spoke with interrogators freely after receiving and understanding Miranda warnings and with his mother's consent. The interrogation took place in a comfortable setting without any physical coercion or intimidation—without even raised voices—over a relatively brief period of time. Dassey provided many of the most damning details himself in response to open-ended questions. On a number of occasions, he resisted the interrogators' strong suggestions on particular details. Also the investigators made no specific promises of leniency.

Issue before the Supreme Court

1. Did the Wisconsin Court of Appeals unreasonably apply the Supreme Court's precedent when it held that a confession made by a juvenile with significant intellectual and social limitations was voluntary?

Procedural History

The Wisconsin (state, not federal) Court of Appeals and the Supreme Court of the State of Wisconsin found the confession to be voluntary and affirmed Dassey's conviction and sentence. A federal district court and a divided three-person panel of judges in the Seventh Circuit concluded that the state courts erred and determined that Dassey was entitled to a writ of habeas corpus. The Seventh Circuit sat en banc—which means all the judges on the Seventh Circuit participated—to review the decision. They reversed the federal district and circuit courts and deferred to the judgment of the state courts.

Dassey v. Dittmann

	Defer Relist	Cert. CVSG	G	D	GVR
Roberts, Ch. J.					
Thomas, J.					
Ginsburg, J.					
Breyer, J.					
Alito, J.					
Sotomayor, J.					
Kagan, J.					
Gorsuch, J.					
Kavanaugh, J.					

Justification for vote choice:

Cert petition outcome: _____

18. An Empirical Examination of the Business of the Montana Supreme Court

WILLIAM P. MCLAUCHLAN

This is a study of the work of one state supreme court. While it cannot be representative of all fifty state courts, examining this court's work provides insights on various features of the operation of state courts. First, the work of this court certainly reflects the judicial business of this state, unique though that might be. In a study of state politics, the judicial system must be included, and this examination provides an accurate view of the work of that institution. Second, this study provides fodder for comparison with other state courts. Montana's court is not typical of all state courts, but the findings here perhaps provide a vantage point for examining other state appellate courts. Such comparisons are valuable in understanding the similarities and differences among state judicial systems throughout this country.[1]

Here we use empirical data, specifically data from calendar years 2007 and 2017, to examine the processes the court uses and the nature of its business. This will also explore the results of the court's work. Examining the work of a court using empirical data provides an accurate and systematic perspective, and this contrasts with treatments that explore individual court decisions (or a set of notable cases). This analysis is an analysis of the institution and its work rather than focusing on a specific doctrine, case, or even individual behavior.

The Montana Supreme Court heads one of a minority of state court systems, since it operates without an intermediate appellate court located above the state's trial courts.[2] The most important

1. There are fifty-one judicial systems in this country. That includes the federal judicial system, which is by far the most extensively studied. There are some outstanding works on state courts. These include Tarr & Porter (1988) and Porter & Tarr (1982). There have been other typical examinations of state courts. Some of these focus on a set of substantive decisions by state courts—for example, Sohn (2012). A good deal of attention has been given to state court elections because of variations in judicial selection systems in states. See, for example, Hall (2015) and Hall & Bonneau (2008). Still other work on state courts treats comparative actions by those courts in connection with various substantive decisions and doctrines. See, for example, Brace, Langer & Hall (2000); Berry & Wysong (2012); and Lindquist & Pybas (1998). These exemplify categories of research that have been conducted on state supreme courts.
2. At this time, eleven of the fifty state courts have two-tiered systems like Montana's. See Neubauer and Meinhold (2017) at table 4.3.

consequence of this feature is that the Montana court must decide all the qualified cases that are appealed to it from the state's trial courts. The court also has some original jurisdiction that provides additional work for it each year. However, the vast bulk of the court's work involves appeals that derive from the lower Montana courts.

The current Montana court system originated in the 1972 Montana Constitution. Figure 1 is a simplified diagram of the structure of the Montana judicial system. The constitution created the current two-plus tiered system.[3] The trial courts of general jurisdiction are district courts. Below these twenty-two districts, there are justice of the peace courts in each county. In addition, by statute or local ordinance, there are various state or local courts of limited jurisdiction. The courts of limited jurisdiction deal with the multitude of misdemeanor cases filed in each county. The state supreme court, as provided in the constitution, was composed of a chief justice and four justices. The state legislature added two additional justices to the court so that it is now a seven-member court.[4] That expansion occurred in 1979 as a result of the caseload, or workload, that five justices faced. As explained in section I, the court still operates using various five-justice panels for the bulk of its appellate work due to its current workload.

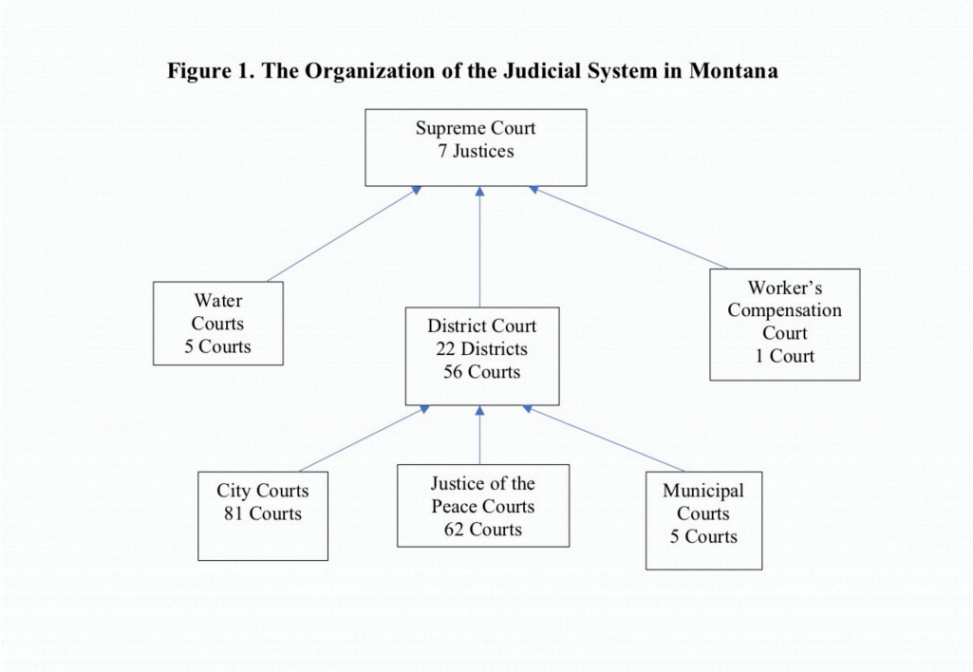

Figure 1. The Organization of the Judicial System in Montana

3. Montana Constitution Art. VII, §3(1).
4. Montana Code Annotated §3-2-101 (hereafter cited as MCA). The 1979 amendment is §1, Ch. 683, L. 1979.

The discussion that follows is divided into sections. Section I contains a description of the supreme court's decisional processes. Deciding a large number of appeals requires the court to divide its workload into different categories and apply different processes to these categories. These processes, though elaborate, have been devised to accommodate the array of appeals the court receives and must resolve. Section II outlines the data that were collected and used for this analysis. The section also provides a set of research questions about the court's operation. The third section is the core of the chapter and presents an empirically based "picture" of the operation of the court, the nature of its appellate business, and how it processes that workload. The last section is a set of conclusions that are derived from the analysis. There are several accompanying appendices.[5]

Supreme Court Processes

The Montana Supreme Court considers two sets of cases: appeals from lower Montana courts and cases filed under the original jurisdiction of the court. The original jurisdiction of the court relates to writs of habeas corpus and to other writs that are authorized by state statute. The original cases constitute about 25 percent of the supreme court's business in 2017. The bulk of the court's business is appealed from lower courts, primarily from the district courts. Those are the trial courts of general, original jurisdiction in the state. The court's appellate jurisdiction extends to all cases in law and equity. The court's term begins January 1 of each year and extends throughout the calendar year, with only one term each year.[6] The supreme court's authority also extends to managing the judicial system in the state, setting procedural rules and requirements for court procedures, regulating the practice of law in the state, and setting standards for the professional conduct of lawyers and judges.

The processes the court follows are contained in its internal operating rules (IORs), first adopted in 1995 and amended later. Appeals must be filed within thirty or sixty days of the entry of judgment by the lower court. The deadline depends on whether the state (sixty days) or a private party (thirty days) appeals from the lower court. Once the appeal is filed, the supreme court clerk distributes the documents to the seven justices, and each case is also assigned to a five-justice panel. The panels are devised so that each justice participates in a nearly equal portion of the court's work, although which cases any given panel receives depends on the order in

5. These appendices are the codebook for the data and the data. There is also a set of suggestions for future research on either the Montana Supreme Court or another state high court.
6. This discussion is based on the Montana Constitution Art. VII and the MCA §3-2-ff.

which an appeal is filed. The statute creating the additional two justice positions specifies that all the decisions of the court must be agreed to or supported by a "majority of the Court."[7] That obvious requirement does place certain constraints on what a five-justice panel can decide, since a majority of seven is four. That means that to decide a case, four of the five justices on the panel must agree. Figure 2 outlines these general features of the court's decisional process.

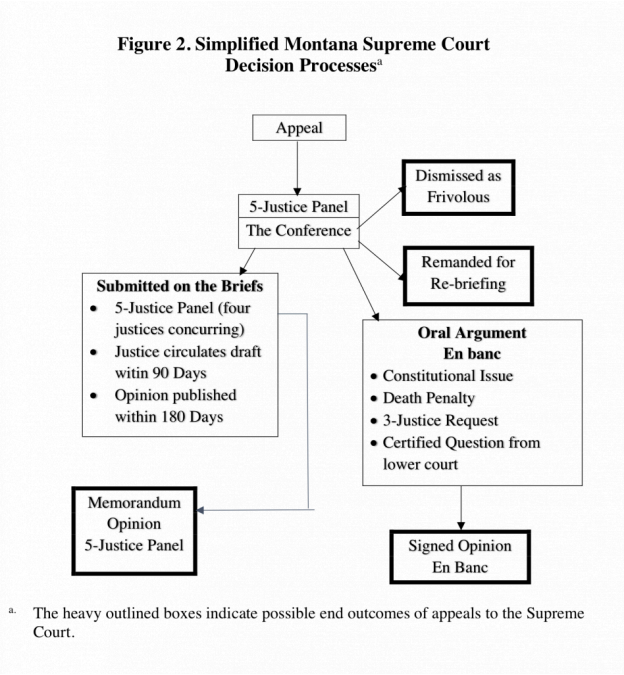

Figure 2. Simplified Montana Supreme Court Decision Processes

The five-justice panel assigned to an appeal presents that appeal at a Tuesday conference of all seven justices.[8] At that conference, several outcomes can result. First, the case can be dismissed as frivolous or remanded to the attorney filing the appeal. A remand seeks a rebriefing because the conference determines that the appeal is insufficiently briefed. Second, if three justices think it is warranted, the case is scheduled for oral argument before the full seven-member court.[9] Third, the conference can determine that the appeal only warrants a memorandum opinion—that is, the case "presents no constitutional issues, no issues of first impression, does not establish new precedent or modify existing precedent, or, in the opinion of the Court, presents a question

7. MCA §3-2-302: "Any decision must be concurred in by a majority of the justices of the court."
8. Conference will be used throughout this discussion to refer to all seven members of the court.
9. This process is similar to how the US Supreme Court dockets cases using a rule of four. On the Montana Supreme Court, it is a rule of three.

controlled by settled law or by the clear application of applicable standards of review."[10] The result of a memorandum opinion is a decision in the case, but that decision is *not* useable as precedent in future litigation.

If an appeal does not warrant oral argument *and* if four members of the five-justice panel agree, the appeal is decided as "submitted on the briefs" after review by the conference. This decision can be either a memorandum opinion or a full opinion by the panel. If three members of the five-justice panel agree on the outcome, the appeal is referred to the conference for consideration and decision by the full court because, as noted above, the law requires that the court's decisions be made by a majority of the court, not a majority of the five-justice panel. The conference will consider, usually without oral argument, the issues in such cases and render a decision that reflects the judgment of a majority of the seven justices.

The decisional attention of the full seven-member court is only given to a subset of appeals. Those appeals include (1) appeals that cannot be dealt with by memorandum opinions, (2) those cases in which a four-justice majority of the five-justice panels cannot agree, and (3) those cases that are scheduled for oral argument. These decisions are usually based on the filings by the appellant and the respondent. However, in a few cases, one or more amici curiae (friends of the court) submit written materials to support the arguments of one of the parties. The formal conduct of oral arguments is public, conducted either in the courtroom in Helena or in a suitable facility elsewhere in the state. However, given the general features of the court's business, which are noted below, the seven-justice conference or en banc proceedings cannot (and does not) absorb a majority of the court's attention. The fact that the court has mandatory appellate jurisdiction in all cases means that there are too many appeals for the seven-justice court to be the standard operating procedures for the court.

This brief outline of decisional processes is enough to generate a variety of descriptive questions that data could be used to answer. These data are the published materials issued by the court in 2007 and 2017. These two years provide a comparison of the court's work a decade apart. This comparison might show changes in the nature of the court's business or changes in the decisions of the court. This minimal longitudinal study will outline and perhaps answer the following questions:

- What is the aggregate volume of the court's appeals?
- Where do these cases come from?
- What kinds of appellants bring the appeals to the court?
- What kinds of cases/questions are appealed?

10. IOR §I.3.(c)(i). A memorandum opinion is not "citable as binding precedent"; it is published in the public domain and is obviously binding on the parties and the lower court involved in the case.

- How are those appeals disposed of by the court?
- What was the vote in the decisions?
- Which justices wrote the opinions in the appeals?
- How long does it take the court to render decisions?
- Have there been appreciable changes in any of these metrics during the decade interval?

While these queries are descriptive, we currently do not have good answers to these questions for the Montana Supreme Court. An understanding of the kinds of cases, the kinds of appellants, and the kinds of results rendered by the court will illuminate its business. These initial answers will provide ideas about (1) the nature of the court's work and how the court's handled its work and (2) the kinds of research that might follow from this exploratory examination. For example, are different case types processed differently? Do they come from different parts of the state? Do different parties win and lose at different rates in the supreme court? Further research always derives from even descriptive analysis of the parties (appellants and respondents, the winners and losers on appeals, and the kinds of decisions that are reached by a court).

The Data

The Montana Supreme Court works in calendar-year terms. As a result, this analysis is based on data collected from two calendar years—2007 and 2017.[11] These two years were selected to provide a minimal comparison of the court's work over time and to suggest the more general features of judicial business in the state than can be derived from a single year's work. The selection of 2017 was based on that fact that it was the most recent year of complete, available data. The earlier year—2007—was selected in large part because it was a full decade earlier. Except for one justice who served during both these years, there was nearly complete turnover in justices between the two years.

The codebook is provided as an appendix and provides an outline of the variables that were collected (around three dozen) and the categories that were developed to sort the data into

11. The data for this study were collected by the author and by a class of undergraduates at the University of Montana during fall semester 2018. Time constraints required the development and use of this limited (two-year) data set. Given the number of cases examined and coded for these two years (N = 692), the empirical picture from this analysis present a valid quantitative comparison. It is often the case with empirical research that the available data are limited or their collection is short of perfect.

subsets. Coding nominal and categorical data requires a good deal of care and a clear understanding of the range of each variable. There are likely to be differences in the judgment of persons who coded parts of the data. The way to reduce those differences, if not eliminate them altogether, is to have several people code the same subset of cases and compare the coding. The comparison suggests that most of the variables were coded consistently by everyone. Some of the variables, particularly those involving the subject matter of each appeal,[12] produced the most variation but was still within permissible limits. Other variables were created or calculated from the original data. In some instances, the number of categories defined for a variable was reduced (or "collapsed") because they contained a very small set of values.[13] Additionally, collapsing similar categories reduces variability in the coding. A statistical software package was used to provide the tabulations and other output that are presented below.[14]

The Supreme Court's Business

An Overview

The analysis begins with an exploration of the general pattern of appeals filed with the Montana Supreme Court. Table 1 shows the total number of appeals for each of the years examined here. The first notable feature of these data is the number of appeals. It is clear that the court treats a substantial number of appeals each year—recall that all appeals have to be considered by the court in some fashion. It is interesting to compare the two years in terms of the number of appeals. There was about a 150-case decline in the number of appeals between 2007 and 2017. This feature alone does not indicate much about the change, but it suggests that in the course of the decade, the volume of business (measured as raw numbers of appeals) has changed (dropped). Whether the nature of that work has also changed remains to be seen.

12. Those variables were "subj" and "submtr." Examine the codebook to see how these were categorized. It should be evident that some variation in coding these variables is possible. Variable names are often peculiar. Rarely can the name be a full description of the variable. A brief acronym is the usual method of labeling each variable. As with the two variables identified here, there is a difference in how the subject matter of the appeal is classified for these two variables, which is indicated in the codebook.
13. These collapsed variables are labeled in the data set as "variablename2."
14. These collapsed variables are labeled in the data set as "variablename2."

Year	*Total Appeals*	*Full Published Opinions*	*Noncite Memorandum Opinions*	*Closed Cases*	*Cases Carried Over*	*Pro Se Cases*
2007	751	233	125	713	694	193
2017	596	158	148	764	581	228

Table 1. The Appeals Filled and Disposed of by the Montana Supreme Court in 2007 and 2017

Other features displayed in this table are the number of cases resolved by the court and the number of cases carried over to the next year.[15] The court disposed of nearly the same number of cases in both years. However, it is striking that the number of appeals carried over to the next year was just over one hundred appeals less in 2017. These carried-over cases were either appeals filed late in the year that the court could not decide and finish before the new year or difficult or unique cases that required repeated and extended attention by the court after the parties had supplied more information. The pro se cases are those appeals presented to the court by the party (the appellant) acting on their own behalf without the assistance of an attorney. As a proportion of the total appeals for each year, this subset of cases represents just over a quarter of the appeals in 2007 and nearly 40 percent of all the appeals filed in 2017. This is a striking feature of the appeals. Pro se cases could involve individuals appealing their criminal convictions. However, there are a variety of civil matters in which the appellant proceeds on his or her own. The court makes every effort to accommodate such appellants, but they undoubtedly present a challenge to the court due to a lack of legal representation.

Table 1 also shows information about how the court handled its work during these two years. A substantial portion of the appeals were disposed of in each of the four ways that are displayed in figure 1. Cases "Dismissed" and those "Remanded for Re-Briefing " constitute about 50 percent of the 2007 appeals disposed of by the court and nearly 60 percent of those the court treated in 2017. Obviously, these are substantial portions of the court's business, and these filings do not receive decisions on the merits unless they are refiled. A detailed examination of these appeals is beyond the data available for this study. There is no public record available on the nature of these dismissed appeals. However, it is clear that the court's decisional processes allow it to make a preliminary screening decision on a substantial portion of the appeals that are brought to it on appeal. This process is similar to the rapid disposition method (RDM) utilized by the Court of Appeals for the Ninth Circuit to manage their heavy caseload.

The remainder of the court's dispositions involves a decision and opinion on the merits. A large

15. A case that is "carried over" is one that was not decided during the calendar year under study. That could be because of the appeal occurring late in the year or because the case was very complex, requiring a great deal of time to decide.

segment of this category was decided by a full written opinion (32 percent in 2007 and 20 percent in 2017). These types of decisions contribute to the body of precedent. These cases involve legal issues that the court determined are credible and possibly useful for future litigants. As a result, the court issued full opinions on this set of appeals. On the other hand, memorandum opinions resolved cases that do not constitute precedent for future legal issues. It is notable for the court to divide cases that it and future litigants could use as precedent in later cases and others that only resolve the issue(s) in the case for the affected litigants. The fundamental feature of the data displayed here is that a large portion of the court's appellate work is treated relatively summarily and quickly, without full opinions or treatment by a full en banc court. In 2007, about two-thirds of the cases were treated by one of the three limited methods of disposition that did not constitute precedent by the court. That proportion was nearly 80 percent in 2017.[16]

Sources of Appeals

The next question explored here is, Where did these appeals come from? To answer this question, we must sort the cases by the lower courts that generated the appeals, and there are several different ways we can accomplish this categorization. First, there is the question of where the appeals originated. That involves two features. One is the geographic origin of the appeals. This is related to various population centers and other locations in Montana.[17] The second feature is the court of original jurisdiction. Although figure 1 correctly indicates that there are three possible courts that could generate appeals for the supreme court, there are a large number of courts of limited jurisdiction that may have heard cases originally. A second perspective on the source of cases is who brought the appeal. It is obvious that the party that lost the case below (at trial) is the likely appellant. There may be cross appeals filed by the winner in order to obtain some correction of a favorable lower court's order; however, for the most part, appeals are largely brought by losing parties seeking to have the supreme court correct a legal error that the appellant argues was made at the trial-court level.

16. This last statement may be somewhat misleading. That is because the court's memorandum opinions do constitute decisions on the merits, whereas the dismissals and remands are not decisions on the merits at all. The important point is that the court has fashioned procedures that allow it to siphon off segments of its business in ways that relieve it from a good deal of detailed work.
17. Montana has district courts in each of its fifty-six counties (Montana Constitution Art. VII, §4). However, the constitution permits the state legislature to draw "district" boundaries to include multiple counties. As a result, there are twenty-two judicial districts that encompass one to seven counties each (MCA §3-5-101). The geographically largest district is District 16, which includes seven counties and therefore seven separate district courts. One judge covers all these counties.

Next, we look at which court level, displayed in figure 1, the appeals originated from. Table 2 is an aggregate display of the court of origin for the appeals. Clearly, the large majority (nearly 85 percent) were originally filed in the trial courts of general jurisdiction (district courts). Nearly another 10 percent were started in the justice courts or municipal courts in the state. These appeals were channeled through the district court, which treated them de novo.[18] This category largely involved misdemeanor crimes initially treated by justices of the peace. Thus the vast bulk of appeals came to the supreme court from the district courts. Interestingly, the last 5 percent began in the specialized water courts or the workers' compensation courts.[19]

Court	***Proportion of Appeals***	**N**
Courts of Limited Jurisdiction*	9.7%	66
District Court	84.5%	577
Water Court/Worker's Compensation Court	5.8%	40
Total	**100%**	**683**

Table 2. Court of Origin for Appeals Filed with the Montana Supreme Court, 2007 and 2017

*This category includes Justice Courts, Municipal Courts, and City Courts.

The second exploration of where cases came from is displayed in figure 3, which represents a set of dot plots showing the number of appeals from each of the twenty-two district courts in the state. Dot plots are a readable method of arraying some kinds of data. Figure 3a displays the number of total appeals, combining appeals from both years. These are categorized by district court numbers from which appeals were taken. The largest sets of appeals are displayed at the bottom of figure 3a. Figures 3b and 3c subdivide the appeals by the years under study here. Clearly there are some districts that generate the bulk of the appeals in either year as well as the combined number.

18. De novo treatment of a case means the district court started the case again "from the beginning."
19. It should be noted that from this point in the analysis, the number of cases in the data set (N = 692) are reduced to those that are reported rather than the totals that were given in various the tables presented in this analysis.

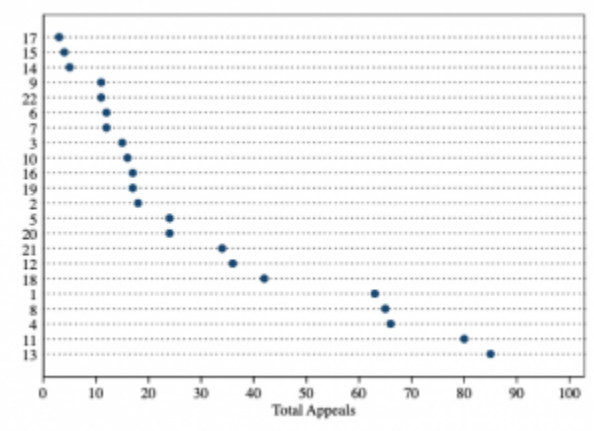

Figure 3a. Appeals by District 2007 and 2017

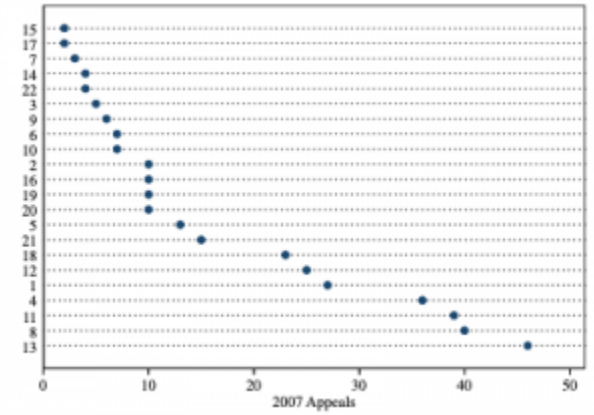

Figure 3b. Appeals by District, 2007

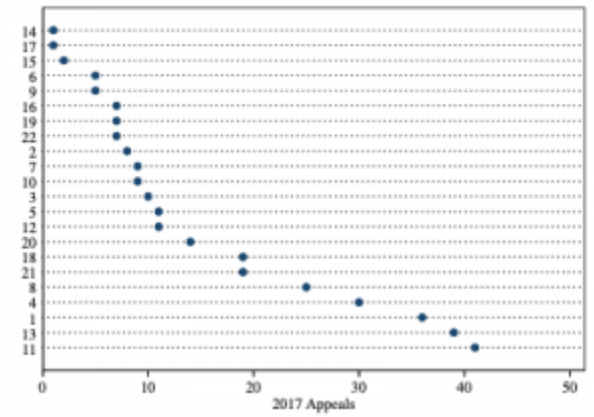

Figure 3c. Appeals by District, 2017

The largest numbers of filings come from the population centers in the state. District 13, for example, is Yellowstone County, which includes the state's largest city, Billings. The other districts with the largest number of filings are District 1 (containing the capital, Helena), District 2 (Butte), District 4 (containing Missoula), District 8 (Great Falls), and District 11 (Kalispell). The other three districts that provided a noticeable set of appeals are a mixed set. District 18 (Bozeman) could be considered a population center, though the number of appeals from that district is less than the other population centers.[20] Both District 12 and District 21 contain more than one county. These districts, each of which generated a significant number of appeals in one of the two years, do not contain any population centers.

While the subset of districts that generated the most or the largest set of appeals seems arbitrary, the largest numbers of appeals come from population centers. The largest numbers of filings are not from identical districts for both years. Districts 12 and 21 were each among the largest of the seven in one of the years, but not both. Figure 3a is a less clear presentation, as there are several breaks or gaps when both years are added together. The dots and the cutoff could include Districts 5 and 20 for a total of ten districts. These two districts do not contain state population centers. However, the eight largest appeals from districts (identified in figures 3b and 3c) are the eight large, populated districts. The other extreme (the upper portions of each figure) identifies districts that presented very few appeals, say one or two per year. The median number of appeals from the twenty-two districts was 10 in 2007 and 9.5 in 2017 (the means are 15.6 and 14.3, respectively).

The third question about origins seeks to determine who appealed cases. This involves the types of parties appealing cases. There are various ways to categorize parties. The simplest, used here, is to bundle together all (1) individuals acting on a matter that concerns them; (2) government institutions, whether a sheriff, a city, or the governor of the state; and (3) companies or business interests of some sort. As displayed below, there is a fourth category of "other" parties. The largest number of appellants in this category was interest groups litigating a public policy issue, such as an issue involving environmental protection or water conservation.

Table 3 indicates the types of appellants and appellees involved in appeals to the Montana Supreme Court. This display of data contains a tabulation of the filings combing both years. The difference between 2007 and 2017 on this matter is not noticeable.[21] Of course, appellants were the

20. The districts identified below contain all the population centers in the state. These are not necessarily large urban cities in the usual sense. This table indicates the 2017 population and the proportion of the state population in the relevant districts.
21. It should be noted that table 3 is statistically significant—that is, the p-value is less than .05 ($p < .05$). In other words, the displayed pattern between appellant and appellee most likely did not occur randomly or by chance. While this discussion does not rely on the statistical significance of the data,

parties who lost in the court below and who sought a reversal of the trial outcome. It is important to note the number of cases appealed by each type of appellant and appellee in the table. These are the row and columns labeled "N" in the table. Clearly, the vast bulk of the appeals was brought by individuals (81.2 percent), and most of the time (56.8 percent), the government is the appellee. That indicates that the "typical" appeal involves an individual challenging an action by a governmental entity where the appellee won in the trial court. The table also indicates that the remaining types of appellants and appellees constitute small portions of the litigating population in this study.

	Appellee - Individuals	***Appellee - Government***	***Appellee - Business***	***Other***	***Total***	**N**
Appellant - Individuals	17.6%	56.8%	14.6%	11.0%	**81.2%**	562
Appellant - Government	62.9%	11.4%	14.3%	11.4%	**5.1%**	35
Appellant - Business	23.1%	25.0%	44.2%	7.7%	**7.5%**	52
Other	18.6%	30.2%	11.6%	39.5%	**6.2%**	43
Total	**20.4%**	**50.4%**	**16.6%**	**12.6%**	100.0%	692
N	141	349	115	87		692

Table 3. The Appeals Filled with the Montana Supreme Court Categorized by the Type of Appellant and Appellee, 2007 and 2017

Chi2 = 111.47 pr=.0001

Note: Appellants file appeals. Appellees respond to appeals brought by appellants.

The appeals brought by individuals against the government largely dealt with one of two kinds of claims by individuals. First, a great many appeals considered an individual subjected to a criminal charge or convicted of criminal activity who challenged his or her charge/conviction in some form. These suits are brought against the county, the county prosecutor, or a prison warden. All of these appellees are represented by the state attorney general at the supreme court. In most of those cases, the relevant county attorney also prepared the response to the appeal, but the attorney general or a staff member filed the response. A second set of these appeals treated an individual seeking a remedy for (relief from) some action by a government agency or actor involving an administrative or civil issue. That is, the government actor reached a decision or took some action that the appealing individual challenged on grounds that it was illegal. The remainder

it is worthwhile to note. The statistical significance is also misleading here because some of the cells in some tables contain small numbers of values.

of individual appellants' cases was relatively evenly distributed among the other three kinds of appellees.

The second most frequent appellant was businesses (7.5 percent). These appeals largely involved cases against other businesses. It is possible these contract disputes could not be settled through negotiation or mediation. Another quarter of the appeals by businesses were challenges to a governmental policy. A bit over 20 percent of appeals from businesses were against individuals. Nearly all of this last category of contract cases dealt with individual who entered commercial transactions that failed for some reason. Businesses and the other two small categories of appellants—the government and "other"—constitute just under 20 percent of appellants altogether. None of these three categories compose a striking portion of the appellants.

It is noticeable that when the government appealed a case, the primary appellees were individuals (over 60 percent). These appeals by the state or a local government involve a variety of civil disputes. There were two primary appellee categories of appeals brought by "other" appellants against "other" appellees (nearly 40 percent) and against governmental actors (30 percent). Given that many of the "other" appellants were interest groups, their suits against governmental agencies were focused on a policy or regulation that raised a legal issue that the advocacy group sought to reverse or clarify.

The Nature of Appeals

Who Are the Appellants?

The nature of the appeals that the various categories of appellants presented to the court is suggested above and also displayed in table 4.[22] This is a simple categorization of appeals versus appellants. The meaning of a civil or criminal appeal is self-evident. The "other" category included a variety of issues related to equity claims. These include appeals that involved injunctions, restraining orders, or determinations of status—for example, determinations relating to youth in need of care. In addition, this category included civil commitment cases where an individual challenging his or her commitment to an institution for some kind of treatment. Interestingly, the civil and criminal appeals each constituted about the same portion of the appeals (43.5 percent and 39.3 percent, respectively). The remaining 17 percent were the "other" types of appeals.

22. The preceding footnote (#20) applies here.

	Subject Matter - Civil	***Subject Matter - Criminal***	***Subject Matter - Other***	***Total***	**N**
Appellant - Individuals	38.3%	45.6%	16.2%	81.2%	562
Appellant - Government	45.7%	40.0%	13.3%	5.1%	35
Appellant - Business	94.2%	0.0%	5.8%	7.5%	52
Other	48.8%	4.7%	46.5%	6.2%	43
Total	43.5%	39.3%	17.2%	100.0%	692
N	301	272	119		692

Table 4. Appeals Filed with the Montana Supreme Court Categorized by Appellant and Subject Matter, 2007 and 2017

Chi2 = 99.7389 pr=.0001

The core feature of criminal appeals is that they are presented by individuals. Civil appeals involved various appellants who raised different substantive issues. Table 5 displays the numbers and proportions of civil appeals categorized by the type of appellant and the substantive issue presented in the appeal. This category of appeals (civil) constitutes nearly half the business of the court during these two terms. The largest set of civil appeals involved contract issues. The "other" category of appeals is the next largest and involved various procedural issues, equitable claims, government regulations, and public policy. Property claims involved nearly a quarter of appeals to the court. Tort claims constituted a small segment of the substantive work for the court.

The bulk of civil appeals were brought by individuals. The primary subject of those appeals was issues relating to contract. These appeals involved either interpreting a provision of a contract or resolving issues about what the consequence of the contract was. Businesses were the second most frequent appellant (over 15 percent of civil appeals), and those suits were primarily contract cases. Half the appeals brought by businesses were contract cases. The government was not the appellant in many civil cases at all (5.3 percent). The "other" category of appellants includes a collection of appellants, largely interest groups, both public and private. There were few appeals brought by this category of appellant, but most of those raised property issues.

Appellant	***Contract***	***Tort***	***Property***	***Other***	***Total***
Individual	72 (66.7%)	25 (80.7%)	53 (72.6%)	65 (73.0%)	215 (71.4%)
Government	7 (6.5%)	0	2 (2.7%)	7 (7.9%)	16 (5.3%)
Business	24 (22.2%)	3 (9.7%)	10 (13.7%)	12 (13.5%)	49 (16.3%)
Other	5 (4.6%)	3 (9.7%)	8 (11.0%)	5 (5.6%)	21 (7.0%)
Total	**108 (35.95)**	**31 (10.3%)**	**73 (24.2%)**	**89 (29.6%)**	**301 (100%)**

Table 5. Types of Civil Appeals Categorized by Types of Appellants, 2007 and 2017

Chi2 = 11.6521 pr=0.23

Types of Questions

The kinds of questions presented to the court on appeal require another categorization. The issue(s) involved a substantive issue of law, a procedural issue, or a constitutional issue. Table 6 displays this categorization of the appeals to the court. The largest segment of appeals presented the court with a substantive legal issue. A full quarter of the appeals challenged the procedure used at the trial-court level. There were only sixteen appeals that raised purely (only) a constitutional issue. Of those, 68 percent were affirmed. That means that over 30 percent of these few appeals treated at least a partial reversal of the lower court on the issue. These few cases (five appeals altogether) did not necessarily mean the court invalidated a statute as unconstitutional; rather, these claimed a violation of a constitutional right or principle that required reversal.

Issue Type	***Proportion***	**N**
Substantive	43.9%	304
Procedural	25.9%	179
Constitutional	8.5%	59
Mixed	21.7%	150
Total		**692**

Table 6. Types of Appeals Categorized by Issue Type, 2007 and 2017

There were appeals that combined an issue of constitutional law and a substantive or procedural claim. An appeal does not necessarily present only one issue; rather, a mixture of claims was prevalent in a number of appeals. The "constitutional" category in table 6 combines cases with multiple issues (substantive or procedural as well as constitutional). This expanded category of cases with some constitutional issue includes the most expansive set of constitutional appeals that is possible here. This category still constitutes less than 10 percent (8.5 percent) of the court's business. The other categories presented in table 6 obviously constitute the vast bulk of the court's appellate work. Close to 70 percent involve a substantive claim relating to either a common-law or a statutory issue. The 25 percent of appeals that presented procedural issues is interesting to note. That means one-quarter of the appeals claimed that the trial court's proceedings did not involve a matter of substance. As already noted, the "mixed" category included determinations of

status for the appellant or requests for injunctive relief. The broadest set of appeals that presented a constitutional issue involved fifty-nine of the appeals to the court.

This last point is not surprising, but it is worth emphasizing that the work of this appellate court (and perhaps other state appellate courts in this country) may not involve a large portion of issues of constitutionality. The concern that some observers have about the exercise of the power of judicial review is an important point of discussion; however, this state court had few opportunities to consider an issue of constitutionality. Furthermore, those cases did not contain a constitutional flaw in the trial court's work. When the remaining appeals (reversed or affirmed in part) are combined, just over 20 percent of the appeals were reversed—and again, none of these decisions involved the declaration of a constitutional error.

Number of Issues

Another feature of the kinds of appeals that might be considered is the number of issues decided by the court. Appeals often presented the court with various legal questions, ranging well into the double digits. However, the median number of issues raised was 1 and the mean is 1.7. These appeals displays several interesting features when the data are categorized by the substantive kinds of cases presented to the court. The court often indicated that one legal question out of the multiple questions presented on appeal was determinative. As a result, the court only decided that legal issue, no matter how many legal issues the appellant presented in his or her brief. Table 7 indicates the substantive case types and the number of legal issues presented to the court (not necessarily decided). A substantial majority of appeals presented a single issue (nearly 60 percent). Another 20 percent of appeals presented the court with two issues. The other 20 percent of cases presented three or more issues.[23]

Number of Legal Issues	***Contract***	***Tort***	***Property***	***Criminal***	***Other***	***Total***
One Issue	59 (50.4%)	15 (41.7%)	33 (44.0%)	177 (63.2%)	129 (70.1%)	413 (59.7%)
Two Issues	19 (16.2%)	9 (25.0%)	23 (30.7%)	69 (21.4%)	26 (14.1%)	137 (19.8%)
More than Two Issues	39 (33.3%)	12 (33.3%)	19 (25.3%)	43 (15.7%)	29 (15.7%)	142 (20.5%)
Total	**117 (16.9%)**	**36 (5.2%)**	**75 (10.8%)**	**280 (40.5%)**	**184 (26.6%)**	**692 (100%)**

Table 7. Types of Appeals Categorized by the Number of Legal Issues Presented, 2007 and 2017

23. The extreme appeal was one case that presented thirteen issues. The Court decided only one of those.

Chi2 = 38.4975 pr=0.000

When the types of appeals are examined in relation to the number of questions, criminal appeals present the largest proportion of single-issue appeals. None of the other (civil) categories of case types display very striking differences in the proportions of issues. There is some variation in the proportions of single-issue cases for contracts and the other category. Probably the most striking feature of the data categorized by number of issues and case types is the fact that on appeal, most of the appeals presented the court with one issue. In fact, for multiple-issue cases, the court often converted those to a single issue that disposed of the case.

Appellate Outcomes

The outcome of the court's decisions in these appeals presents interesting patterns. These results are first displayed in tables 8a and 8b. These results are categorized by the type of appellant (table 8a) and the kinds of substantive issues presented to and decided by the court (table 8b). In the aggregate, the appeals were largely affirmed (73.7 percent). This indicates that the appellants' claims, though considered by the supreme court, did not constitute a reversible error in three-quarters of the appeals. This feature does not vary with the type of appellant. Seven percent were affirmed in part and reversed in part. That means that some action by the lower court was reversed even though that is really a partial victory for the appellant. In those cases, the lower court was directed to correct some legal error. Nearly 14 percent were reversed completely. These general features of table 8a suggest that trial-court errors requiring reversal (correction) by the supreme court were the exception rather than the rule for these two years.

Appellant	***Affirmed***	***Affirmed in Part / Reversed in Part***	***Reversed***	***Other***	***Total***
Individual	433 (77.1%)	38 (6.8%)	73 (13.0%)	18 (3.2%)	562 (81.2%)
Government	16 (45.7%)	3 (8.6%)	10 (28.6%)	6 (17.0%)	35 (5.1%)
Business	41 (78.9%)	2 (3.9%)	9 (17.3%)	0 (0.0%)	52 (7.5%)
Other	20 (3.9%)	7 (16.3%)	4 (9.3%)	12 (27.9%)	43 (6.2%)
Total	**510 (73.7%)**	**50 (7.2%)**	**96 (13.9%)**	**36 (5.2%)**	**692 (100%)**

Table 8a. Outcome of Appeals Decided by the Montana Supreme Court 2007 and 2017 Categorized by Types of Appellant. Result of Appeals

Chi2 = 1.1102 pr=0.000

Appellant	*Affirmed*	*Affirmed in Part / Reversed in Part*	*Reversed*	*Other*	*Total*
Contract	79 (67.5%)	13 (26.0%)	14 (14.6%)	11 (30.6%)	117 (16.9%)
Tort	23 (63.9%)	3 (11.1%)	7 (12.0%)	3 (9.4%)	36 (5.2%)
Property	51 (68.0%)	10 (13.3%)	11 (14.7%)	3 (4.0%)	75 (10.8%)
Criminal	224 (80.0%)	13 (4.6%)	37 (13.2%)	6 (2.1%)	280 (40.5%)
Other	133 (72.3%)	11 (6.0%)	27 (28.1%)	13 (7.1%)	184 (26.6%)
Total	**510 (73.7%)**	**50 (7.2%)**	**96 (13.9%)**	**36 (5.2%)**	**692 (100%)**

Table 8b. Outcome of Appeals Decided by the Montana Supreme Court 2007 and 2017 Categorized by Type of Legal Issue. Results of Appeals

Chi2 = 24.7613 pr=0.016

Both individual and business appellants lost their appeals over 75 percent of the time. There seems to be little difference between these two primary appellants in their winning proportions (reversals in 19.8 percent for individuals and 21.2 percent for businesses). On the other hand, the government as an appellant prevailed (at least partially) in a larger proportion of appeals (37.2 percent reversals). The other category of appellants did receive a notable number of "other" outcomes. These court orders related to injunctions, vacating and remanding, or procedural rulings, such as mootness or a lack of jurisdiction or standing.

Table 8b examines the outcomes categorized by type of case. The most striking feature of this display is that criminal appeals were the highest proportion of affirmed results among the categories. This finding suggests that the court addressed the criminal appeals, scrutinizing the lower court closely, but generally could find no reversible error in the lower courts' actions. The three categories of civil appeals—contracts, torts, and property—were all affirmed at nearly the same rate. There are almost no differences among case types in terms of complete reversals. If the partial reversals are added, there is a bit more variation; however, it does not appear to be a striking set of differences.

The Votes and Work of Justices

The vote of either the five-justice panel or the seven-justice panel on these cases was largely unanimous. Table 9 indicates this feature of the supreme court's decisions. Over 85 percent of the appeals were decided unanimously regardless of whether they were decided by five or seven

justices.[24] Some of these unanimous decisions did include a concurring opinion; this set (about 5 percent of the unanimous decisions) involved support for the result but presented a different view of the reason for that result. Only about 13 percent of the appeals were decided with one or more dissenting opinions. This level of unanimity changed somewhat between the two court terms examined here, though the differences were not statistically significant. The 2007 term had 14.6 percent nonunanimous compared with 10.9 percent in 2017. The aggregate of these two was 13.4 percent nonunanimous decisions. The takeaway point from these analyses is that the court in 2007 was somewhat more divided than in 2017.[25]

Panel	***Unanimous***	***Non-Unanimous***	***Total***
Five-Justice Panel	550 (93.4%)	39 (6.6%)	589 (85.1%)
Seven-Justice Panel	49 (47.6%)	54 (52.4%)	103 (14.9%)
Total	**599 (86.6%)**	**93 (13.4%)**	**692 (100%)**

Table 9. The Vote of Montana Supreme Court Panels, 2007 and 2017

Chi2 = 158.1210 pr=0.000

It is clear that the court's procedure allows five-justice panels to decide appeals under some circumstances. Table 9 shows that for the two years examined here, 86 percent of the court's decisions were rendered by five-justice panels—a large portion of the court's decisions. A second point to note is that the proportion of unanimous decisions in seven-justice panels is lower than the proportion in five-justice panels (48 percent compared with 93 percent). This might be because the seven-justice panels arise only when three justices request oral argument or when four justices of a five-justice panel cannot agree on the decision. It is not possible to determine which of the seven-justice decisions were the result of five-justice panel disagreement and which were selected out by any justice who decided oral argument should be conducted. The difference in votes might suggest that the seven-justice panels deal with the more controversial or difficult cases. Table 9 permits the conclusion that the bulk of the court's business is handled by the smaller panels of justices, and those appeals are probably easier, run-of-the-mill cases. It could be inferred that a portion (less than 15 percent of the appeals) generated enough disagreement or attention among the court members to warrant full-court decisional attention. Lastly, it is

24. In comparison, the median proportion of unanimous decisions by the US Supreme Court between 1948 and 2017 was 30 percent.
25. Since there are no data in this set regarding the voting patterns of each justice, it is not possible to make any judgments about which justices were the "dissenters" in 2007 or in 2017. Those data need to be collected and added to the set before additional analysis can be made of this phenomenon.

noticeable that even the seven-justice panel decided a significant proportion of its cases (nearly half) unanimously.

While the individual votes of the justices in each case were not recorded, the identity of the opinion writer was collected. This permits the examination of several questions. The first is whether the opinion writing for each year was distributed evenly among the seven justices. Second, did the chief justice write about one-third fewer opinions than the other members of the court, as the IORs permit? Tables 10a and 10b provide the opinion writers by year, with the justices identified by number. A completely even distribution of opinions among the seven justices would require each justice to write one-seventh (14.3 percent) of the opinions. Clearly opinion workload was not distributed evenly among the justices. However, the distribution of opinions is fairly even, with some variation among the justices' workloads. This suggests that the US Supreme Court's norm of equal work may be shared in other collegial high courts.

Justice	*Opinions*	*Proportion of Total*	*Mean Opinion Length (Pages)*	*Median Opinion Length (Pages)*
2007-1	48	13.3	7.5	6
2007-2	54	15.0	10.2	8
2007-3	65	18.1	9.8	8
2007-4	56	15.6	10.6	8
2007-5	45	12.5	18.9	13.5
2007-6	48	13.3	10.9	10
2007-7	44	12.2	8.2	7

Table 10a. The Number or Proportion of Opinions Written by Montana Supreme Court Justices, 2007

Note: The average length of all opinions rendered in 2007 was 10.7 pages, and the standard deviation was 9.6. That is a fairly wide distribution of opinion lengths.

Justice	*Opinions*	*Proportion of Total*	*Mean Opinion Length (Pages)*	*Median Opinion Length (Pages)*
2017-1	59	18.2	7.4	6
2017-2	54	16.7	12.3	10
2017-4	43	13.3	12.7	12
2017-5	53	16.4	9.2	8
2017-6	25	7.7	13.4	10
2017-7	38	11.7	8.8	8
2017-8	52	16.1	10.0	8

Table 10b. The Number of Proportion of Opinions Written by Montana Supreme Court Justices, 2017

Note: The average length of all opinions rendered in 2017 was 10.3 pages, and the standard deviation was 6.2. That too is a fairly wide distribution of opinion lengths.

It is unlikely that each justice would ever be assigned precisely one-seventh of the opinions to write. Justice 3 did write the largest proportion of opinions in 2007 (18 percent). That value is certainly higher than the target. It is interesting that a number of the remaining justices (particularly 1, 3, and 7) wrote noticeably less than one-seventh of the opinions. It is accurate to say that the distribution of majority opinions in 2007 was about even among all the justices.

The distribution for 2017 was different. Again, 14.3 percent would be an even distribution for each of the seven justices. In this year, Justice 1 wrote the highest proportion of opinions. Furthermore, three other justices (2, 5, and 8) wrote relatively high proportions, and this might account for the strikingly low proportion written by Justice 6. The reason for this particular feature of 2017 was that Justice 8 retired from the court, and another justice chose not to run for retention. Justice 6 was elected to the High Court in November 2016 and was sworn in at the beginning of 2017. This low output might reflect a choice by the assigner (usually the chief justice) to permit the freshman justice to "learn" during this year and have the other six justices make up the difference.

The second question focuses on the writing workload of the chief justice. The answer to that question is that neither chief justice wrote one-third fewer opinions, as the IORs permit. If the chief justice wrote one-third fewer opinions, that proportion would be about 9.6 percent of the court's output. In terms of the raw numbers, one-third fewer opinions in 2007 was thirty-four; in 2017, it was thirty. The only justice who wrote a noticeably lower proportion of majority opinions than the rest of the court was Justice 6 from 2017, not the chief justice. In both years, the chief justice wrote a good deal more than their lower proportion, or number, of opinions would have permitted. Both chief justices contributed a significant proportion of opinions each year.

The box plots in figure 4 indicate the range of opinion lengths for each justice for 2007 (3a) and 2017 (3b).[26] There are two points to note about these figures. First, there are no opinions plotted in 2017 for Justice 3. That is because this justice was appointed late in the year (December 2017) and did not author any opinions. The new justice replaced Justice 8, and the opinion output for Justice 8 was not particularly diminished by the abbreviated length of service during that year (see table 8b). Furthermore, table 9 indicates that in 2017, Justice 8 contributed a substantial portion

26. There are various ways to count the length of opinions. The method used here was to count any portion of a typed double-spaced page as reported in the database: https://law.justia.com/cases/montana/supreme-court/. A more elaborate and satisfactory method would be a word count of opinion length.

of majority opinions despite leaving the court early. Second, note the difference in the vertical scales in figures 4a and 4b. The difference is due to who wrote two very long opinions during 2007 (Justice 5).

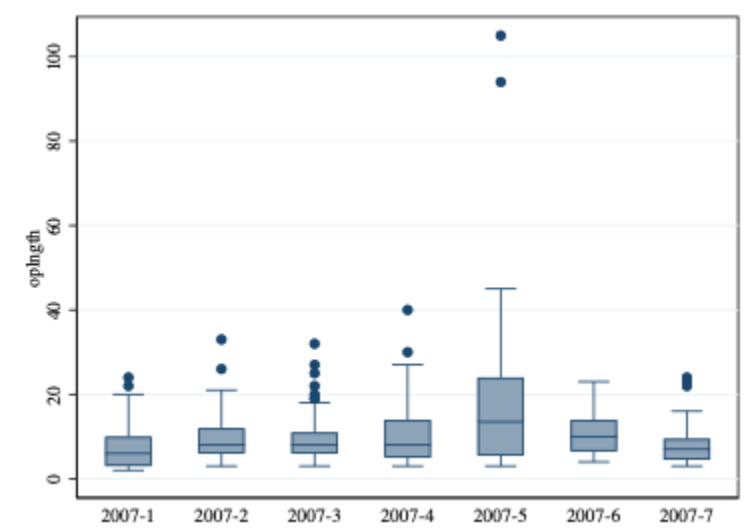

Figure 4a: 2007a Opinion Length

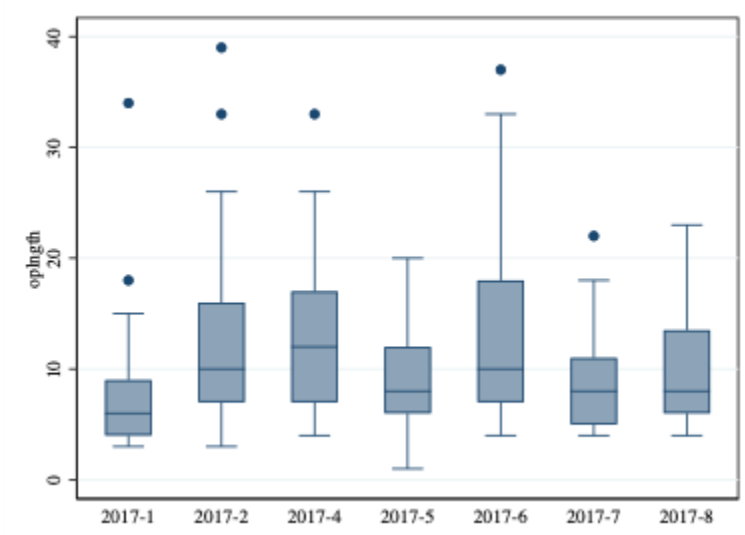

Figure 4B: 2017b Opinion Length

Figure 4: Boxplots of Opinion Lengths Categorized by Opinion Writer, 2007 and 2017

The box plots in figure 4 also illustrate that some justices wrote a greater range of opinions when compared to others, and there are relatively striking distributions of opinions for several individual justices. In 2007, Justice 3 wrote a number of lengthy opinions (five outliers) when compared with the usual opinion length (the box and median). Justice 5 wrote two exceptionally long opinions (94 and 105 pages). The bulk of Justice 5's opinions had a much greater range than that of the rest of the court. The opinion length of the justices in 2017 displays less variation than that of 2007. While there are some outliers, and Justice 6 in 2017 does display more spread than the rest of the justices' opinion lengths, generally the opinion behavior of the justices on the supreme court did not vary a great deal either among the justices or from one year to the next.

The last feature of the process to be explored here is the amount of time it took the court to reach decisions on appeals. The court's IORs specify that within 90 days of an appeal submitted on the briefs, an opinion should be circulated among the rest of the members, and within 180 days, it should be announced. The data available for this study do not indicate when an opinion was circulated to the court members. However, most of the cases were "submitted on the briefs," and that can be considered the start date. Interestingly, for 2007 and 2017, the processing time ranged from a minimum of 12 days to a maximum of 930 days! This maximum is an extreme outlier. The box plots for the two years, displayed in figure 5, indicate some differences in the patterns for 2007 and 2017. There are a number of extremely high outliers in 2007, and while there are several outliers in 2017, the number of days involved for these outliers is much less than in 2007. Additionally, there are fewer outliers in the 2017 term than in 2007.

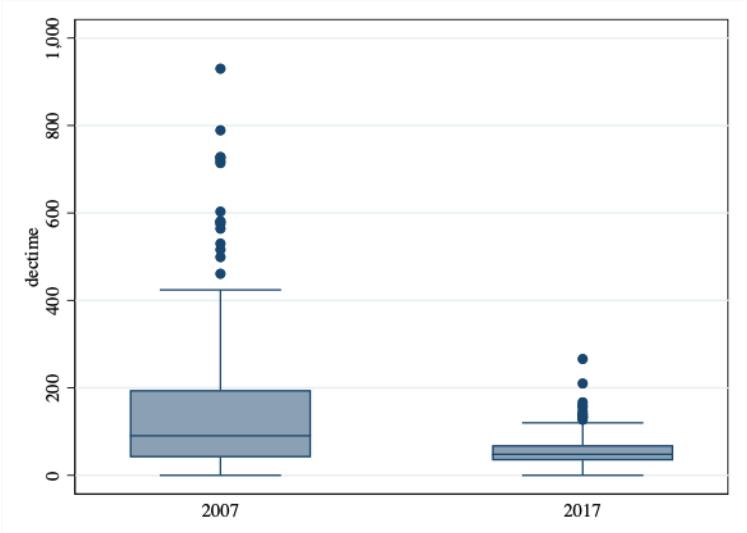

Figure 5. Boxplots of the Time from Submission to Decision for Appeals to the Montana Supreme Court, Categorized by Year

The mean processing time (from submission to announcement of the decision) for 2007 was 139 days (the median was 90 days). More importantly, a full quarter of the decisions involved more than 195 days. Clearly in 2007, the time the court took to complete its decisions work varied widely, and a substantial portion took more than the 180 days allowed by the court's own rules. The comparable numbers for the 2017 term were a mean of 54 days and a median of 48 days. Furthermore, in 2017 the upper quartile of the court's decisions required 160 days or more to decide (the maximum was 266 days). The box plots in figure 5 clearly indicate the differences in the court's processing time between the two years. The number of appeals decided in these two years was not much different (361 decisions in 2007 and 324 in 2017). The difference in processing time does not seem related to the volume of work. It could be that the appeals were more "difficult" in the earlier year. It could be that the members of the courts were less in agreement about the outcomes in 2007, which might have required more time on average to decide cases.[27] It might mean that it simply took the justices longer in 2007 to reach decisions even when they were unanimous. However, there are no data that measure difficulty. Figure 6 displays the distribution of decision time categorized by year and by general type of appeal. These data convey points about this variable that clarify the processing times somewhat. The court's IORs are designed to provide some parameters for the conclusion of appeals, but the 180 days is clearly an objective, not an absolute.

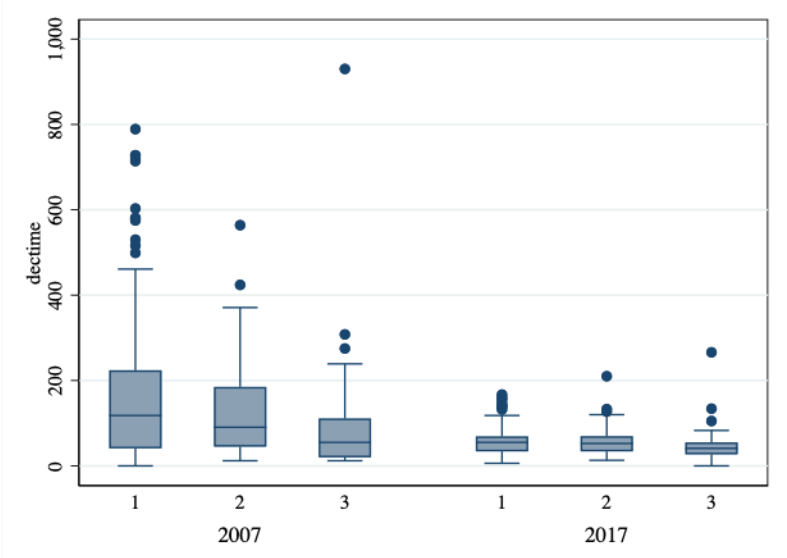

Figure 6. Boxplots of Time to Decision for Montana Supreme Court Appeals Categorized by Type of Appeal and Year. Legend: 1 = Civil Appeals; 2 = Criminal Appeals; 3 = Other Appeals

27. This table indicates the proportion of unanimous decisions during the two years. This permits some comparison with table 9. There is some difference in the proportion of unanimous decisions during the two years; however, it is not a very great difference. It is unlikely that there was more disagreement among the justices between 2007 and 2017.

The differences in processing time between the two years may involve the types of appeals. The position and the spread of the three box plots for 2007 are much different from 2017. In 2007, the categories of case types varied widely in the time it took to decide them. In 2017, the types of cases did not take different amounts of time to decide. The means and the medians for each of the categories of appeal in 2017 are nearly identical (mean of 54 days and median of 48 days). There is a good deal wider diversity in the mean and median processing time for 2007 cases (139 days and 91 days, respectively). Another point to note is that there are several outliers for the "other" category in 2017; this category in 2017 presents some idiosyncratic appeals that required more attention than is "normal" for that set of appeals. This is probably not surprising, since these of appeals undoubtedly includes a diverse set of issues that do not fit into the traditional civil and criminal cases.

The pattern for 2007 is even more striking when the time-to-decision variable is categorized by case type. Most notably, the extreme outlier in 2007 involves one case in the "other" category. This particular case was clearly unique. Another notable feature of the box plots for 2007 is that the civil appeals show a much wider distribution and display a number of outliers compared with the other two types of appeals. Civil appeals had a mean of 164 days and a median of 118 days.[28] These two indicators of centrality differ from those for the other two categories of appeals. Criminal appeals in 2007 had a mean of 124 days and a median of 90.5 days. The "other" category of appeals had a mean of 99 days and a median of 55 days. These numbers may indicate the "qualitative" feature in these kinds of appeals. It is also interesting to note that the upper edge of the box plots (the top of the boxes) for both civil and criminal appeals in 2007 exceeded the 180-day guide contained in the court's IORs (224 and 185 days, respectively). While these patterns are interesting, they do not help us answer the intriguing question of why the decisional time is so different between the two terms, especially when most other indicators reveal only small differences between 2007 and 2017.

One final way to look at the time-to-decision feature of these cases would be to consider segments of the time it takes for the court to render a decision. For example, we could look at the proportion of case types that the court decided within 90 or 180 days of submission. The court decided 99.4 percent of the appeals in 2017 within 180 days of submission (only two appeals exceeded that "deadline"). On the other hand, in 2007, the court decided 69.8 percent within the 180-day limit, and the remainder, some 109 cases (31.2 percent), took longer than 180 days to decide. While this difference presents the same phenomenon as the earlier discussion and displays in figures 5 and 6, the difference is striking. Again, what occurred during the 2007 term that "caused" this pattern warrants closer inspection.

28. The means and medians for time required to render decisions for the three categories of cases are as follows: (link to table)

Conclusions and Prospects

The conclusions to be drawn from this analysis may not be profound or earth-shattering. They are certainly unique to the Montana Supreme Court. Yet our understanding of this court is enhanced by the descriptive treatment of its work during 2007 and 2017. It appears that much (nearly all?) of the court's work involves examining various challenges to the decisions of the trial courts in the state. Furthermore, the supreme court largely affirmed the original decisions by the lower courts, suggesting that most of the appeals do not present difficult or "new" legal questions that involved many trial-court errors. Most of the court's business, it seems, did not involve great efforts at correcting the lower state courts.

The court changed membership over this period. There may be fewer cases to disagree about among the more recent members (2017) than the earlier year and its members. This would require the collection and analysis of more data from earlier years; data from years such as 2012, which is halfway between the two years examined here; or information on the justices and their ideology. The data used here could be supplemented with additional years of information, providing a more comprehensive picture of the court's work and its members. However, the data used for this study indicate some possibilities for differences among justices and differences over time.

This analysis raises a good many questions for future research. Answering these questions would provide a more detailed understanding of the Montana court and its operation and the people (justices and litigants) who are involved in that work. The value of empirically based research is that it permits a closer examination of *what* any court does and *how* it accomplishes its tasks. This kind of work also allows for comparisons with other state appellate courts if the data were available. While each state is unique in many ways, they all have a judicial system with a high court, and those courts treat various kinds of appeals (and other business) that would permit comparisons if the data were collected and analyzed.

There is a short list of additional questions below that these data might be used to explore. However, there are many more questions that future research could treat, depending on the collection and analysis of additional variables. The additional data probably should include additional years of the supreme court's business, permitting much closer and extensive longitudinal analysis. Either examining the comparable data for each year between 2007 and 2017 or adding other earlier or later years would greatly enhance the understanding that could be derived from this kind of analysis. Additional variables might also be revealing. Identifying the individual justices who voted in the majority and the minority (in those cases that were not unanimous) might reveal some individual behavioral patterns among the justices. Since there are relatively few attorneys who appeal cases to the court, examining particular legal representatives (lawyers) might yield different results for different attorneys. County prosecutors and public

defenders might display different kinds of criminal cases and different outcomes. Furthermore, the composition of the five-justice panels (which justices served on which panels) might grant a closer understanding of the interpersonal interactions (their votes) among particular justices.

There are a number of questions that might yield interesting patterns and results. Perhaps the most important point to make here is that empirical data can answer various questions that qualitative data (substantive court decisions) cannot answer. To understand an appellate court in this country, it is important to undertake both kinds of research.

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20.

District	Population (2017)	Proportion of state population
13	156,332	14.7
11	96,147	9.0
4	125,645	11.8
8	81,810	7.7
1	22,045	2.1
18	100,733	9.5
12	24,525	2.3
21	41,387	3.9
Total MT population	1,062,305	57.1

27.

Vote		Year	
	2007	2007	Total
Unanimous	308 (85.3%)	291 (89.8%)	599 (87.5%)
Nonunanimous	53 (14.7%)	33 (10.2%)	86 (12.6%)
Total	361	324	685

Pearson chi2(1) = 3.1443 Pr = 0.076

28.

Year	Civil	Criminal	Other
2007	164/118	124/90.5	99/55
2017	57/55	56/53	46/41

Mean days / median days

Class Activity

There is a relatively small number and proportion of cases in which one or more Montana supreme court justice dissented,

- Are there specific, individual justices who dissented most of the time?
- Do the dissents display any patterns in
    - Case type?
    - Reasons given for the dissent?
    - Who writes the dissent?

About 8% (53) appeals involved concurring opinions.

- What patterns can be derived from the data about concurring justices?
- Do some kinds (types) of cases display more concurrences than others?
- Do some justices differentiate themselves more than other justices by writing a concurring opinion while agreeing with the outcome?

The analysis presented here indicates differences in the time-to-decision variable between 2007 and 2017.

- Does time-to-decision in cases vary over time (different years)?
- Is 2007 a unique year in terms of this variable or has the change in processing patterns been gradual (incremental) over the course of a number of years?

[Exploration of these questions would require more data, from additional years.]

There were few appeals where the trial court was reversed in the data set for 2007 and 2017.

- Do some districts get reversed proportionately more than others?
- For the six or eight districts with the most appeals,
    - What is the reversal rate for this subset of districts?
    - Is the reversal rate for these “big” districts different from those of “smaller” districts?

All the Court’s decisions are not available to be used as precedent.

- What proportion and what kinds of cases resulted in Supreme Court decisions that

constituted precedent, and what proportion resulted in memorandum opinions?
- Do the memorandum opinions display any noticeable characteristics that differ from the other category of decision?
    - Types of cases?
    - Lower court origination?
    - The types of parties bringing the appeals?

Depending on the availability of data from other states, comparisons between two- and three-tiered court systems could be quite possible and interesting.

Montana Supreme Court Research Project Codebook – 2019

The variables for this research project on the Montana Supreme Court are listed below in alphabetical order.

These are contained in two downloadable data sets – **MT SupCt Data 07 & 17 27.xlsx**

————————————————————

access This variable indicate the method by which the Court considered the case and decided it. This variable is located on the front page (the frontmatter) of each opinion.

1 = Submitted on Briefs

2 = Argued and Submitted (after Oral Argument)

3 = A Court ruling based on submissions or requested that do not result in a signed opinion. These are usually designated by "PR" or "AF" in the docket number.

N.B. Most Supreme Court cases will have a value of "**1**" for this variable.

————————————————————

amcur This variable is a count of the number of Amicus Curiae briefs filed in a case.

N.B. This information will be listed on the frontmatter or front page of each case, along with the attorneys appearing for the Appellant and the Respondent. Amici are listed separately in favor of the Appellant or the Respondent. Count them all no matter what party they support. There is often more than one attorney on the briefs for each side in an case. Those multiple attorneys are NOT amicus. The usual number for this variable will be "0" since amici are not often involved in appeals to the Court.

————————————————————

appnt This variable is the type of appellant who filed the case. This corresponds to the **respnt** variable as well. Be careful to note that the first name on a case may NOT be the **Appellant** but rather the Respondent.

1 = Private Individual (This includes prisoners or convicted criminals appealing the rulings of the trial court as well as citizen in civil cases. This also includes a lawyer petitioning the Court regarding their bar status.)

2 = State or local official. These include sheriffs, county prosecutors, the State Auditor or the Director of the Dept of Corrections.

3 = A company or partnership doing business in Montana. This includes law firms.

4 = Not-for-profit organization, public interest group, Indian Tribe

5 = A representative of a class (This will be indicated by a name plus the statement "other similarly situated.")

6 = Individual as a Representative of an Estate

9 = not initiating party or appellant listed.

N.B. There may be cases/orders/Rulings of the Court that do NOT have an initiating party (**appnt**) or a responding party (**respnt**).

———————————————————

casename This variable is the title or name of the case. The entire case name may not appear on the *Justia* front page but it will be placed on the frontmatter of the actual opinion. Examples are:

Jones v Smith

Matter of WD BD

Matter of Rules of Appellate Procedure

———————————————————

cite This variable is a citation to the Court reports. This will serve as an identification number for each case in the data set, since each citation is unique. An example is:

DA 2017MT224

It should be entered without spaces and without the letter designations – 2017MT224. You should drop the letter designation before the citation is there is one. The variable **prtype** below indicates where and how to code the letter designation of citations.

N.B. If the citation has a total of 8 digits, e.g., 2007MT43, then the citation should be entered with another digit (a ninth) preceding the two digits after "MT." For example, the citation just indicated should be coded 2007MT043.

N.B. if the citation includes an "N" after it, such as 2015MT443N, then the variable "**prec**" needs to be coded as "**1**". Do not enter this variable (**cite**) with the "N," but rather just enter the number with the "MT" in the middle 2015MT443.

———————————————————

decdate This variable is the date the Court rendered its decision in each case. This date is located on the front page (the frontmatter) of each opinion. It is coded in the same form as **strtdate** is coded: mm/dd/yy. An example would be:

04/26/17

This "date" should be entered with slash marks (/) and with two digits for the month and the day of the month, and four digits for the year.

———————————————————

decmnth This variable is the month that the Court's decision was decided.

1 = January

2 = February

3 = March

4 = April

5 = May

6 = June

7 = July

8 = August

9 = September

10 = October

11 = November

12 = December

———————————————————

dectime This variable is time, measured in days, that it took the Court to decide the case. That is a calculated variable, based on the following formula:

If there is not submission date or oral argument date available, then this variable is "missing" in the data set.

———————————————————

docno This variable is the docket number of the case. The two digits before the dash is the year in which the case was appealed to or filed with the Supreme Court. This number after the dash will always have four digits. These four digits are place holders unless the number actually reaches the thousands. Examples include:

16-1403 – An appeal filed in 2016

17-0014 – An appeal filed in 2017

11-0037 – An appeal filed in 2011

N.B. Docket Numbers also have a two-letter designation – "DA," "OP," "PR," or "AF." These should be dropped from the value entered for this variable. Be certain to include the "dash" between the two-digit year and the four-digit number.

———————————————————

frstct This variable indicates the first court that heard or decided the case. It is likely to be the District Court, but it could be a "Justice Court" or a Justice of the Peace Court.

1 = Justice Court/Youth Court (This is a Dist. Ct. acting as the Youth Court. See the Notes in **lwrct**)

2 = District Court

3 = Montana Supreme Court (this applies to courts rules and regulations or professional disciplinary actions.

4 = Board, Commission, or specialized court such as a Municipal Court, the Water Court, or the Workman's Compensation Court.

N.B. This value is likely to be found in the early paragraphs of the opinion where the Opinion outlines the facts of case, either in an introductory section or in a section labeled something like "Factual Background."

N.B. There may no information about a Justice Court's action in the opinion, even if the proceeding had to have originated in the Justice Court. DO NOT code this variable as a "1" unless there is explicit reference to Justice Court action in the case.

———————————————————

lwrct This variable is the court from which the case was appealed to the Supreme Court. Most often this will involve a District Court number. This variable should be indicated if a District court heard the case, even though it might not have originated there. See **frstct**.

0 = This value pertains to cases that originated in the Supreme Court.

1 = 1st Judicial District

2 = 2nd Judicial district

3 = 3rd Judicial District.

…

22 = 22nd Judicial District

30 = Montana Water Court

40 = Montana Workers Compensation Court

50 = Commission of Practice (This commission deals with complaints filed against lawyers.)

60 = Other (E.g., A federal court certification of a question to the Sup. Ct. State or Local Board or Commission.)

N.B. If **frstct** is designated as "1" because the District Court is acting as a Youth Court, this variable (**lwrct**) should be coded with the District Court number (as usual), rather than using the "**60**" designation.

This particular coding scheme is also relevant when a parent's parental rights are being considered or terminated by the Supreme Court. That is because the Dist. Ct. is originally acting as a Youth Court to determine if the Youth is In Need of Care (YINC) and whether parental rights should be terminated or conditioned (limited) in some way.

———————————————————

noiss This variable is the number of issues that the Court indicates it considers. This is NOT the number the appellant presented. Usually the opinion will identify the issue(s) the Court considers in the opinion. Sometimes this variable will have to be determined by reading most or all of the opinion.

———————————————————

oplngth This variable is the length of the majority opinion, in pages that include the front matter and are presented as 8.5 x 11 inch page size of the PDF reported in *Justia*. Count as the last page, the page on which the justices identified as supporting or concurring in the majority opinion are listed.

———————————————————

N.B. Opinions end with a typed or written signature of the writing justice and a list of those justices concurring in that opinion. That may be the end of the document. That is the point from which this variable should be taken. It may not be the last page of the opinion if there is a concurring

opinion or a dissenting opinion, that additional opinion may begin on the next page of the opinion. Do not count the following pages for purposes of this variable.

———————————————————

opwrtr This variable indicates the name of the justice who wrote the opinion in each case. This list is in order of seniority.

This is the code for the 2017 calendar year.

2017-0 = the opinion/ruling was not signed (e.g. per curium)

2017-1 = Chief Justice McGrath

2017-2 = Justice Baker

2017-3 = Justice Gustafson

2017-4 = Justice McKinnon

2017-5 = Justice Rice

2017-6 = Justice Sandefur

2017-7 = Justice Shea

2017-8 = Michael Wheat

This is the code for the 2007 calendar year.

2007-0 = the opinion/ruling was not signed (e.g. per curium)

2007-1 = Chief Justice Gray

2007-2 = Justice Cotter

2007-3 = Justice Leaphart

2007-4 = Justice Morris

2007-5 = Justice Nelson

2007-6 = Justice Rice

2007-7 = Justice Warner

————————————————————

pnl This variable is the count of Justices participating in each case. The number is usually five (5) justices or 7 (seven) justices. However, there are times when one justice is absent. In other cases, district court judges are assigned to the panel if one or more of the panel justices recuses (removes) themselves. In a few cases there is more than one justice removed. Count each district court judge as a full, participating member of the panel.

————————————————————

pnl2 This variable collapses **pnl** into two categories – Five and seven justice sets. The five-justice set may involve less than five justices and the seven-justice set may involve six or seven justices.

————————————————————

prec This variable is to be coded as indicated below. The Court will decide some cases and indicate that they are decisions in the case, BUT are not to be used for precedent in other cases. An example of the citation (**cite**) for such an opinion is 2015 MT 443N

In all such cases the first, full paragraph of the opinion in the case will begin with the sentence:

Pursuant to Section 1, Paragraph 3(c), Montana Supreme Court 1996 Internal Operating Rules, the following decision shall not be cited as precedent. . . .

0 = no "N" is present in the citation (**cite**)

1 = “N” is present in the citation

————————————————————

prtype This variable is the type of proceeding the Supreme Court dealt with in each case. It is derived from the Docket Number letter designation.

1 = DA (Direct Appeal)

2 = OP (Opinion)

3 = AF (Administrative Filing)

4 = PR (Professional Responsibility)

9 = Other (This applies when the Docket Number does not contain any letter designation at all.)

N.B. If a Court case is labeled AF, then a good many of the other variables on this row of data will be coded uniquely (e.g., **appnt**, **opwrtr**, **respnt**, **subj**, **submtr**, and **type**.)

————————————————————

respnt This variable is the type of responding party in the appeal. It is largely comparable to the **appnt** categories. Be careful to note that the first name on a case may NOT be the **Respondent** but rather the Appellant. Some of these categories re NOT the same as the **appnt** categories.

1 = Private Individual (This includes prisoners or convicted criminals appealing the rulings of the trial court as well as citizen in civil cases. This also includes a lawyer petitioning the Court regarding their bar status.)

2 = State or local official. For example, sheriffs, county prosecutors, the State Auditor or the Director of the Dept of Corrections.

3 = A company or partnership doing business in Montana. This includes law firms.

4 = Not-for-profit organization, public interest group, Indian Tribe

5 = representative of a class (This will be indicated by a name plus the statement "other similarly situated.")

6 = Individual as a Representative of an Estate

9 = no Respondent involved in this case. (This most often relates to proceedings that are titled "Matter of X X X.")

————————————————————

result This variable is the outcome or the result of the Supreme Court's decision. This variable will be found at or near the end of each opinion. It may be one word, easily recognized. It may be contained in a paragraph.

0 = Filed with Supreme Court originally (no District Court decision.)

1 = Affirmed

2 = Affirmed in part and reversed in part

3 = Reversed (and remanded)

4 = Vacated and Remanded

5 = Adopted/Submitted for Comments (This category relates to proposed rules the Court is considering relating to the operation of the judicial system in the state. These rules may be Supreme Court Rules, rules relating to the District Courts, or to the practicing bar in the state.)

6 = Dismissed (E.g., mootness or lack of jurisdiction or standing)

7 = Denied (This largely relates to a Petition for a Writ of Habeas Corpus.)

————————————————————

strtdate This variable is the date coded as mm/dd/yy that the case was filed with the Court. This date is located on the front page (the frontmatter) of each opinion. This is not the date the Clerk of the Court received the filings in the appeal. It will be indicated as the date the case was "Submitted on the briefs" or was Argued Orally. See **decdate** for an example. An example would be:

04/26/17

N.B. There may be no **strtdate** for those decisions with a docket number designated as "AF" or "PR." Leave this variable blank if that is the case.

————————————————————

strtmnth This variable is the month the case was submitted to the Court for decision. It should correspond to the month indicated in the **strtdate** variable.

1 = January

2 = February

3 = March

4 = April

5 = May

6 = June

7 = July

8 = August

9 = September

10 = October

11 = November

12 = December

————————————————————

subj This variable indicates the nature of the question presented to the Court.

1 = substantive law

2 = procedural issue

3 = constitutional law

4 = both procedure and substance

5 = both substantive and constitutional

6 = both procedural and constitutional

7 = equity

9 = other issue

N.B. This variable will be difficult to assign if here is more than one issue identified in the case. Use your best judgment.

———————————————————

submtr This variable indicates the subject matter that is raised in the appeal. Any of these subjects can present the Court with procedural rather than substantive questions. If **subj** is coded as procedure, then this variable can still be coded substantively.

1 = contract, employment, debt, mortgage, and the like

2 = tort, personal injury, damages for injury

3 = property, ownership of land or items (chattels)

4 = criminal conviction, sentencing, parole

5 = equitable remedy/injunction/restraining order/termination of rights/dissolution of marriage/youth in need of care (YINC)/

6 = jurisdiction or other procedural issue

7 = habeas corpus/post-conviction relief

8 = Public Regulation/Policy

9 = other

————————————————————

type This variable indicates the type of case involved.

1 = Civil

2 = Criminal

3 = Other (This category relates to administrative proceedings, the declaration of a Youth in Need of Care (YINC), divorce decrees, or equitable remedies.)

————————————————————

vote This variable indicates the size of the **majority vote**. This variable usually will be coded either 5 or 7. If there is a dissent in the case, then the **vote** will be coded as the number of justices who voted in the majority. This includes concurrences since that justice voted with the majority. The values below are likely to be those recorded for this variable. Others may be possible and should be entered.

3

4

5

6

7

N.B. There will be some cases in which one or more district court judges will be serving on the

Supreme Court. That is because one or more Supreme Court justices have recused themselves from the case. These district court judges count just the same as a Justice does for this variable.

N.B. The value of this variable will be the same or less than the value for the **pnl** variable.

———————————————————

vt This variable indicates whether the decision was unanimous and whether the decision involved concurring opinions.

0 = unanimous

1 = not unanimous

2 = unanimous with concurrence

3 = not unanimous with concurrence

4 = not unanimous with concurrence **and** dissent (This might be one justice "concurring in part and dissenting in part" or one or more justice(s) concurring and at least on other justice dissenting.)

———————————————————

year This is the year the Supreme Court decided a case.

2007

2017

———————————————————

https://github.com/osuoer/open-judicial-politics/raw/master/McLauchlan-data.xlsx

PART III

DECISION MAKING

That forces other than "the law" or the facts of the case affect judges' decisions is axiomatic. After all, not every decision is unanimous despite the fact that a set of highly trained, experienced, and attentive individuals read and hear the same arguments based on the same set of laws and legal doctrines. Understanding how and why judges decide the way they do is a topic of nearly bottomless interest among judicial scholars, and so this section contains the largest number of contributions. Most often, political scientists focus this interest on the US Supreme Court and the internal machinations of the justices. Adding to this literature, we offer two studies that attack this question in less conventional ways. The other seven contributions break from this mold, examining state courts, district courts, and international courts. In terms of US Supreme Court decision-making, each of these pieces uses textual analysis to answer a narrow question regarding the behavior of the justices. Professor Adam Rutkowski derives a measure of interpretation style for all the justices from 1946 through 2010. Making a distinction between such interpretation styles as textualism, originalism, and progressivism, Rutkowski finds that, even while holding ideology constant, the systematic and predictable effect of style on individual decisions in search and seizure cases remains significant. Professors Picado and Reid use the concept of Gilligan's different voice (see either Goelzhauser or Kraybill in the Actors/Judges chapter for more on this theory) to determine if gender differences between Supreme Court justices appear in their decision-making. More specifically, they broaden this discussion beyond the typical gender issues to determine if women justices use a different voice when deciding environmental issues. Marrying the ecofeminism and different voice literature, and using linguistic analysis, these scholars find a distinct difference in the framing and tone of these opinions.

Again, the other offerings here examine decision-making by judges from a variety of courts. One subset looks outside the United States. First, Professor Shannon Smithey examines how some high courts built their institutional power through strategic judicial action. Professor Rebecca Reid also investigates judicial choices and how those choices can yield policy protections. Studying the Mexican Supreme Court, Reid finds that the justices there are voluntarily increasing the space on their agenda for human rights cases and providing an alternative venue for individuals to achieve protections for their rights. Finally, in a more traditional study of decision-making, Professors Henrik Litleré Bentsen, Mark McKenzie, and Jon Kåre Skiple examine why Danish Supreme Court justices choose to dissent in a system known for its high level of consensus. While the scholars investigate individual factors, case characteristics, and institutional attributes, they find that the institutional norms are the strongest predictors of dissent. The other subset looks at US courts other than the Supreme Court. Professors Gonzalez, Fairbanks, and Gleason continue a theme already strongly present in this volume—diversity and inclusion—by investigating whether

intersectional judges behave differently from their counterparts. More specifically, are these women of color more likely to display strategic voting in order to retain their seats? Analyzing the decisional behavior of state Supreme Court justices, they find that intersectional judges are more likely to reflect public opinion in their voting when reelection or retention looms. Finally, Professors Johnson et al. focus on a different type of decision-making altogether—namely, the decision whether to publish an opinion or not. Scholars have already shown clearly that unpublished decisions are important policy-making tools; there has not been a great deal of attention paid to this choice, however. Johnson and her colleagues show that the decision is affected by individual attributes and strategic behaviors rather than ideology, which is so often the sole touchstone of judicial decision-making studies.

Rutkowski, Adam G. "Constitutional Interpretation Styles of US Supreme Court Justices."

Picado, Jonathan A., Rebecca A. Reid. "Mother Nature, Lady Justice: Ecofeminism and Judicial Decision-Making."

Smithey, Shannon. "Strategic Activism."

Reid, Rebecca. "Human Rights and Court Activism in the Mexican Supreme Court."

Bentsen, Henrik Litleré, Mark McKenzie, and Jon Kåre Skiple. "Explaining Dissent Rates on a Consensual Danish Supreme Court"

Gonzaléz, Aidan, Bailey R. Fairbanks, Shane A. Gleason. "At the Intersection of Law and Identity: Immutable Characteristics, Voter Preferences, and Strategic Voting on State Supreme Courts."

Johnson, Susan W., Ronald Stidham, Kenneth L. Manning, Robert A. Carp. "To Publish or Not Publish: Exploring Federal District Judges' Published Decisions."

19. Constitutional Interpretation Styles of US Supreme Court Justices

ADAM G. RUTKOWSKI

Studies of US Supreme Court decision-making often describe justices' votes (decisions) as either liberal or conservative. This is understandable given that a justice's ideology (how liberal or conservative they are) is consistently shown to be a significant predictor of his or her votes on the Court (Segal and Spaeth 2002). While justices have their ideological preferences, they also have their own unique ways of interpreting the Constitution. For example, the late conservative Supreme Court Justice Antonin Scalia was a textualist, believing that one should only look at the text of the relevant provision when applying the Constitution to a case (Scalia and Garner 2012; Scalia 1998). His jurisprudential and ideological opposite, the late Justice Ruth Bader Ginsburg, argued that interpretations of the Constitution should adapt to a changing United States (De Hart 2018).

When Justice Ginsburg wrote an opinion, she did not simply write, "I am a liberal, therefore I vote in a liberal way in this case." Instead, she provided a detailed opinion in which she interpreted the Constitution and relevant laws and applied that interpretation to the case; there was legal reasoning behind her decision. While ideology may have informed her decisions, her interpretation style should not be overlooked as a distinct characteristic.

Scholars have produced numerous quantitative studies concerning the effects of ideology on US Supreme Court justices' decision-making, but there have been few, if any, quantitative analyses of the effects of justices' constitutional interpretation styles. This shortcoming is most likely due to the lack of a measure of this important concept. This chapter develops a measure of constitutional interpretation style for justices serving on the Supreme Court from 1946 to 2017 and applies the measure to justices' votes in Fourth Amendment cases. Results suggest that these styles matter in predicting judicial decision-making, although their effects may be partially masked by the way scholars typically consider judicial decision-making and outputs.

How Do Judges Make Decisions?

Scholars have identified three primary models of judicial decision-making: legal, attitudinal, and strategic. The earliest of the three, the legal model asserts that judges are neutral arbiters of the

law (Maveety 2003; Levi 1949). According to this model, judges decide cases in light of the facts in relation to precedent (existing case law), plain meaning of the Constitution and statutes, and the intent of the legislative branch and Constitutional framers (Segal and Spaeth 2002).

Over time, scholars became less satisfied with this black-and-white picture of judicial decision-making. Research revealed that justices consistently voted in ways that could be placed on a left-right ideological spectrum (Schubert 1968; Pritchett 1948). These discoveries led to the development of the attitudinal model, which asserts that judges decide cases in light of the facts in relation to their ideological values and attitudes (Segal and Spaeth 2002). In other words, judges decide cases based on their *views* about the relevant law and the parties in a suit (Spaeth 1972). Therefore, "private attitudes become public law" (Pritchett 1941).

It is important to note that law still matters in the attitudinal model. Studies show that justices' preferences are constrained by precedent, judicial review, and adherence to constitutional provisions when they make decisions (Bailey and Maltzman 2008; Spriggs and Hansford 2001). Justices' attitudes and the law are thus in a conditional relationship; what judges want to do is constrained by what they can do under the law (Gibson 1978).

The idea of the constrained justice is central to the strategic model of judicial decision-making. While justices may have their own preferences, they are in a state of interdependence with their colleagues and other branches of government (Epstein and Knight 1998; Murphy 1964). In order to "win" the final outcome of the case, they may have to compromise in other areas, such as opinion content. Constraints on justices' preferences can come from sources both internal (e.g., collegial relations; interbranch relations) and external (e.g., public opinion; interest groups) (Baum 1998).

As this discussion illustrates, one particular model of decision-making does not have all the answers. Instead, it is important to combine elements of each theory to provide a more wholesale account of judicial decision-making. It is from this place that this chapter proceeds—recognizing that while attitudes may be important to justices, how they view and interpret the Constitution also affects their decision-making.

Constitutional Interpretation Styles

While seldom discussed in studies on judicial decision-making, constitutional interpretation style is an important and relevant judicial characteristic to consider. As this chapter will discuss in subsequent sections, interpretive styles are often mentioned during the nomination and confirmation process—especially for nominations to the US Supreme Court. These styles are part of the public discourse about nominees and may serve as cues for both the president

and senators, helping them predict a nominee's future actions. Further, as discussed in the introduction, interpretation styles are used as the bases for justices' decisions. What follows is a brief overview of common interpretation styles.

Typically, interpretation styles are described as either originalist or progressive (Tribe 1995; Dodson 2008). The three primary originalist styles identified are original intent, textualism, and strict constructionism. Original intent relies on what the framers of the Constitution intended a clause to mean when they wrote the document (Segal and Spaeth 2002; Gillman et al. 2017). Justices subscribing to this method believe that the framers' intentions should always be considered and respected (Powell 1985; Bork 1997; Kirby 2000). Textualism relies on the text of the Constitution itself. This style—made famous by the late justice Antonin Scalia—focuses on the relationships between words and the commonly understood meanings of those words both at the time the Constitution was written and the present day (Perry 1985; Tushnet 1985; Scalia 1998; Whittington 1999, 2004; Gillman et al. 2017). Finally, strict constructionism is a narrower form of textualism. This style limits constitutional interpretation to the clauses enumerated in the Constitution (Whittington 1999; Gillman et al. 2017).

A more progressive style of interpretation treats the Constitution as a living document (Marshall 1987; Starkey 2012). This style advocates for a Constitution that "adapts to changing circumstances and evolves over time" (Dodson 2008, 1320). When the Constitution is not explicit on an issue, clauses of the constitution and other statutes can be read to find their "spirit"; this spirit can then be applied to the case. Because America changes rapidly, interpretations of a document written over two hundred years ago should adapt.

Measuring Constitutional Interpretation Style

While scholars often describe a justice as a textualist, or believing the Constitution is a living document, no quantitative measure of interpretation style exists. The primary goal of this chapter is to develop such a measure. Segal and Cover (1989) measured justices' ideological preferences using newspaper editorials in order to capture a justices' *perceived* ideology at the time of their confirmation.[1] It is in this spirit that I set about coding constitutional interpretation style. Because the editorials often quote the justices describing how they interpret the Constitution, this method

1. Segal-Cover scores are sometimes criticized for being static; meaning, they do not account for changes in justice ideology that may occur over time. Martin-Quinn scores (Martin and Quinn 2002) measure ideology in a way that updates justices' ideology scores each Court term. Indeed, some justices' preferences have been shown to evolve (Epstein et al. 2007).

provides a direct measure of interpretation style. Further, choosing editorials provides a manageable number of succinct documents written during a finite nomination period. In other words, it avoids the problems of studying countless justice biographies, memoirs, and interviews.

In order to avoid bias from politically motivated writers, Segal and Cover (1989) used two newspapers with a consistently liberal slant over time (the *New York Times* and *the Washington Post*) and two with a consistently conservative slant over time (the *Chicago Tribune* and the *Los Angeles Times*). They coded various paragraphs of editorials for statements that were either liberal, moderate, conservative, or none of the above. Based on the total number of editorial statements, they ultimately place justices on a continuum of ideological value scores ranging from 0 (unanimously liberal) to +1 (unanimously conservative).

While my coding of interpretive style follows Segal and Cover's methods as closely as possible, some adaptations were made. The same two liberal newspapers were coded (the *New York Times* and the *Washington Post*), and one of the same conservative newspapers was used (the *Los Angeles Times*). However, the *Chicago Tribune* archives are not readily available electronically. Therefore, I used the *Wall Street Journal*, another conservative-leaning paper, in its place (Wagner and Collins 2014).

I coded five different categories of constitutional interpretation style and treated them as dichotomous variables. Therefore, a justice was coded as a (1) if he or she possessed a certain style and a (0) if he or she did not. The categories I use here are *living document*, *textualist*, *original intent*, *other originalist*, and *progressive*. Although scholars identify strict constructionism as an originalist constitutional interpretation style, only one justice in my study was called a strict constructionist by one of the four papers. Therefore, I created the *other originalist* category for this justice and others not fitting the rigid originalist categories. I created the *progressive* category to capture justices who have a progressive interpretive style but were not explicitly said to interpret the Constitution as a living document in the editorials.

To reduce bias in the coding, the following steps were taken. First, I coded newspaper editorials from the four aforementioned newspapers that were written during the time period six months prior to their nomination until the day of their confirmation. After coding all thirty-seven justices in the date range, final determinations were made using strict cutoffs. In order to ultimately be assigned to a style, the justice had to be coded as that style for at least three of the four papers used. This threshold provides a more balanced measurement, as it picks up liberal-leaning and conservative-leaning papers. It is also important to note that the categories are mutually exclusive. In this coding framework, a justice cannot belong to more than one constitutional interpretation style. The editorials did not ascribe more than one interpretation style to any of the thirty-seven justices. **Table 1** provides more information on my coding framework and how I made final coding decisions.

For even more clarification, consider the following coding example. In a majority of the editorials, Justice Scalia was described as a defender of the words of the Constitution. Additionally, he was often quoted as saying that judicial decisions must be guided by the Constitution's text. Because these statements belong to the textualism category, Justice Scalia was marked as a (1) in the textualist style and a (0) in the other five categories.

Interpretation style	**Common phrases from editorials**
Living document	• "…believes the Constitution is a living document…" • "…will adapt the Constitution to modern times…" • "…does not hold a static view of how the Constitution is to be interpreted…"
Textualist	• "…believes the Constitution should be interpreted by analyzing the words…" • "…does not 'read-in' to the Constitution…" • "…will respect the text of the Constitution when making decisions…"
Original intent	• "…interprets the Constitution the way the Founders intended…" • "…keeps in mind what the framers meant the Constitution to mean…"
Other originalist	• These are justices described as originalists generally, but neither textualism nor framers' intent were mentioned.
Progressive	• These are justices said to have a progressive interpretation style; interpreting the Constitution as a living document was not mentioned.

Table 1. Coding framework

Table 2 reports each justice grouped alphabetically by their perceived preconfirmation constitutional interpretation style. The number of editorials coded for each justice is included in parentheses.[2]

2. Three justices—Burton, White, and Vinson—had unknown interpretation styles. The editorials gave no indication of these justices' interpretation styles, so a final style determination could not be made. Therefore, they are excluded from this table and the statistical analysis.

Living document	Textualist	Original intent	Other originalist	Progressive
Black (17) Brennan (18) Breyer (17) Fortas (7) Frankfurter (9) Ginsburg (14) Goldberg (10) Harlan (16) Jackson (10) Kagan (23) Marshall (10) Minton (9) Murphy (8) Reed (4) Rutledge (4) Souter (19) Stevens (6) Warren (19)	Burger (16) Gorsuch (17) Scalia (18)	Kennedy (31) Rehnquist (9) Stewart (10)	Alito (14) Blackmun (6) O'Connor (17) Powell (9) Roberts (16) Thomas (41) Whittaker (4)	Douglas (6) Sotomayor (19)

Table 2. Justices' constitutional interpretation styles

The table above underscores the importance of constitutional interpretation style as a judicial characteristic; indeed, it is clear that editorials use these explicit styles to describe nominees to the nation's highest court. It is apparent that the living document category contains justices often considered more liberal, while the textualist, original intent, and other originalist categories contain the more conservative justices. Perhaps surprisingly, the most variation in interpretation style is found in these conservative justices. While Scalia was identified as a textualist, Rehnquist was matched with original intent, and O'Connor was painted as a general originalist. All these justices are considered conservative, but each was said to have a distinct constitutional interpretation style. The following application section speaks further to this variation among conservative justices.

It is important to remember that these categorizations were made based on editorials written *before* the justices' confirmations. It is possible that the justices shift their styles over time, or that they have different styles for different issue areas. For example, Justice Hugo Black, identified

above as a living document justice, was sometimes considered a "literalist"—especially in cases concerning the First Amendment (Lewis 1986). My measure seeks to capture an overarching interpretation style and does not account for issue-specific or temporal nuances.

An Application: Justices' Votes in Fourth Amendment Cases

With a method of measuring constitutional interpretation style in hand, the next step is to apply it to judicial behavior. For this initial application, I choose to analyze how justices' constitutional interpretation styles affect their decisions in Fourth Amendment cases. My reasons for analyzing cases on the Fourth Amendment—which protects citizens from unreasonable searches and seizures—are twofold. First, scholars assert that Fourth Amendment cases are rarely clear-cut and that justices interpret this amendment in many different ways (Amar 1994; Dworkin 1973). The varying interpretations of the Fourth Amendment present on the Court make it a natural first issue area to explore. Second, Fourth Amendment cases were often used in seminal judicial politics scholarship on the attitudinal model and fact patterning models (Segal and Spaeth 2002; Segal 1986).

In this application, I theorize that justices' constitutional interpretation styles should affect their voting independently of other judicial characteristics such as ideology. How can justices with different interpretation styles be expected to vote? In this application section, I offer hypotheses and corresponding theoretical explanations based on the writings of legal scholars.

> **H1**: Justices with an original intent interpretation style are more likely to vote in favor of the government than textualists in Fourth Amendment cases.

Fourth Amendment scholars are in agreement that originalist justices should be expected to rule in favor of the government in disputes about searches and seizures. Amar (2000) asserts that the Fourth Amendment was not meant to be a protection against warrantless or unreasonable searches, but rather a protection against unspecific warrants. Other scholars agree that the modern conception of unreasonable searches and seizures is "the product of post-framing developments that the Framers did not anticipate" (Davies 1999, 552). In this view of academics, originalists should only rule against searches and seizures if the warrants are not specific.

The problem with this literature is that it does not distinguish between the types of originalists

identified in the previous section—textualism, original intent, and strict construction. These scholars speak of originalism broadly but do not elaborate on which specific type of originalist they expect to rule in favor of the government. I surmise that they are speaking of original intent because they are discussing what the framers meant. These scholars assert the original understanding of the Fourth Amendment is that warrantless searches are not unreasonable; only nonspecific warrants are problematic.

While it is clear that justices subscribing to original intent should more often vote in favor of the government, it is less clear how textualist justices should rule. Amar (1994) asserts that there is a discrepancy between what the words of the Fourth Amendment *mean* and what they actually *say*. Therefore, if the original intent justices are comfortable with warrantless searches—which is what scholars have identified the amendment to mean at the founding—then textualists should consider warrantless searches to be unreasonable. Textualists are more concerned about reasonableness of searches and seizures, and thus should uphold protections for individuals (Amar 1994).

The other originalist interpretation style identified in the literature is strict construction. However, this style is rarely ascribed to justices (for further discussion, see the data and measures section). As I discuss later in the paper, I create a category of "other-originalists." These are justices with a conservative interpretation style that does not fit into original intent or textualism. Because this is a less precise category, formulating a theory of how they should vote is more difficult. Therefore, I do not include a theoretical expectation of how these justices should vote.

H2: Justices with a living document or progressive constitutional interpretation style are more likely to vote in favor of the individual than original intent justices in Fourth Amendment cases.

Opposite these conservative interpretation styles are justices with styles holding that the Constitution is a living document. Justices who view the Constitution in this manner are more likely to read into the text to find protections for individuals and are not likely to rule in favor of the government (Balkin 2009; Dodson 2008). This has also been shown in Fourth Amendment cases. Justices with a flexible outlook on the Constitution are more likely to "beef up" Fourth Amendment protections for individual plaintiffs (Amar 2000, 761).

H3: A liberal justice should be more likely to vote in favor of the individual than a conservative justice.

Because of the prevalence of the attitudinal model in judicial politics literature (see Lewis and Rose 2014; Boyd et al. 2010; Segal and Spaeth 2002; and George and Epstein 1992), I include a hypothesis concerning ideology. I expect that even when controlling for interpretation styles, ideology will still have a significant effect. Spaeth et al. (2018, SCDB codebook) assert that ideologically liberal decisions are typically those that rule in favor of the individual rather than the government. Thus it is expected that a more liberal justice should more often vote in favor of individuals in Fourth Amendment cases.

In the following section, I discuss the operationalization of concepts that will be utilized to test these hypotheses.

Data and Measurement

For this application, I analyze the 341 Fourth Amendment cases decided by the Supreme Court between 1946 and 2017. The unit of analysis is a justice's vote in a particular case. The cases were sourced from Spaeth et al.'s (2018) US Supreme Court database (SCDB).

The dependent variable employed is *progovernment*. The data for this variable is gathered from the SCDB and is a measure of whether a justices' decision is progovernment (conservative) or not (i.e., proindividual or liberal). This dichotomous variable is coded 1 for a conservative (progovernment) decision and 0 for a liberal (proindividual) decision. Of the 341 Fourth Amendment cases in the SCDB from 1946 to 2017, 203 were decided conservatively, and 138 were decided liberally.

The primary concept of interest in this chapter is constitutional interpretation style. This concept, discussed in greater detail in earlier sections, captures a justice's perceived preconfirmation constitutional interpretation style as revealed in editorials written about the justice when he or she was a nominee to the Court. This concept is indicated by five separate dichotomous variables: *original intent*, *textualism*, *other originalist*, *progressive*, and *living document*. As noted in the measure development section, these categories are mutually exclusive, meaning that each justice can only be assigned to one of the five categories.

The second independent variable, *ideology*, is measured with Segal-Cover scores (1989) ranging from 0 (extremely liberal) to 1 (extremely conservative). As discussed earlier in the chapter, these scores capture the *perceived* ideology of Supreme Court nominees.[3]

3. Other measures of ideology such as Martin-Quinn scores (Martin and Quinn 2002) use Bayesian statistical methods to update ideology scores over time as new cases are decided. While these

Prior prosecutorial experience is included as a control variable. It is widely argued that background characteristics of judges such as prior prosecutorial experience affect case outcomes (Brace and Hall 1997; Ashenfelter et al. 1995; Ulmer 1961, 1973). Tate (1981) found that justices who worked as prosecutors in the past vote less often in favor of individuals and more often in favor of the government. This could be because the justices are accustomed to representing the government's position and learn to see cases from that perspective (Tate and Handberg 1991).

Experience is a dichotomous measure coded from information in Epstein et al.'s (2020) US Supreme Court Justices Database. This database contains a wealth of knowledge about justices' background characteristics. Several of these variables convey justices' prosecutorial experience at various levels. I code a justice as (1) if they have prior prosecutorial experience at any level (local, state, or federal) and (0) if they do not. In the dataset of 37 justices, 22 have prior prosecutorial experience.

Results

As discussed in the application section, justices subscribing to original intent and general originalism are expected to vote more often in favor of the government, while justices who are textualists are expected to vote more often in favor of the individual. Justices who view the Constitution as a living document and justices with a generally progressive interpretation style are also expected to vote more often in favor of the individual. Further, justices with conservative ideologies and prior prosecutorial experience are expected to vote more often in favor of the government.

scores are useful in some research settings, I choose Segal-Cover scores because they are measured in a similar way as my interpretation variables during the same period of time (prior to the nomination). While Segal-Cover scores are imperfect, they provide a measure of ideology that is methodologically and temporally consistent with my independent variables of interest.

Progovernment = 1	Model 1
Original intent	1.35** (.31)
Textualism	1.03** (.47)
Other originalist	1.27** (.40)
Progressive	-.49 (.52)
Living document	Baseline
Ideology	-1.22* (.65)
Prosecutorial experience	.54** (.27)
Constant	-.15 (.57)

Table 3. Results of logistic regression

Note: *Table 3 reports coefficients with corresponding standard errors in parentheses.* ** $p \leq .05$, * $p \leq .10$, N = 3,793. *Standard errors are robust and clustered around each justice.*[4]

Table 3 presents results from a logistic regression. Remember that each interpretation style is treated as a separate dichotomous variable. In the model, the *living document* category is held as the baseline, meaning that results for the interpretation styles are interpreted in relation to justices with this interpretation style. The results from this model suggest that subscribing to textualism, original intent, or general originalism (i.e., *other originalist*) increases the likelihood of voting in favor of the government, as the coefficients for those variables are positive and

4. Since ideology and interpretation style could be related theoretically, collinearity (i.e., the interpretation styles being highly correlated with ideology in a way that affects the results) is possible in this model. Performing the variance inflation factor (VIF) diagnostic on the model provides evidence that collinearity is not an issue. No variable has a VIF over 3, and the average VIF is less than 2. These VIFs are well below the commonly accepted maximum VIF range of 5–10 (Ringle et al. 2015; Hair et al. 2009).

statistically significant at the 0.05 level. Note that the coefficients for *original intent*, *textualism*, and *other originalist* are similar in magnitude. This suggests that instead of there being variation between justices with the originalist interpretive styles, these justices form a camp and vote more often in favor of the government—even when controlling for *ideology* and *prior prosecutorial experience*.

Conversely, I can surmise that justices believing the Constitution is a *living document* are more likely to vote in favor of the individual, as expected by H_2. Further, the lack of significance in the *progressive* variable suggests that those justices vote similarly to *living document justices*.

Figure 1 plots predicted probabilities of voting in favor of the government for justices with each interpretation style. While the results from table 3 allow for the direction and significance of effects to be determined, predicted probabilities provide a more substantive way to interpret the regression results.

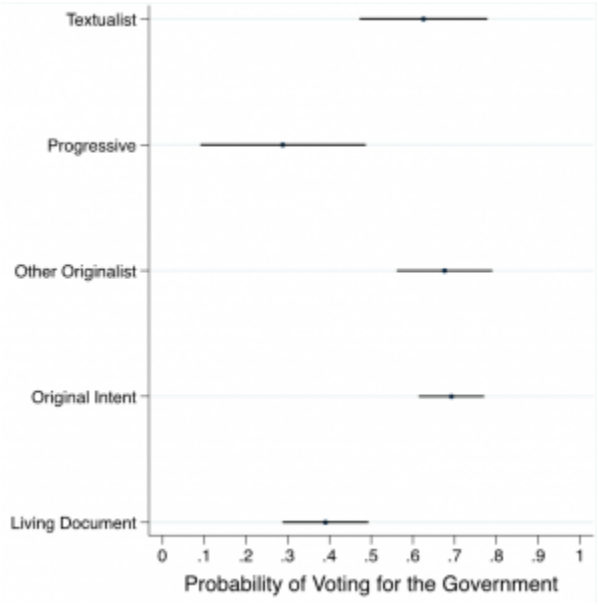

Figure 1. *Graph of predicted probabilities*
Note: *This graph shows predicted probabilities of voting in favor of the government for justices with each interpretation style. Ideology and prior prosecutorial experience are controlled.*

I will first consider the three originalist styles—textualist, original intent, and other originalist. A textualist justice has a 63 percent probability of voting in favor of the government in these cases. Justices with the *other originalist* style and *original intent* style have a 68 percent and 69 percent probability of voting in favor of the government, respectively. Although textualist justices vote less often in favor of the government, the difference is statistically insignificant (the confidence

intervals overlap in the graph). Therefore, H_1 is unsupported. However, it is interesting to note that these interpretation styles have significant effects even when ideology is controlled.

It is striking to see the stark differences in how *living document* justices vote in relation to justices with an originalist style. A justice viewing the Constitution as a living document has only a 39 percent probability of voting in favor of the government. Further, justices with the *progressive* interpretation style only have a 29 percent probability of supporting the government's position. Therefore, it is clear that H_2 receives strong support in this model.

My ideology hypothesis (H_3) is also supported. **Table 3** conveys that a more ideologically liberal justice is less likely to vote in favor of the government, as indicated by the negatively signed coefficient. Conversely, it can be assumed that a more conservative justice is more likely to vote in favor of the government. Also, it is evident that justices with prior prosecutorial experience are more likely to rule in favor of the government, as the coefficient for *experience* is positively signed and statistically significant at the .05 level.

The results from **table 3** and **figure 1** show that despite legal scholars' purported differences in the originalist constitutional interpretation styles (original intent, textualism, and other originalist), these justices usually form a camp to vote in favor of the government, at least in Fourth Amendment cases. Likewise, living document and progressive justices form a camp and usually vote in favor of the individual. In sum, justices with a progressive interpretation style of the Constitution vote in favor of the individual, and justices with an originalist interpretation style of the Constitution vote more often in favor of the government.

Future Application: Studying Supreme Court Opinions

This chapter developed a novel way of measuring interpretation style and applied it to Fourth Amendment cases. The natural place to start with an application of the interpretation style variables was judicial voting. By their very nature, Supreme Court justice votes are dichotomous. This dichotomy provides for clean research designs but is limited by a lack of variation. Indeed, the lack of variation found among justices with originalist interpretation styles is probably due to the fact that the dichotomous nature of the dependent variable makes it difficult to observe differences.

The next step is to move past dichotomous votes and analyze the actual content of the opinions. Opinion language is important to consider because it reflects how the law develops, not just who wins or loses. The language of these opinions becomes precedent and is used in rationales of future court decisions in both federal trial and appellate courts. Differences in originalist

interpretation styles may shine more easily through the language used by these justices when they write opinions. I illustrate this possibility in the following anecdotal example.

Consider *Bertine v. Colorado* (1987), a case decided 7–2 by the Rehnquist Court. Chief Justice Rehnquist, identified as an original intent justice in editorials, authored the conservative-leaning majority opinion. In the opinion, he asserts that reasonable searches are acceptable even without a warrant. This interpretation is similar to Amar's (1994, 2000) expectation of how original intent justices should interpret the Fourth Amendment. Now consider *Murray v. United States* (1988), a case decided 4–3 by the Rehnquist Court. Justice Scalia, a known textualist, wrote the conservative-leaning majority opinion. In his writing, he places controlling weight on the words of the Fourth Amendment and decides that the words of the disputed policy supported the government's claims. It is important to note that Scalia joined the majority opinion written by Rehnquist, and Rehnquist joined the majority opinion written by Scalia. So although they both agreed on the outcome of each case, they each used different language and arguments to form their conclusions. These different arguments can form the basis of rationales used by other judges and justices in the future.

The challenge with studying interpretation styles via opinions is coming up with a systematic way of analyzing them. Text analysis software would have to be used, and key words related to the interpretation styles would need to be developed. Once the key word lists were developed, software could automatically analyze the opinions to find those particular words. I leave this mention of studying opinion texts as food for thought and encourage scholars to pursue this research path.

Discussion and Conclusion

This chapter developed a measure capturing Supreme Court justices' perceived, preconfirmation constitutional interpretation styles. The primary styles identified were original intent, textualism, and viewing the Constitution as a living document. With the interpretation style variables in hand, the chapter applied them to justice voting in Fourth Amendment cases to discover whether these interpretation styles affect justices' votes.

The styles did matter, but not in the ways expected for this particular Fourth Amendment application. No variation was found among the voting of textualist and original intent justices; instead, each consistently voted in favor of the government. This runs contrary to Amar's (1994, 2000) and others' expectations of variation. Thus there seems to be a discrepancy between legal scholars' arguments and the realities of Fourth Amendment case voting. However, the

constitutional interpretation style variables were consistently significant in the models, suggesting that they affect decision-making independently of ideology.

On the other hand—and perhaps unsurprisingly—justices who view the Constitution as a living document ruled more often in favor of the individual compared to the originalist styles. Although justices seem to divide themselves into simple progovernment/proindividual voting camps, I think further consideration of the effects of constitutional interpretation style is warranted.

One method of considering these effects further could be to apply the style variable to another set of cases. For example, maybe all hypotheses would be supported in First Amendment cases of the Supreme Court. This amendment may allow the hypothesized variation between textualists/other originalists and original intent justices to be seen. While it is beyond the scope of this chapter to explore this possibility, this suggestion provides an interesting avenue for future research.

Another factor probably masking variation is the dichotomous nature of the dependent variable. Studying votes does not take into account the actual language of the opinions. Opinion language is important to consider because it reflects how the law develops, not just who wins or loses. The section above highlights the importance of considering opinion language by highlighting two particular cases. The anecdotal evidence provided there could be a cue that it is time to reconsider the black-and-white dichotomy of voting and analyze whether justices with different conservative constitutional interpretation styles are writing opinions in different ways.

Future work should also consider more sophisticated ways to measure interpretation styles. Just as Martin and Quinn (2002) sought to provide a dynamic measure of ideology that improved upon Segal and Cover's (1989) static scores, it seems plausible that a similar development could happen for interpretation styles. While the strategy of coding interpretation style outlined in this chapter is useful, it is limited by the fact that it reflects the *perceived* interpretation style at the time of their nomination to the Supreme Court. It does not take into account issue-specific differences or changes that can occur over time. While a daunting task, having a dynamic measure of interpretation style would be incredibly beneficial for further understanding Supreme Court behavior.

Overall, this chapter provides a measure of constitutional interpretation style that can be applied to many issue areas and many areas of judicial behavior. It is important to note that this is only the starting point on a long road to understanding how justices' views of the Constitution affect their behavior. The interpretation measure and the application presented in this chapter provide useful first steps toward this worthy task.

Student Activities

1. This chapter addresses the importance of considering aspects of both the legal and attitudinal models in studies on judicial decision-making. The component of the legal model addressed is constitutional interpretation style. Justice ideology was included to account for the attitudinal model. In a one- to two-page essay, compare and contrast constitutional interpretation style and ideology. Further, discuss how these two concepts affect each other. Does judicial ideology influence interpretation style, or does judicial interpretation style influence ideology? Justify your response with both academic sources and practical examples.
2. Refer to the section entitled "Future Application: Studying Supreme Court Opinions." This section highlights the importance of considering interpretation styles in the context of opinion content but recognizes the challenges this would present. In small groups, develop a research plan that allows for systematic analysis of opinion content that could help reveal effects of constitutional interpretation style. What "tools" would a researcher need to complete this task? How long might such a project take? What are some challenges of such a project? What could make these challenges easier to overcome?

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20. Mother Nature, Lady Justice

Ecofeminism and Judicial Decision-Making

JONATHAN A. PICADO AND REBECCA A. REID

Many theories of gendered judicial decision-making can be traced back to Carol Gilligan's (1982) different voice theory. Gilligan (1982) finds that women tend to define themselves within a community of relationships while men define themselves as separate and autonomous. Because women view themselves as linked to others, different voice theory suggests that women tend to prioritize justice as an "ethics of care," focusing on interpersonal relationships, emphasizing empathy and compassion, and acknowledging interdependence across community members. Men, on the other hand, prioritize justice as viewed through individualism, autonomy, rights, and rules. This difference in conceptions of justice suggests that women may perceive and apply the law differently from their male peers, especially since the law frequently adjudicates between moral dilemmas, such as reconciling competing rights.[1] As such, women should engage with law differently and develop their own feminine jurisprudence compared to their male peers (Sherry 1986).

Yet despite its reliance on different voice theory as the basis for possible gender differences, judicial scholarship has largely avoided engaging with feminist theories.[2] This omission has left judicial theories of gendered decision-making underdeveloped, and it potentially reinforces harmful essentialist[3] stereotypes of women. In addition, judicial scholarship's emphasis on positivist, quantitative methodology has also severely limited its ability to evaluate different voice theory by forcing scholars to focus on case outcomes and judge votes, rather than the qualitative, contextual, and linguistic analyses required. Feminine jurisprudence may not directly align with case outcomes, judge votes, or traditional liberal-conservative judge ideologies. Different voice theory, for example, asserts that women make decisions differently from their male peers, not

1. Women may also perceive and apply the law differently from their male peers due to their history of exclusion and disenfranchisement, which ensured that their perspectives were omitted from the development of the law and political systems.
2. But see Kraybill, "Women of SCOTUS: An Analysis of the Different Voice Debate," in this volume.
3. *Essentialism* refers to the belief that these gender differences are due to inherent or intrinsic dispositions of men/women. Essentialist stereotypes thus assume that all women/men behave similarly and in a fixed manner, thereby ignoring heterogeneity within genders, social contexts, and gender fluidity.

necessarily that the decisions will be different in terms of outcome. Focusing solely on quantitative outcome differences thus misses the crux of this theory.[4]

This limited theoretical engagement and reliance on quantitative measures are likely why judicial scholarship finds mixed results in gendered decision-making. For example, Johnson et al. (2008) find that women are more sympathetic to civil liberties claimants. However, Walker and Barrow (1985) find no significant difference in women judges' decision-making when compared to their male colleagues in civil rights claims, though women appear to be more sympathetic to economic regulation (see also Segal 2000). Kritzer and Uhlman (1977), Gruhl, Spohn, and Welch (1981), Gottschall (1983), and Davis (1986) do not find any significant differences in the voting behavior of male and female judges. Yet Boyd et al. (2010) and Haire and Moyer (2015) find that women judges vote differently from their male peers in sex discrimination cases, and Songer, Davis, and Haire (1994) show significant differences between men and women in cases involving employment discrimination.

In this chapter, we incorporate ecofeminism into gendered judicial decision-making. Ecofeminism builds upon feminist theories such as different voice theory by expanding the conceptualization of women's issues and ethics of care to include not only communities of people but communities within an ecological system. Ecofeminism offers novel insights that source potential gender differences to their roles within communities and ecological systems and offers more explicit predictions for gendered decision-making that apply to previously unaddressed areas of law: environmental cases. We qualitatively evaluate the implications of ecofeminist theory on judicial decision-making in environmental cases before the US Supreme Court. By linguistically analyzing a set of solo-authored dissenting opinions, we evaluate whether women authors differ in their language, attitudes, and framework pertaining to environmental issues compared to their male peers. In the following sections, we discuss ecofeminism and how it applies to judicial decision-making. We then offer the results of our qualitative analyses and some concluding remarks.

Ecofeminism

Ecofeminism serves as a theory where feminist thought meets ecological interdependence (Mies

4. However, Sherry (1986) qualitatively analyzes differing votes between Justice O'Connor and Chief Justice Rehnquist, who frequently voted in similar ways due to ideological alignment, in Establishment Clause cases and discrimination cases to show that Justice O'Connor was more likely to adopt a community-oriented approach and often favored the well-being of the community over individual rights when compared to her male colleague, Chief Justice Rehnquist.

and Shiva 2014). Ecofeminism highlights the relationship between the exploitation and domination of nature with patriarchal[5] societies' exploitation and domination of women, where both are rooted in socially constructed dichotomies that maintain existing power structures (Mies and Shiva 2014). These dichotomies—man versus woman, nature versus society, civilization versus primitive nature—are derived from Western colonialism (Mack-Canty 2004). Western colonialism, which is fundamentally dependent upon environmental and labor exploitation, created the institutional structures for oppression, racialization, misogyny, indigenous erasure, heteronormativity, and poverty (Mack-Canty 2004; Tuck and Yang 2012; Gruen 1992).

For example, the nature versus culture dichotomy is a central tenet of most Western ideologies, where "civilized" man is seen as having complete domination over "uncivilized" or primitive nature (Mack-Canty 2004; Lahar 1991). Indeed, this tenet was the foundation for colonialism, where legal justifications such as *terra nullius*[6] enabled Western (White) expansion and legal appropriation of "unoccupied" lands because the "primitive" Indigenous Peoples on those lands were deemed to be part of nature—that is, they were part of the flora and fauna to be extracted or exploited. Colonialism was further mandated by capitalism, which requires the perpetual extraction of resources in order to generate profits; this discourse directly informed the development of classical liberalism (Mack-Canty 2004). The necessary spread of "civilization," and thus capitalism, mandated and justified colonization and the exploitation of the environment, which holds value solely as a provider of resources for economic gain.

Environmental extraction became the key to promoting and funding Western colonization, whereby extraction became a powerful form of domination and control—both internally and abroad. For instance, internal colonization requires the management of people, land, flora, and fauna within the domestic borders of the colonial nation to generate wealth, which is derived from land. There, labor must be extracted in order to "develop" the land (Tuck and Yang 2012). These requirements gave rise to the enslavement of African and Indigenous Peoples (Spiegel 1996; Baptist 2014; Dunbar-Ortiz 2015; Reséndez 2017), as well as current modes of control such as policing, segregation, criminalization, and minoritizing (Tuck and Yang 2012). Western colonization impacts international communities in that many nations in the Global South who rely on agricultural and mineral exports are subjected to pressures from Western nations in the Global North such that they are incentivized (i.e., forced) to become monoculture industries to satisfy Western demands for imported resources (Lahar 1991). The transition to monoculture prompts a developing country to abandon centuries-old, sustainable practices to satisfy the desires of Western nations, such as being required to use genetically modified seeds to produce the "ideal" crop, a crop that

5. *Patriarchy* refers to the social and political systems in which men hold primary power and from which women are largely excluded, disenfranchised, subordinated, and/or oppressed
6. *Terra nullius* is land that is legally determined or deemed to be unoccupied or uninhabited.

can eliminate native crop species. Becoming dependent on lithium mining, which eradicates clean water supplies, causing mass animal deaths and wreaking havoc on ecosystems, is another example of this forcible imposition of resource demand. Furthermore, this relationship contributes to colonization: these nations in the Global South internalize Western beliefs, viewing natural resources as a commodity, valued only in terms of extractable units to be exploited, and the associated value systems (Lahar 1991).

Another effect of Western colonization and capitalism is that these systems designate which forms of labor are valuable (i.e., those that are profit-generating), tie the value of people to their economic use (i.e., their ability to generate profit), and delegate gendered (and racialized) roles of labor whereby certain groups of people are relegated to particular forms of labor. More specifically, because the tenets of Western colonization place women as closer to nature and thus more "primitive," they are relegated to the "primitive" domestic work. This work largely consists of care-related activities, such as caring for family by cooking nutritious foods, creating safe and clean households, maintaining the health of family members, raising and educating children, and so on. Women are given similar roles within communities, as well; both family and community well-being are directly dependent upon the environment, as it provides the materials for food, water, housing, clothing, and medicine. These forms of labor are not directly profit-producing, which renders women of lower value in capitalist societies (MacGregor 2004). This devaluation of women causes a significant increase in violence against women (Shiva 1989), higher rates of female infanticide (Lahar 1991), and other female mortality risks (Mack-Canty 2004). Similarly, policies related to "women's issues," such as education and health care, are devalued relative to the more masculine policy areas of national security and economy.[7]

Based on these critiques, ecofeminism seeks to alter discourse and sociopolitical practices to emphasize the value of women and the environment interdependently. Specifically, ecofeminism advocates for the adoption of an ecological civic virtue that stems from women's societal standards of care—or a *politicized* ethic of care (Curtin 1991). Care ethics emphasize the notion that women are the individuals "who do the caring, nurturing, and subsistence work that sustains human life" (MacGregor 2004, 58). This "barefoot epistemology" states that women's "ways of knowing" are inherently tied to life-affirming activities; therefore, women's relation to nature, through their labor, is drastically different than men's (MacGregor 2004). Women are more

7. Ecofeminism also highlights how the spread of Western colonization disseminated sociopolitical narratives that dictate political priorities and create false dichotomies between issues, where political goals and priorities are treated as trade-offs rather than complementary (Lahar 1991). For example, politicians may argue that it is more important to invest in the economic system rather than investing in environmental sustainability or health care, as though these areas cannot be simultaneously pursued.

concerned with issues of survival rather than power, unlike men, which is directly dependent upon the environment (MacGregor 2004). Women have a higher epistemic awareness of survival and protection of life; therefore, women are more inclined to protect natural resources for the continued survival of their families and communities (MacGregor 2004). Consequently, ecofeminism suggests that women have a stronger ethical approach to the survival of the environment, as their relation to nature is fundamentally different from that of men (Salleh 2017).

Ecofeminism and Judicial Decision-Making

Ecofeminism helps to bridge different voice theory and ethics of care feminist theories into environmental case law and judicial decision-making. Ecofeminism suggests that women exhibit higher awareness of survival and prioritize the protection of life; therefore, women have a stronger moral approach to the survival of the environment as their relation to nature is fundamentally different from that of men (Salleh 2017; MacGregor 2004). More specifically, because the economic division of labor places women in domestic, caregiving, and "primitive" sustenance-providing roles that are closer to nature (such as through the provision of food and water, caregiving via motherhood and extended family/community, and ensuring family/community health, safety, and nutrition), women experience the environment more directly and are more aware of their interdependence and reliance upon (a healthy) environment. Men, on the other hand, largely view themselves as separate from the environment and responsible for the "development" of environmental resources to generate wealth. As such, a woman judge should exhibit different responses to environmental issues compared to their male counterparts. We expect women judges to differ from men in their discussion of environmental cases, where women are more likely to (1) address the interdependence and interactions between humans and nature, (2) view environmental risk as more serious, long-lasting, and detrimental, (3) prioritize an ethics of care form of justice that values sustainability and sustenance, and (4) rely on legal theories that justify and mandate government intervention and oversight to protect the environment. We expect men judges to be more likely to (1) discuss people and society as separate and autonomous from nature, especially where people (men) are viewed as superior to nature, (2) minimize environmental risk, (3) prioritize economic endeavors and emphasize potential economic loss, (4) rely on legal theories limiting government power in order to avoid environmental restrictions and oversight. Table 1 summarizes these expectations.

Men	Women
Humans treated as separate, distinct, autonomous, and superior to nature	Humans treated as interdependent and reliant upon nature
Environmental risk perceived as lower	Environmental risks perceived as greater
Prioritizes economy • Views environment profit-producing resource • Emphasizes potential economic loss through environmental protections • Focuses on the rights of businesses • Wealth treated as common good	Prioritizes sustainability and sustenance • Views environment as life-sustaining • Emphasizes long-term quality of life and health through environmental protections • Focuses on the rights of family and community • Nature treated as common good
Relies on legal theories limiting government power in order to avoid environmental restrictions and oversight	Relies on legal theories justifying government intervention, restriction, and oversight of environmental policies

Table 1: Expectations of ecofeminism in judicial decision-making

Before turning to data and methods, we want to emphasize that we do not argue that women judges themselves identify with ecofeminism or view themselves as ecofeminists. Rather, we suggest that women judges, as women, have a different relationship with nature than their male counterparts because of their social and economic attribution as caregivers and providers of sustenance within and across family units and communities. These life-affirming and sustaining roles given predominantly to women make them more directly aware of their dependence on nature. Thus it is women's unique, prescribed relationship with the environment, rather than anything ontologically[8] inherent about womanhood, that causes this difference between men and women. In other words, it is the social and economic designation of women to these caregiving and sustenance roles that causes the expected gender differences.

We also want to note that ecofeminism acknowledges that there are differences among women and the forms of oppression women experience (Mack-Canty 2004). Women in the Global North and Global South likely differ in their relationships with nature and the environment. Similarly, women of color and indigenous women differ in their relationship with nature relative to white women. While these variations—among others such as wealth, motherhood, religion, and so on—are certainly expected to exist, we cannot evaluate these differences, since our data include only the four women on the US Supreme Court.

8. *Ontology* refers to the philosophical study of being and existence. By arguing that there is no ontological difference between genders, we assert that there is nothing essential, necessary, or determinate about gender. In other words, women are not inherently closer to nature due to some essential quality about their woman-ness (and vice versa).

Data and Methods

We test our theory of ecofeminism in judicial decision-making by qualitatively analyzing dissenting opinions written by justices of the US Supreme Court in environmental cases. A qualitative analysis enables analyzing social phenomena through an interpretivist epistemology so as to allow for a deeper understanding of social behavior and structural relations (Webley 2010) and offers a more detailed, contextual analysis (Kritzer 2009). Not only are qualitative analyses capable of testing causal and descriptive inferences and producing valid results (King, Keohane, and Verba 1994), but a qualitative, linguistic approach is the most appropriate method of evaluation of ecofeminism, which is based on an epistemology emphasizing multiple, dynamic understandings of knowledge and value.

Linguistics and concept formation can draw connections between women and nature. Wittgenstein (1953) argues that concept formation can be analyzed by the way an individual uses language to discuss themselves and the world around them. In most cultures, language is critical in perpetuating a sexist-naturist dialogue that sees women and nonhuman nature as less than men (Mack-Canty 2004). Specifically, the English language promotes naturalizing and animalizing women by comparing them to certain animals or parts of nature that are already viewed to be inferior to men (Adams 1990). For example, women can be referred to as bitches, chicks, queen bees, snakes, pets, bunnies, pigs, cows, and social butterflies; however, men are usually referred to as animals that are not similarly exploited (e.g., lions, wolves, tigers, eagles). The English language also feminizes nature as Mother Nature, while many nation-states and civilizations are masculinized as Fatherlands or father states, patriotism (derived from Greek and Latin words for father), and ancestral forefathers. Several English words are applied equally to women and nature, such as *fertile*, *virginal* and *untouched*, and *wild*, where both nature and women must be controlled, guided, and dominated by man in order to properly develop into their potential value—while simultaneously offering both a reprieve and recreation for man. Hence the way we talk about ourselves and the world around us matters. Language formation and cultural formation work to perpetuate patriarchal domination of women and nature by incorporating language that feminizes nature and naturalizes women (Adams 1990). Language also harbors these conceptualizations of relationships and hierarchies that may not otherwise be directly observable.

In order to test these linguistic components of ecofeminist theory, we qualitatively analyze the language of dissenting opinions from the US Supreme Court. We use dissenting opinions for two reasons: (1) dissenting opinions are not binding law, so justices have more freedom to express themselves (Wahlbeck et al. 1999), and (2) dissenting opinions require less negotiation and

compromise than majority opinion decisions, so dissents should have a more centralized voice of the author to compares women and men's voices.[9]

Using Westlaw, we pulled all environmental cases with dissenting opinions from 1973 to 2010. Of all environmental cases decided during this time period, there were a total of fifty-seven available dissenting opinions, with fifty dissents authored by men and the remaining seven dissents authored by women. From this population of dissents, we sought to ensure representation of all the women (as there are only seven total dissents authored by women) and selected a random sample from male-authored dissents. Of the seven women-authored dissents available, none were authored by Justice Sotomayor. Justice O'Connor had only one dissent: a short paragraph summarily agreeing with Justice Scalia in *Pennsylvania v. Union Gas Co* (1989),[10] and the majority of female dissents were written by Justice Ginsburg. Justice Kagan had only one dissent as well, which was joined by Justices Ginsburg, Sotomayor, and Breyer (in *Michigan v. EPA*). We include this dissent, despite the possibility for influence by other justices, because it reflects a majority of women on the Court. Omitting this dissent would effectively silence Justice Kagan, as author, and the other women (and Justice Breyer) joining her. For the male-authored dissents, we selected a random sample of the fifty available dissents in Westlaw. This random sample includes dissents from Justices Stevens, Scalia, Powell, Roberts, Douglas, and Marshall.

Hence we examine a total of nine dissenting opinions authored by men and women justices.[11] Justice Ginsburg authored two dissenting opinions, and the remaining seven dissenting opinions are authored by Justices Kagan, Scalia, Stevens, Powell, Roberts, Douglas, and Marshall (with one dissent each). The limited female-authored dissents reflect the low number of women represented on the US Supreme Court and their relatively recent appointment to the Court (with the first female justice appointed in 1981). Yet comparing their dissenting language to their male dissenting counterparts enables a preliminary evaluation of whether gender differences aligning with ecofeminism appear at the nation's highest court.

9. While some dissents are coordinated and written by multiple justices, we assert that this level of negotiation is not required (unlike majority opinions) and less likely to occur.
10. See appendix for text of Justice O'Connor's dissent.
11. This sample represents 18 percent of the total number of written dissenting opinions in environmental cases during this time frame.

Results

We first evaluate the dissents written by women justices, followed by qualitative analyses of dissents authored by men justices on the US Supreme Court.

Justice Elena Kagan

In *Michigan, et al. v. Environmental Protection Agency*, et al., 576 U.S. __ (2015), pertaining to the Environmental Protection Agency's (EPA) regulation of power plants, Justice Kagan filed a dissenting opinion, joined by all the other women on the court (and Justice Breyer), which argues that the environmental risk was greater than that perceived by the men in the majority opinion and argues in support of governmental (agency) responsibility to maintain a safe (unpolluted) environment. Furthermore, Justice Kagan critiques the majority opinion's car metaphor that likened the EPA to a driver who believes it is "appropriate" to buy a Ferrari but fails to account for the cost, because "he plans to think about cost later when deciding whether to upgrade the sound system" (*Michigan v. EPA* 2015). Justice Kagan responds by providing her own car metaphor by comparing the EPA to a driver who decides that it is "appropriate and necessary" to replace ***her*** worn-out brake pads without initially considering cost, since ***she*** is well aware that ***she*** has enough time to evaluate costs and explore different options to stay within her budget from her prior experience with replacing worn-out brake pads.

Justice Kagan's critique of the majority's car metaphor is a direct critique on the masculine themes found within the majority's opinion, where she categorizes the metaphor as "witty but wholly inapt," and reminds the majority that the issue at hand has much larger implications than buying a car. She intentionally switches the pronouns used by the majority from *he* to *she* in her own interpretation of the reasonable car purchase metaphor. Switching the metaphor from male to female, and from a luxury purchase to a necessary safety purchase, simultaneously addresses the male perception of unpolluted nature as an unnecessary luxury while firmly placing the provision of safety and reasonable decision-making within a female realm. This switch thus reaffirms female agency and decision-making as necessary, "appropriate and reasonable" lifesaving actions.

Justice Ruth Bader Ginsburg

In *Donald C. Winter, Secretary of the Navy, et al. v. Natural Resources Defense Council, Inc., et al.*, 555 U.S. 7 (2008), pertaining to requirements for an environmental impact statement (EIS) to assess

the risks and potential dangers Navy exercises could have on marine life, the dissent by Justice Ginsburg emphasizes the potential harms to marine mammals and environment when she states that "environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration—that is, irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment" (*Winter v. Nat. Res. Def. Council, Inc.* 2008).

Justice Ginsburg thus perceives the public interest to be one of protecting the environment and marine wildlife, rather than the continued military exercises. This affirms (feminine) environmental protections over (masculine) security priorities. Her dissent thus reflects her perception that the environmental risk is greater than perceived by the majority opinion, questions the presumption that military interests automatically outweigh environmental interests, and affirms broad use of government power to protect the environment through an injunction.

In *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council, et al.*, 557 U.S. 261 (2009), dealing with wastewater from gold mines, Justice Ginsburg argues that the all-male majority opinion completely undermines the purpose of the Clean Water Act. In a footnote, Justice Ginsburg critiques Justice Breyer's attempt to assuage concerns of the Court creating loopholes in environmental protection (expressed in his concurring opinion) by stating that "[d]estruction of nearly all aquatic life in a pristine lake apparently does not qualify as 'unacceptable.'" Justice Ginsburg's use of imagery cannot go unnoticed. Her use of the word "pristine" to describe the lake, which she argued would be perversely polluted, could be interpreted as an ecofeminist critique against the exploitation of a "pristine" lake to be used as a dumping site for waste. Furthermore, she again finds environmental risk to be greater than her male peers believe and sees environmental protection as a legitimate, necessary interest of government, such that she expresses her disdain for the majority position in both her words and tone.

Chief Justice John Roberts

In *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007), pertaining to the regulation of greenhouse gases, Chief Justice Roberts dissented against the majority's stance that the EPA has authority to regulate greenhouse gases, arguing that the petitioners do not have a traceable or particular injury to have Article III standing to sue. Chief Justice Roberts begins his dissenting opinion by stating that "global warming may be a 'crisis,' even 'the most pressing environmental problem of our time.'...Indeed, it may ultimately affect nearly everyone on the planet in some potentially adverse way, and it may be that governments have done too little to address it" (*Massachusetts v. EPA* 2007).

Chief Justice Roberts downplays the potential risks of climate change by continuously employing the word *may* to condition its significant, negative effects through generating uncertainty. He also intentionally places the word *crisis* and the phrase "the most pressing environmental problem of our time" in quotes to signal that he does not believe these claims. Ironically, Chief Justice Robert's focus on the global scale of the risks of climate change and the recognition that these risks (i.e., injuries) are experienced by every living being on the planet—rather than being individual and personal—are used to undermine petitioner standing and government authority to ensure environmental (and thus human) protection. These themes thus align with the masculine perspective we hypothesized, where environmental risks are undermined or underestimated and government authority is insufficient or illegitimate in efforts to protect the environment.

Justice Antonin Scalia

In *Friends of the Earth, Inc., et al. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000), dealing with the discharge of mercury into the North Tyger River in South Carolina, Justice Scalia's dissenting opinion reflects rhetoric similar to that of Chief Justice Roberts. Justice Scalia states, "Ongoing 'concerns' about the environment are not enough, for 'It is the reality of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions'" (internal quotes pertain to *Los Angeles v. Lyons*, 461 U.S. 95 [1983]) (*Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. [TOC], Inc.*, 2000).

Justice Scalia uses linguistic tools to undermine the legitimacy of environmental concerns and questions the ability of people to demonstrate environmental injury as well as their legitimacy as enforcers of environmental laws. In every discussion of environmental concerns or environmental harms, Justice Scalia consistently places the terms *concerns* or *harms* in quotation marks, to indicate that the environmental concerns or harms asserted by Friends of the Earth, or any party asserting similar concerns, are not legitimate and not objective realities—which is reiterated in his reference to environmental harm as "subjective apprehensions" rather than demonstrable fact. Justice Scalia also implies a distinct separation between mankind and the environment by asserting that no direct, objective link can be made between the environment and litigants. Thus his dissent appears to align with our expectations that this male-centered view underestimates environmental risk or damage, perceives nature as something completely distinct and separate from human livelihood and safety, and seeks minimal government action and authority to protect the environment.

Justice John Paul Stevens

In *Monsanto Co., et al. v. Geertson Seed Farms, et al.*, 561 U.S. 139 (2010), dealing with genetically engineered alfalfa plants, Justice Stevens places significant weight on the environmental impacts that genetically modified plants could have when gene transfer occurs with native plants, where "the environmental and economic consequences would be devastating." Yet his concerns for the cross-contamination of alfalfa crops are mostly framed within the forecasted economic loss of farmers whose livelihoods depend on naturally occurring alfalfa crops. While this framing can be conceived as ecofeminist in the efforts to preserve sustainable agricultural techniques and protecting natural seeds, especially in the face of large transnational corporations (Mies and Shiva 2014), it can also be framed as masculine in that the value of the natural seed, as treated in Steven's dissent, does not originate from an innate value of natural seeds or preserving traditional cultural practices. Rather the value of natural seeds is that farmers rely on them for their economic livelihood. Hence the driving factor of Steven's dissent is not the protection of naturally occurring alfalfa (i.e., the environment itself); instead, the primary motivation for environmental protection is the protection of farmers' economic well-being and national economic production of American agriculture. Because his focus remains primarily on human economic wealth and future national wealth, which are conceptualized as profit rather than sustenance, we consider his dissent to align with our expectations of masculine perspectives rather than ecofeminism.

Justice Lewis Powell

In *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), pertaining to the construction of the Tellico Dam in a critical habitat for the endangered snail darter, Justice Powell issued a dissenting opinion, joined by Justices Rehnquist and Blackmun, arguing that environmental concerns of endangered species should not apply when a project is completed or substantially completed. He writes, "This decision casts a long shadow over the operation of even the most important projects, serving vital needs of society and national defense, whenever it is determined that continued operation would threaten extinction of an endangered species or its habitat" (*Tennessee Valley Auth. v. Hill* 1978).

Here, one sees Powell's prioritization of national defense over the environment, implying an assumption of the superiority of mankind and their military (and economic) endeavors to dominate environments, which are considered largely useless as they offer homes to only tiny, inconsequential life-forms. Justice Powell draws a dichotomy between the "grandiosity" of governmental projects and the "minuscule" environment, referring to the federal hydroelectric projects and reservoirs as "great" and "essential to the [United States'] economic health and safety." However, when critiquing the majority's decision, he uses a "water spider" or "amoeba"

as an example of what the majority argues would be sufficient to halt the development of an infringing federal project. Justice Powell's choice to use a water spider or amoeba is intended to categorize the environment as a minuscule barrier that is overshadowed in comparison to the "great" federal projects. Indeed, his selection of these life-forms is designed to make the majority opinion protecting the environment appear ridiculous. The dissent thus reflects the perception that humans are fundamentally distinct and separate from their environments, where the environment is most (or only) useful as a resource to develop, through which it gains value.

Justice William Douglas

In *United States v. Students Challenging Regulatory Agency Procedures* (SCRAP), 412 U.S. 669 (1973), dealing with environmental impact statements (EIS) on proposed changes to railroad freight rate surcharges, Justice Douglas references the value of environment as solely resources used for human activity and consumption. His concerns are thus not the protection of the environment for sustainable ecological well-being and interdependence; rather, his concerns focus on the preservation of nonrenewable resources that are used in human economies, such as wood pulp and metal ore. For example, Justice Douglas quotes the National Environmental Policy Act of 1969 (42 U.S.C. §4331 [b]) that conceptualizes nature as ensuring "safe, healthful, productive, and esthetically and culturally pleasing surroundings…and enhance[ing] the quality of renewable resources and depletable resources." This conceptualization suggests an acknowledgment of nature in providing mankind's health and safety, but then immediately emphasizes its value through ensuring productive human activities as resources and sites of recreation and reprieve that are culturally and sensorially pleasing to man. This context suggests the extractive nature of the perception of nature's value, in that the value of nature is what it provides mankind. In his dissent, Justice Douglas focuses on injuries related to environmental damage in recreational areas, such as parks and picnic areas. The implication is thus that the primary value of the environment is economic (as resources for human economies) and recreational (as aesthetic human playgrounds). In sum, the language of the dissent reveals an androcentric perception of nature and its utility to mankind.

Justice Thurgood Marshall

In *Chemical Manufacturers Association v. Natural Resources Defense Council, Inc.*, 470 U.S. 116 (1985), pertaining to EPA regulation of toxic pollutants, Justice Thurgood Marshall filed a dissenting opinion, joined by Justices O'Connor, Blackmun, and Stevens, emphasizing the

environmental risks of toxins, by quoting a portion of the Congressional Record in which the bill's Senate manager, Senator Muskie, argued that "the seriousness of the toxics problem is just beginning to be understood. New cases are reported each day of unacceptable concentrations of materials in the aquatic environment, in fish and shellfish, and even in mother's milk" (*Chem. Mfrs. Ass'n v. Nat. Res. Def. Council, Inc.* 1985).

Justice Marshall's decision to include this direct quote in his dissent is worth noting. The explicit reference to mother's milk connotes the interdependent relationship between the environment and humans, where the environment is not separate or distinct from human living and well-being. Of course, this reference to motherhood and family raising could be strategic (on the part of both Senator Muskie and Justice Marshall)[12] in that these frames are effective mediums that are politically useful; they simultaneously appear apolitical (since everyone cares for their family and children) and they are mobilizing political action based on fears of safety and protection, where women are called upon to act to protect their children and men are called upon to protect their wives and the mothers of their children. In essence, the most vulnerable and sympathetic persons are placed as the most at risk. Not to undermine the importance of mothers and children, but we do want to highlight that neither Muskie nor Marshall discusses presumably less sympathetic persons who would also be particularly vulnerable to such toxins: the poor, homeless, people of color, immigrants, and so on.

Despite this reference to the contamination of mother's milk, however, the dissent contains little discussion that could be considered ecofeminist. Instead, Justice Marshall focuses only on the language of the Clean Water Act and congressional records detailing hearings and committee meetings related to the Act. We thus find mixed results, where the main arguments of the dissent are consistent with masculine conceptions of the environment in terms of its value for economies and recreation. However, the environmental threat is not underestimated, and there is the acknowledgment through Muskie's quote of human interdependence with nature.

Conclusion

The linguistic analysis of justices' written dissenting opinions provides promising insight into gender effects on environmental litigation before the US Supreme Court. Justices Ginsburg and

12. It is also unclear whether Justice O'Connor had any influence in the language of the dissent or the decision to include Senator Muskie's quote. Senator Muskie is quoted repeatedly throughout the dissent, but no similar ecofeminist perception, language, or themes appear in any of these other quotes.

Kagan demonstrate a clear concern with the protection of human and nonhuman beings as well as implementing ecofeminist-aligned language within their opinions. Both Justice Ginsburg and Justice Kagan continuously emphasize the harms associated with environmental destruction, and they do not presume that human interests are divorced from, or superior to, environmental interests—even in national security contexts. They not only use explicit legal argumentation to refute majority positions, but their intentional use of tone and diction to convey strong convictions and more subtle redefining is noteworthy.

Justice Ginsburg particularly emphasizes risks specific to the environment and nonhuman life (e.g., advocating for the protection of marine mammals in *Winter*), and she promotes the use of court injunctions as remedies to avoid further destruction or harm to the environment. Justice Kagan focused primarily on the interdependence of humans and the environment, particularly focusing on the connections between environmental harm and harm to human society as a result. In *Michigan v. EPA*, Justice Kagan cited the potential risks associated with air pollutants, particularly to asthmatic children. Additionally, Justice Kagan's critique of the majority's car metaphor could be interpreted as a feminist critique of the majority's hypermasculine metaphors when discussing the environment. Overall, Justices Ginsburg and Kagan clearly prioritized environmental protection for the sake of protecting the environment, as well as protecting human society by emphasizing society's interdependence with the environment. In addition, their conception of protecting human society stems from family/community well-being and health rather than economic profits.

Compared to Justice Ginsburg and Justice Kagan, male justices demonstrated significantly different concerns when discussing the environment—even when they agreed on similar outcomes of environmental protection. Specifically, male judges often dissent in matters where Article III standing was at issue, or whether courts have legitimate authority to intervene in environmental matters (i.e., issuing injunctions), where men were more likely to use legal procedures to limit government authority in regulating or protecting the environment. In addition, the language of these male-authored dissents largely conforms to our expectations of masculine views of nature as distinct and inferior to human interests and activities, as well as perceptions that underestimate or question the severity or existence of environmental threat. For example, Justice Scalia was not convinced that environmental harms could be connected to the petitioners in any justiciable way. Chief Justice Roberts also emphasized the lack of standing when discussing the harms of climate change.

Male justices often questioned the redressability of environmental harms, particularly through court injunctions. Justice Powell argued that the US District Court in *Tennessee Valley Authority* abused its discretion by issuing an injunction that halted the construction of the Tellico Dam in order to save the snail darter. Justice Powell based his argument on the grandiosity of US federal projects, such as the Tellico Dam, and emphasized the potential economic growth that would have resulted if the Tellico Dam had reached completion. Chief Justice Roberts continuously stressed

the limitations of the US government and judicial system in redressing any sort of environmental harm associated with rising temperatures as a result of greenhouse gases.

Furthermore, even when male justices are arguing for environmental protection, their language reveals androcentric values that prioritize economic interests and recreational use, rather than viewing nature as necessary and symbiotic with the well-being and survival of humankind. Justice Stevens and Justice Douglas both view the environment as valuable due to the economic and recreational resources it provides to humankind. Justice Douglas is primarily concerned with injuries related to environmental damage in recreational areas, and Justice Stevens prioritizes environmental protection as a mode for economic production.

In sum, while interesting variation appears across the male justices—and even within some dissents, such as those of Justice Marshall—these results are consistent with the expectations implied by ecofeminism. The language of dissenting opinions reveals gender differences in how men and women relate to, and place themselves in relation to, nature and the environment. Even with the limited number of women on the US Supreme Court, the homogenizing effects of law school and legal careers (Guinier et al. 1994; Kritzer and Uhlman 1977), and the constraints imposed by law in making judicial decisions, we find evidence that women judges are more likely to view people as interdependent and reliant upon nature for survival and well-being, more likely to find inherent value in nonhuman beings, more likely to take environmental risks seriously, more likely to prioritize health and sustenance as valuable common goods provided by nature, and more likely to find legitimate government authority to regulate and intervene to protect nature. On the other hand, men judges are more likely to view humans and civilization as distinct from and superior to nature, more likely to minimize or question environmental risks, and more likely to question government authority to protect the environment. Even the men judges who seek court outcomes protecting the environment tend to prioritize human economies and business profits and view nature primarily as resources to develop economic activities.

Hence the addition of women onto courts not only increases court legitimacy via descriptive representation but can fundamentally transform the law (Maule 2000) by restructuring the process of solving moral dilemmas, altering agendas (Thomas 1994), integrating women's experiences and recognizing power (im)balances (Binion 1991), and supporting social values rather than assuming that individuals exist separate from society (West 1988). This transformation occurs not just within cases pertaining to traditional "women's issues," but forms a substantively different set of decision-making processes that can complement the masculine forms already institutionalized within our political and legal institutions to generate a better future for everyone, human and nonhuman alike.

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Student Activities: Critical Reflection

1. How do you relate and interact with nature and the environment? Identify how you interact with nature, environmental issues, and life-affirming processes such as caregiving, parenting, homemaking, health, and so on in your daily life.
2. How does your interaction with nature impact you?
3. How do your actions impact the environment?
4. In some countries, the environment has legal personality, and certain environmental entities have legal rights and protections in the same way people have status as legal persons (generating rights, protections, privileges, and responsibilities). For example, the Colombian Constitutional Court declared that the Atrato River Basin and Amazon River have legal rights to "protection, conservation, maintenance, and restoration." In New Zealand, the Te Urewera National Park was declared an environmental legal entity, as were the Whanganui River and Mount Taranaki. This means that these environmental entities can "appear before a court" through legal guardians in order to ensure their protection from pollution, extraction, and exploitation. Do you think the environment (or parts of the environment) should have legal personality(s)? What impact would legal personality have on the environment and on people seeking to use natural resources for economic growth, employment, national security, and tourism.

Appendix

Dissenting Opinion by Justice O'Connor, from Westlaw

Pennsylvania v. Union Gas Co., 491 U.S. 1, 57, 109 S. Ct. 2273, 2304, 105 L. Ed. 2d 1 (1989), overruled by *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996)

Justice O'CONNOR, dissenting.

I agree with Justice SCALIA that a faithful interpretation of the Eleventh Amendment embodies a concept of state sovereignty which limits the power of Congress to abrogate States' immunity when acting pursuant to the Commerce Clause. But that view does not command a majority of the Court, thus necessitating an inquiry whether Congress intended in CERCLA, 42 U.S.C. § 9601 et seq., and SARA, Pub.L. 99–499, 100 Stat. 1613, to abrogate the States' Eleventh Amendment immunity. On that question, I join Part I of Justice WHITE's opinion. I also join Parts II, III, and IV of Justice SCALIA's opinion concurring in part and dissenting in part.

21. Strategic Activism

A Comparative View of Judges as Institution Builders

SHANNON ISHIYAMA SMITHEY

In 1610, English judge Edward Coke boldly asserted that judges had the authority to veto the decisions of Parliament. As a result, Coke was reassigned to a lesser court, called in by the King to defend his extraordinary claim to power, and ordered to rewrite his decision (Plucknett 1926, 50). As Coke learned to his detriment, asserting the power of judicial review can provoke retaliation from other policy makers.

Since Coke's time, judges in many countries have claimed the power to veto the decisions of other policy makers. Some have experienced political retaliation, but others have been more strategically adroit than Coke, finding ways to expand judicial power while avoiding direct conflict with other policy makers. In this chapter, I explore the initial claims to the power of judicial review made by high courts in the United States, Canada, and South Africa. One striking point emerges from this comparison: judges in all three places were successful in expanding the power of their courts because they acted strategically when first claiming the power of judicial review.

Strategy and Institutional Identification

The current debate in the field of judicial politics over the relative strengths of the attitudinal model and the strategic model is in large measure a dispute over the extent to which supreme court justices sincerely pursue their policy goals. Both approaches share the idea that the justices are "policy seekers" whose primary motivation is to achieve policy goals. This focus on policy goals is important, but it presents an overly narrow account of judicial motivations.[1]

Judges are also motivated by the desire to protect and promote the power of their courts. Protecting a court's institutional authority helps judges maintain the power to achieve policy goals

1. A wide range of factors influence judicial behavior. Judges may strive to contain their workload, develop a positive professional reputation, and cultivate positive relations with colleagues, to name but three possibilities. For a fuller discussion of a variety of judicial motivations, see Baum (1997, chap. 2).

(Epstein and Knight 1998; Vanberg 1998), but it also helps them safeguard their institutions. Judges are likely to feel a sense of institutional responsibility for their courts. Institutions like the judiciary tend to become an important "locus of identification" for the officials affiliated with them (Egeberg and Saerten 1999, 94). Institutions "mold their own participants, and supply systems of meaning for the participants" (Peters 1999, 26) so that officials tend to develop a sense of personal affiliation and stewardship for the institutions they serve.

These concerns lead judges to act strategically to preserve judicial authority. Acting strategically is necessary both because judges depend on others to help enforce their decisions and because others have the ability to attack the judiciary and reduce its power.[2] As Gillman argues, "Those who are affiliated with the Court should be expected to deliberate about protecting their institution's legitimacy and (relatedly) adapting their institution's mission to changing contexts and actions of other institutions; in other words, institutional actors must consider issues of institutional maintenance" (1999, 81). Courts must maintain a positive political reputation in order to persuade other policy makers to comply with their decisions. Because the judiciary is politically vulnerable (to noncompliance and to counterattack), judges have strong incentives to act strategically to maintain their institutional standing. We should therefore expect judges to be "institutionally minded," acting strategically to maintain the power of their courts.

Sometimes this means judges will have to choose between safeguarding judicial power and voting for the policies they prefer. When other policy makers are threatening the judiciary, judges may sacrifice their immediate policy goals in order to "live to fight again another day." US history provides many examples of strategic retreats. After the Civil War, congressional Republicans viewed the Supreme Court as a threat to Reconstruction. As members of Congress were discussing impeachment and considering measures to repeal Court authority, the Supreme Court reversed itself to rule in favor of the congressional majority.[3] During the Great Depression, the Court struck down several key provisions of the New Deal. After President Roosevelt won reelection in 1936, with overwhelming Democratic majorities in the House and Senate, the Supreme Court reversed its position on the constitutionality of economic regulation—a move referred to as the "switch

2. Rosenberg (2008) stresses the ways in which courts depend on other branches for policy impact. Other policy makers typically possess a variety of means by which they can push back against judicial power, including the power to censure or impeach judges, to remove jurisdiction, or to override decisions through statutory or constitutional amendment. For example, see Shapiro (1981), Clark (2009), and Pacelle (2015).
3. In Ex Parte Milligan (1866), the Supreme Court overturned the arrest and conviction of a Southern sympathizer. Members of Congress viewed this as a direct threat to the larger Reconstruction program. The Court retreated in Ex Parte McCardle (1869), dismissing a similar complaint after Congress repealed its jurisdiction. For more on this case, see Epstein and Walker (1995).

in time that saved nine."[4] And during the McCarthy era, the Supreme Court withdrew its earlier support for those who had refused to give testimony before the House Un-American Activities Committee in response to congressional threats to repeal the Court's jurisdiction.[5] In each of these cases, the justices faced serious threats to their power and strategically sacrificed policy goals to deflect attacks on institutional power.

Judges also make strategic advances. Courts have become more influential in many places since World War II (Tate and Vallinder 1995), often by asserting judicial authority in ways calculated to avoid retaliation. Constitutional courts in Israel and New Zealand have taken advantage of encouragement from powerful elites to assert themselves politically (Hirschl 2000).[6] Judicial review was first used in France not to challenge popular laws but to overturn extremely unpopular legislation (Mullen 1998).[7] The Constitutional Court of the Republic of Italy struck down many laws from the fascist period while upholding most legislation passed by the contemporary Parliament and Council of Ministers (Volcansek 1992). Similarly, the Constitutional Court of South Africa asserted its power by overturning laws made during the apartheid era rather than taking on the contemporary regime (Smithey 2006).

Judges also use cases where they agree with challenged policies to advance judicial power. Such cases allow judges to write opinions that both please other policy makers (by upholding the policy) and expand the power of courts (by increasing judicial jurisdiction or discretion). For example, the European Court of Justice has made its most expansive claims for judicial power in cases that upheld member state policies (Alter 1998). Sunkin (1994) documents a similar phenomenon in England, where British judges have often declared that they have jurisdiction over administration

4. Prior to 1937, the Supreme Court defined Congress's power to regulate commerce very narrowly. Beginning with NLRB v. Jones and Laughlin Steel (1937), the Court became deferential to congressional power, broadening its concept of commerce to include activities affecting interstate commerce. For more on the Court and the New Deal, see Schwartz (1993) and O'Brien (2000).
5. After the Court protected one HUAC witness from contempt charges in Watkins v. US (1957), Congress began debating legislation designed to remove the Court's jurisdiction over questions asked by congressional committees. As a result, the Court rejected similar arguments made by another witness in Barenblatt v. US (1959). For more on these cases, see Epstein and Knight (1998) and O'Brien (2000).
6. Hirschl (2000) argues that elites who are threatened with decreasing power have supported judicial review and the constitutionalization of rights in order to protect their political and economic position.
7. Nelson finds a related form of strategic behavior among the state supreme courts in the early United States. Rather than risking a backlash from asserting their power against popular policies, judges in the early American states tended "to invalidate legislation having little political significance and arousing little controversy" (1972, 1177).

issues and then ruled in favor of the government. These votes appeared to be deferential, thereby avoiding backlash from other policy makers, but precedent has been set for greater judicial power. In each of these instances, judges acted from vantage points created either by siding with public opinion or by supporting the policy choices of other officials to claim greater power while keeping the risk of retaliation low. Strategic institution building is clearly a recurrent form of judicial behavior.

Strategic Responses to Uncertainty in the Early Years

We are most likely to see strategic behavior from judges on courts with less institutional authority and fewer established safeguards. To test this expectation, we must examine the behavior of courts with degrees of institutional strength that are very different from the modern American Supreme Court. This can be accomplished by comparing courts from different countries according to their institutional positions.[8] In this chapter, I take a comparative approach, focusing on judges in three countries as they first asserted the power of judicial review. The period in which judges first claim this power is an opportune one for studying strategic institution building. Judges have strong incentives to act strategically when they first attempt to expand their authority. Before judicial review has become a routine part of the political landscape, judges cannot assume that others will comply with its exercise. Since political support builds over time as the public is exposed to legitimating messages (Gibson, Caldeira and Baird 1998), judges are most likely to encounter public resistance and political counterattack before they have the chance to cultivate this support.[9] At the same time, legislators and executives have institutional incentives to push back against initial assertions of judicial review, since that practice has the potential to diminish their own power (Steytler 1995). Once judges have decided to assert their authority, they face the dual risk that they will have little normative protection to forestall retaliation, while policy makers

8. Institutional position refers generally to a court's political strength. A number of factors are relevant here, including a court's popularity with the public, the perception of the public and other policy makers about the legitimacy of a court as a decision-maker, and the availability and public acceptance of court-curbing measures. Courts that experience ready compliance from other policy makers are in a much stronger institutional position than those that regularly face concerted opposition.
9. This may explain Nagel's finding that court-curbing attempts were common in the early nineteenth-century US, when "the rule of the judicial branch of the government was not yet established and the obvious partisanship of some justices was a hindrance to the growth of the judicial myth" (1973, 19).

have significant incentives to retaliate. The strategic challenge for judges is to find a way to assert their authority without alienating potential supporters or sparking political retaliation.

One useful way to avoid confrontation while simultaneously establishing precedent for judicial review is to claim the power of review and then use it to rule in favor of a challenged policy. Such decisions are strategically beneficial for judges because they lay the foundation for judicial power without antagonizing those who might undermine a court's institutional position. They represent a form of strategic activism in that they allow judges simultaneously to assert judicial authority and to avoid, or at least minimize, the risk of counterattack. We should regularly expect judges to be strategically activist during the period in which they assert the power of judicial review for the first time.

Examples of strategic activism are apparent in the behavior of high court judges in the US, Canada, and South Africa during their initial "assertive" periods. The US Supreme Court began asserting its review powers during the early 1800s under the leadership of Chief Justice Marshall. The Canadian Supreme Court first asserted a limited form of judicial review in the 1880s under the British North America Act (BNA) and later claimed full-fledged review powers in the 1980s under the Charter of Rights and Freedoms. The Constitutional Court of South Africa asserted its powers in the mid-1990s, shortly after that country adopted its post-apartheid constitution. Judges in all three places laid a legal foundation for judicial power while avoiding policy conflicts with officials who had the power to retaliate against their courts.

United States

The Supreme Court was politically vulnerable in the early 1800s. By the time John Marshall became chief justice in 1801, the Court had already been rebuked for asserting judicial authority over the states.[10] It was not at all clear that Congress or the executive would be any more willing than the states had been to give the Supreme Court final say over the meaning of the Constitution. In addition, the Court was considered the political ally of the Federalist Party, which had just suffered dramatic defeat in the election of 1800.

Shortly after that election, the Court faced an executive challenge to its authority in *Marbury v.*

10. In Chisholm v. Georgia (1793), the Supreme Court ordered Georgia to pay its debts to a South Carolina merchant after deciding that federal courts could exercise jurisdiction in cases in which a state was sued by citizens of other states. Four years later, the adoption of the Eleventh Amendment barred federal courts from deciding cases brought against states by foreigners or citizens of other states.

Madison. Lame duck president John Adams appointed William Marbury as justice of the peace, but his commission had not been delivered by the time Thomas Jefferson had been sworn in as president. Jefferson ordered James Madison, his secretary of state, not to deliver the commission. Marbury then sought a Supreme Court order to compel delivery. Jefferson made it clear that his administration would not comply with such an order. The justices faced the strong possibility not only of executive noncompliance but of outright attack on the institution.[11] Marbury's petition presented a real threat to the power of the Court.

The case confronted Chief Justice Marshall with a stark choice between his policy preferences and his concern for the institutional position of the judiciary. Marshall was appointed to the Court by President Adams. Based on his policy preferences alone, he would have led the other Federalists in a stinging rebuke of the Jefferson administration, culminating in an order to deliver Marbury's commission. Jefferson had made it clear, however, that any such order would be disregarded and might serve as grounds for impeachment. Facing down the president and losing would accomplish little of worth but could do great harm to the position of the Supreme Court. As Epstein and Knight suggest, "Marshall was confronted with a dilemma: vote his sincere political preferences and risk the institutional integrity of the Court, not to mention his job, or act in a sophisticated fashion with regard to his political preferences and elevate judicial supremacy" (1998, 47). He took the latter option.

Marshall's opinion demonstrates that judges sometimes put institutional concerns ahead of policy goals, conceding the battle to win the war.[12] After discussing the ways in which Marbury had been wronged by the denial of the commission, Marshall avoided probable attack on the judiciary by giving Jefferson what he wanted, a refusal to order the commission delivered. He reached this outcome by holding that the Court lacked the power to issue such an order. This was true, Marshall argued, because the act of Congress authorizing such orders was unconstitutional and therefore void. Arguing that it was "emphatically the province of the judicial department to say what the law is," Marshall claimed for the justices the power to strike down laws that were inconsistent with their reading of the Constitution.[13] Though Jefferson rejected the idea of judicial review,[14] Marshall left him no practical way to undo the decision. The Court had conceded its

11. The Jeffersonian Democrats in Congress had abolished the Court's 1802 session. Judicial impeachments were a serious possibility. Jefferson and the Republicans were particularly concerned that the Court not assert authority to oversee executive power (Clinton 1994).
12. Marshall did take the opportunity to rail against Jefferson in the dicta of the opinion.
13. This claim seems even bolder given that the Constitution does not mention such power.
14. Jefferson argued that the Constitution required that each branch of the national government be independent of the others (see O'Fallon 1992, 243–44), which precludes the idea of judicial oversight of the executive through judicial review.

policy preference (delivery of Marbury's commission) in the interest of laying a foundation for judicial power in the future.

Though Marshall's sophistication in Marbury is well known, it is not his only example of strategic activism. The Marshall Court used a similar approach in its attempts to establish federal jurisdiction over the state courts. In *Cohens v. Virginia* (1821), the Court considered whether federal judges could overturn state court convictions they considered inconsistent with federal law.[15] Marshall, an advocate of national power in general and Supreme Court power in particular, faced concerted opposition from states' rights advocates and state judges who rejected oversight by federal courts.[16] The risk of appearing politically impotent was strong. As a result, in Cohens, Marshall declared that federal courts could reverse state court convictions that were in conflict with national law. At the same time, by issuing a very strained interpretation of congressional intent, he upheld the validity of the Cohens' conviction (Graber 1995, 89).

The Court took a similar approach in *U.S. v. Schooner Peggy* (1803). In that case, the Marshall Court was asked to decide whether French ships captured at sea could be treated as spoils, as the Federalists wanted, or should be returned to France, as the Jefferson administration preferred. After asserting the Court's authority to interpret treaties authoritatively, Marshall produced a "legally questionable" interpretation of the Treaty of Mortefontaine to give Jefferson the decision he wanted (Graber 1998, 231).[17]

In each of these cases, Marshall made a claim for judicial authority while declining to give orders that were likely to be disobeyed. The Marshall Court's strategy for building judicial strength might best be summarized as "vigorously asserting judicial power in theory while declining to exercise judicial power in practice" (Graber 1998, 235–36). Such decisions do not reflect mere capitulation. Though they require judges to concede immediate policy victories, they also help lay a foundation in precedent for the future use of judicial review.[18]

15. The case arose when two brothers were arrested for selling national lottery tickets in Virginia. They claimed Congress's passage of a Grand National Lottery precluded their arrest. Virginia countered that the US Supreme Court lacked jurisdiction to take such appeals. For further discussion, see Graber (1995) and Schwartz (1993).
16. Goldstein (1997, 143–51) documents considerable state resistance to national power prior to the Civil War, including the controversy in Martin v. Hunter's Lessee (1816), in which the Virginia Supreme Court claimed the authority to overrule a decision of the national Supreme Court.
17. This was fairly typical of the early Marshall Court, which ruled in the Jefferson administration's favor "in every politically salient case decided between 1801 and 1805" (Graber 1998, 223).
18. For example, by 1825 Judge Gibson decried the fact that judges almost uniformly accepted Marshall's arguments for judicial review and used them to support their own case rulings (see his dissent in Eakin v. Raub, reprinted in O'Brien 2000).

Canada

The Supreme Court of Canada engaged in strategic activism during both of its institutionalizing periods. The first of these periods occurred in the late nineteenth century, shortly after the founding of the Court. The second occurred after the adoption of the Charter of Rights and Freedoms in 1982. In both instances, the justices asserted their power to authoritatively interpret Canada's constitution and then avoided political backlash by using that power to support challenged government policies.

Initially, the Canadian Supreme Court was not a very powerful institution. The Court was structurally weak in that it was not established by constitutional mandate, and it could be modified or even abolished by a standard act of Parliament. Its decisions could be appealed and overruled by the British Privy Council.[19] The Court had no entrenched bill of rights to use as a basis for creating an important role for itself. The BNA, Canada's "constituting" statute, divided government authority between the national and provincial governments, but it did not explicitly empower the Court to enforce its provisions. Parliament waited until 1876, eight years after Confederation , to create the Court and initially declined even to authorize funds for the construction of a building for its operations.[20] The delay in creating the Court reflected significant political opposition, particularly to the idea of a court with the power to overrule acts of the central government (Smith 1983). There was serious consideration of allowing the central government, rather than the judiciary, to "rule on the constitutionality of provincial legislation" (Maclem 1988, 127).

The Supreme Court of Canada lacked significant political support. The legal establishment disapproved of the "way in which the Supreme Court of Canada had been designed and the character of its jurisprudence. . . . The court was thus faced with a pre-existing hostility even before commencing work" (Snell and Vaughan 1985, 24). Once the Court was created, a number of prominent candidates refused to serve and "the intellectual strength of the Court clearly suffered as a result" (Snell and Vaughan 1985, 15). Several proposals were introduced in Parliament to weaken the powers of the Court during its first decade.

As a result, the Court did not boldly assert itself into most aspects of Canadian politics, with one notable exception. The justices did lay a foundation for judicial power when it came to resolving disputes over the division of national and provincial power. The BNA did not specify an arbiter for federal disputes; the Canadian Supreme Court claimed that role for itself. In 1879, the justices

19. Appeals to the Privy Council continued until 1949. Russell (1987) reports that approximately half of the Privy Council's Canadian cases were appealed directly, bypassing the Canadian Supreme Court.
20. The justices took temporary quarters in the Parliament building until 1882, when a renovated stable became home to the Court and the National Gallery of Art (McCormick and Greene 1990).

declared that they would have the final say in interpreting the provisions of the BNA and that they would strike down as void any policy that the justices thought had been adopted by the wrong layer of government.

The Court made the claim in *Valin v. Langlois* [1879]. Parliament adopted the Dominion Controverted Elections Act, authorizing the creation of special commissions to review contested election results for the House of Commons. The Act specified that provincial court judges would serve on these commissions. The appellant in Valin objected to this provision, arguing that Parliament was not authorized to change the power of provincial tribunals or obligate their members to additional service. The Court unanimously agreed that the Act was within Parliament's competence.

After taking this deferential stance, the justices went on to assert a claim of significant judicial power. After upholding the law, the justices declared that they possessed the power to strike laws down for inconsistency with the BNA. The justices declared that it was their responsibility "to declare authoritatively the principles by which both federal and local legislation are governed."[21] After emphasizing the powers of Parliament at several points, the justices went on to stress that the BNA limited those powers and that the justices would be the ones to enforce them.[22] Several justices explicitly discussed the threat that parliamentary power posed to judicial authority, highlighting their awareness of the potential for retaliation against an upstart judiciary.[23] They skirted this danger by claiming federal review powers while upholding the challenged policy. In this strategically sophisticated way, they were able to lay a foundation for judicial power while minimizing the possibility of political backlash.[24]

21. Justice Ritchie in Valin v. Langlois [1879] Vol. 3 SCR at 9.
22. Justice Ritchie notes, for example, that "it is too clear that if they do not possess the legislative power, neither the exercise nor the continued exercise of a power not belonging to them could confer it or make their legislation binding" (at 22). Justice Henry stresses his willingness to disallow inappropriate acts of Parliament by noting that he is "gratified to witness the success that has been achieved in . . . the trial of election contests; but at the same time, would not give my sanction to an Act which is ultra vires" (at 70).
23. For example, Justice Fournier notes that the national government has "the most extensive powers over the courts in existence, namely those of repealing, abolishing or altering them" (in translation, at 57). In his opinion, Justice Taschereau (at 76) emphasizes the control Parliament has over court jurisdiction and then notes that "if the House of Commons, even now, chose to disobey a judgment of an election court, I do not see how the court could enforce its judgment" (at 80).
24. The Canadian Supreme Court was not considered particularly significant politically for much of its history. However, it did have a significant impact on the balance of federal and provincial power (e.g., see Hogg 1979; Russell 1985), the area over which it asserted review power in 1879.

A century later, the Canadian Supreme Court proceeded strategically as it began interpreting the new Charter of Rights and Freedoms. Adopted in 1982, the Charter expanded the power of the judiciary by protecting a wide range of civil liberties and by explicitly empowering courts to enforce those protections through the exercise of judicial review.[25] This represented a considerable departure from the role formerly performed by the Supreme Court. Except in the area of federalism, the Court had primarily limited its policy making role, interpreting rights narrowly and adopting canons of construction by which policies could be found constitutional (Hogg 1983; Tate and Sittiwong 1989). This restraint had fostered a respect for judicial independence,[26] but it also accustomed legislators to a considerable amount of judicial deference.

The adoption of the Charter of Rights and Freedoms provided a significant opportunity for judicial expansion, but there was no guarantee that claims for increased judicial power would be accepted. The Charter represented a significant departure from past practice. Though the Charter explicitly recognized judicial review, judges had little way of knowing whether other policy makers would respect a more assertive judiciary. Elected officials unwilling to comply had several options for retaliation. Section 33 of the Charter allows legislatures to reinstate judicially invalidated laws for renewable five-year periods. Legislatures may also create new courts and reassign jurisdiction to other tribunals (Smith 1983; Russell 1987). Such court-curbing measures provide a strong incentive for justices to assert their authority strategically to minimize the chances it will be undermined by legislative retaliation.

The Canadian Supreme Court did not initially assert its authority recklessly. *Operation Dismantle v. the Queen* [1985], one of its earliest cases, provides a prime example of a court engaged in building institutional credibility. The case involved a challenge to a foreign policy decision taken by the cabinet to allow the US to test cruise missiles in Canadian air space. The group Operation Dismantle argued that such cooperation with the US would prompt the Soviet Union to make Canada a target for its nuclear missiles, infringing the Charter right to security of the person. The government argued that the Supreme Court lacked the authority to review foreign policy

25. The charter declares constitutional protection for rights to religion, expression, and association (Section 2); a series of defendants' rights (Sections 7–11); and minority language rights (Sections 16–23). Section 15 guarantees equal protection of the law. Section 24(1) declares, "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."
26. The BNA and the 1970 Judges Act support judicial independence by granting judges tenure from appointment until age seventy-five, given good behavior. Justices may only be removed after nonpartisan judicial inquiry. For more on judicial independence in Canada, see McCormick and Greene (1990) and MacKay and Bauman (1985).

decisions. The government advocated the adoption of a political question doctrine, which it recommended the Court use to deny itself the authority to decide the case.

Rather than wall itself off from the foreign policy field, the Supreme Court pursued the midlevel strategy of asserting its authority and then using it to uphold the government's policy choice. In his majority opinion, Chief Justice Dickson averred that he had "no doubt that disputes of a political or foreign policy nature may be properly cognizable by the courts" (1 SCR at 459). Justice Wilson concurred: "The courts should not be too eager to relinquish their judicial review function simply because they are called upon to exercise it in relation to weighty matters of state" ([1985] 13 CRR at 309). She also noted,

> Because the effect of the appellant's action is to challenge the wisdom of the government's defence policy, it is tempting to say that the Court should in the same way refuse to involve itself. However, I think this would be to miss the point. . . . The question before us is not whether the government's defence policy is sound but whether or not it violates the appellants' rights under s.7 of the Charter of Rights and Freedoms. This is a totally different question. I do not think there can be any doubt that this is a question for the courts. ([1985] 1 SCR at 472)

Indeed, she said, the Court is not merely allowed but obligated to make decisions in such cases:

> If we are to look at the Constitution for the answer to the question whether it is appropriate for the courts to "second guess" the executive on matters of defence, we would conclude that it is not appropriate. However, if what we are being asked to do is to decide whether any particular act of the executive violates the rights of the citizens, then it is not only appropriate that we answer the question; it is our obligation under the Charter to do so. ([1985] 13 CRR at 310)

After finding that the Court had the power to make a decision, the justices voted to uphold the missile program. The majority held that the Section 7 argument was

> too uncertain, speculative and hypothetical to sustain a cause of action. Thus, although decisions of a federal cabinet are reviewable by the courts under the Charter, and the government bears a general duty to act in accordance with the Charter's dictates, no duty is imposed on the Canadian government by s.7 of the Charter to refrain from permitting the testing of the cruise missile. (1 SCR at 447–48)

This decision is perfectly consistent with the expectations of strategic activism—judges argued for an expansion of their decision-making authority, while the executive was left no practical way to

undermine the decision.[27] Rather than focusing narrowly on policy outcomes, the justices used the case as a vehicle to promote institutional power.

South Africa

The justices of the Constitutional Court of South Africa have also acted strategically while attempting to establish institutional power. From the late 1940s through the early 1990s, South Africa's government enforced policies of racial separation and repression and denied the vast majority of its citizens the right to vote. After experiencing violence at home and condemnation abroad, South Africa began a negotiated transition to democratic government and protection of civil liberties in the early 1990s. In 1994, the Convention for a Democratic South Africa adopted an interim constitution and established a Constitutional Court with the authority to enforce fundamental principles of human rights (Williams 1998; Newitt and Bennun 1995). The Court's review power extended to regular laws and to the constitutions that would be drafted by the national assembly and the provincial legislatures. The Constitution of the Republic of South Africa, which the Court certified in December 1996, explicitly grants the Court the power to declare invalid any law or official conduct that is inconsistent with the Constitution.

The judges of South Africa's new constitutional courts faced significant uncertainty about their authority. The Court had no traditional reservoir of goodwill to draw on for support (Spitz and Chaskalson 2000; Gibson and Caldeira 2003). As Gibson reports , "The Constitutional Court was conceived in controversy . . . and inevitably is connected to some degree by the link to the judiciary's apartheid past. Thus, one might expect the Court to have a limited store of institutional legitimacy" (2008, 237). South Africans had finally achieved the right to elect their leaders, but judicial review meant that the Court could overturn policies favored by the people's representatives. This had the potential to stir resentment and inspire retaliation against the Court.

More broadly, there remains considerable doubt about the country's future. The white minority may not accept democracy; the black majority may not accept constitutional limits on its new

27. The Court has become more assertive over time. This may reflect the high rates of acceptance among policy makers that met the Court's initial charter decisions. The fact that only Quebec initially used the override may have increased the justices' confidence. Some of the Court's later decisions have been assertive and politically controversial, such as its decision invalidating the country's abortion law (R.v. Morgentaler 1988) or its decision to extend antidiscrimination laws to protect homosexuals (Vriend v. Alberta 1998). For more on the controversial nature of the expansion of judicial power in Canada, see Morton (1984) and Knopff and Morton (1992).

powers.[28] While most South Africans found common cause in their support for President Mandela, it was not at all clear how well the country would hold together under other leadership (Gibson and Gouws 1997). Given the instability of the political environment, the judges of the Constitutional Court may be concerned not only with establishing their institutional credibility but also with persuading South Africans of the legitimacy of the new regime and its constitution.[29]

As the theory of strategic activism would predict, the Constitutional Court has employed a sophisticated approach to the task of establishing judicial review. The case of *President of South Africa v. Hugo* (1997) presented the South African Constitutional Court with a useful strategic opportunity. In Hugo, the Court was asked to review Presidential Act No. 17 (akin to an executive order), which remitted the sentences of "all mothers in prison on 10 May 1994, with minor children under the age of twelve years." John Hugo was a prisoner with an eleven-year-old son, who would have qualified for remission of sentence if he had been a woman. He challenged the Act on the grounds of gender discrimination in violation of Section 8 of the South African Constitution.[30] The local division court ruled for Hugo, directing President Mandela to amend his order to make it consistent with the Constitution. On appeal, the Constitutional Court was asked to consider whether it had jurisdiction over acts of presidential prerogative, such as the right to remit sentences, and if so to decide whether the presidential act was consistent with the Constitution.

In considering the issue of jurisdiction, Judge Goldstone's majority opinion admitted that

28. The protection of minority rights could come to be viewed as the protection of white privilege if the Court aggressively protects the right to property, which disproportionately benefits white elites. For more on this point, see Abel (1995) and Davis et al. (1995). Steytler suggests that similar tensions are present in other democratizing African countries, where "the judiciary, in protecting minority interests, cannot antagonize majoritarian interests unduly without undermining their own position" (1995, 506).
29. Gibson, Caldeira, and Baird (1998) speculate that courts build up their credibility over time by rendering decisions that please the public. The converse of this is that unpopular decisions may endanger their position and possibly even the position of the regime of which they are a part.
30. Section 8 reads, in part, (1) Every person shall have the right to equality before the law and to equal protection of the law. (2) No person shall be unfairly discriminated against, directly or indirectly . . . on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language. (3) (a) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination. . . .(4) Prima facia proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established.

"traditionally the exercise or prerogative powers of a monarch have not been subject to judicial scrutiny" (¶ 16). He went on to note a recent trend in favor of judicial review of prerogative decisions, giving particular attention to English precedent[31] in favor of judicial oversight, which argued that "the powers of the court cannot be ousted merely by invoking the word 'prerogative.' The question is simply whether the nature and subject matter of the decision is amenable to the judicial process" (at ¶ 18).

The Constitutional Court concluded that the Constitution not only allowed but required judicial review of acts of executive prerogative. Goldstone wrote,

The interim constitution obliges us to test impugned action by any organ of state against the discipline of the interim Constitution. . . . That is the fundamental incidence of the constitutional state which is envisioned by the Preamble to the interim Constitution. . . . In my view it would be contrary to that promise if the exercise of presidential power is above the interim constitution and is not subject to the discipline of the Bill of Rights. (at ¶ 28)

In his concurrence, Judge Kriegler added that "the president, as the supreme upholder and protector of the Constitution, is its servant. Like all other organs of state, the President is obliged to obey each and every one of its commands" (at ¶ 65). In order to ensure constitutional accountability, the Court declared that its power reached every aspect of executive prerogative. In coming to this conclusion, the Court adopted a review power broader than that available to judges in any other democracy.

Having established that presidential acts could be reviewed by the Court, the majority then turned to the issue of whether Mandela's decree had violated Hugo's Section 8 right against gender discrimination. The Court sided with Hugo, holding that the Act constituted prima facia discrimination "on a combined basis, sex coupled with parenthood of children below the age of twelve" (at ¶ 33). The Court then ruled that once discrimination has been established, the Constitution puts the burden on the executive to prove the reasonableness of the discrimination. Rejecting a less demanding standard adopted by a lower court,[32] Goldstone held that a lack of discriminatory intent would not be enough to save the act if it was found to constitute "unfair discrimination." All this presents a significant challenge to executive authority.

Consistent with an expectation of strategic activism, after declaring their right to oversee the

31. R. v. Home Secretary, ex parte Bentley [1994].
32. In Kruger v. Minister of Correctional Services 1995 SA 803 (T), Judge Van Schalkwyk held that courts could not review the constitutionality of prerogative acts on equality grounds unless there was an allegation of bad faith by the president. The decision in Hugo subjects presidential actions to a higher burden because it considers effect as well as intent.

executive and evaluate his motives, the Court upheld the act as reasonable. Despite expressing concern that the President's choice was based on a gender stereotype that often worked to women's disadvantage, the Court held that the Act passed muster under Section 8. The majority expressed concern that if the Court required a gender-blind release of inmates, the President would find the costs too high to release anyone, resulting in a situation in which the goal of increasing care of prisoners' children would be wholly frustrated. On this basis,[33] the Court held that the President's rather blunt use of gender stereotypes did not violate the prohibition against unfair discrimination.

One might argue that the outcome in this case is merely a reflection of the judges' preferences—that the logic the judges resorted to is no more than window dressing for their personal support for Mandela (who appears to have the respect of the Court) or a view that Hugo and inmates like him should be in jail. Advocates of the attitudinal model would be most likely to put that spin on the case. However, if the case outcome was most important to the judges, they had a number of easier approaches available. They could have dismissed the case as moot,[34] resulting in the same outcome. Or the Court could have declined to extend its jurisdiction to acts of presidential prerogative either for presidential pardons or as a whole. This would also have achieved the same outcome for the litigant, and it would have had the added benefit of supporting Mandela's executive authority.

Instead, the Court chose the path of strategic activism. The decision laid down a broad claim of judicial authority to review acts of presidential prerogative that was more extensive than that of courts in other democracies (who recognize some categories of prerogative as forbidden ground). After asserting this power, the majority attempted to make it more palatable to potential opponents by using that authority to reinforce the president's position in the instant case. Therefore, while the outcome of the case appears to be a victory for presidential power, the doctrine established supports judicial oversight in the future. Policy makers who dislike judicial authority are left with no policy incentive to object or any practical way to resist, just as the Canadian Parliament had no incentive to override Valin, the Canadian cabinet had no practical way to undermine Operation Dismantle, and Jefferson could not undo Marbury.

33. The Court also took into account the social benefits of executive acts of mercy and of controlling crime by keeping male criminals incarcerated.
34. Hugo's son was already twelve when the case was filed, making him too old for Hugo to be eligible for release. In his dissent, Judge Didcott argued (at ¶ 55) that the Court should dismiss the case on that basis, as they had dismissed the case of JT Publishing v. Minister of Safety 1996 (12) BCLR 1599 (CCT) for the lack of a concrete controversy.

Discussion

The similarity of strategic activism in such different places and times is remarkable. This should encourage judicial scholars to become more comparative. As Hall and Brace argue, "To achieve the primary scientific goal of developing general theory that takes into account the complete range of forces affecting the politics of courts, comparative analysis is essential" (1999, 282). Cross-national studies allow scholars to select cases based on theoretically interesting similarities and differences to provide greater leverage on persistent questions in the field. Future research is likely to be most beneficial if it systematically varies the institutional setting, paying particular attention to the factors that increase or mitigate risk for high court judges.

This study also demonstrates that a complete picture of judicial behavior must include the opinions judges write, not just the direction of their votes. The votes in these cases suggested deference to other policy makers, but the opinions told a much more activist story. The most important details were contained in the opinions. Judges craft opinions to guide future judges and the officials who are charged with implementing court decisions. Ignoring the opinions therefore not only "misses the law" (Tiller and Cross 2006, 517) but ignores the key details of legal policies that judges make. Analyzing opinions is crucial if we are to identify strategic activism.

The evidence in this chapter shows that judges can be strategic institution builders. Judges in the US, Canada, and South Africa all employed sophisticated tactics when the acceptance of judicial authority was uncertain. Rather than engaging in open conflict with other policy makers or fully acquiescing in their policy choices, judges in all three countries pursued a middle road. Sometimes, as in Marbury, they sacrificed their policy preferences to further institutional ends. At other times, as in Hugo, they seem to use cases in which they essentially agreed with challenged policies to further the cause of greater judicial power. By asserting their decision-making authority and then using it to validate the choices of other policy makers, they found a way to stake a claim to judicial power without facing political counterattacks. By establishing precedent on which later judges could build, they laid a strategic foundation for judicial power.

Judges in the US, Canada, and South Africa have been successful in institutionalizing judicial power. The cases discussed here demonstrate a degree of success that may be emulated by other courts. Constitutional courts in Germany and Israel as well as the European Union have been relatively successful in using similar tactics.[35] Other judges may make all manner of strategic calculations but still fail to achieve much respect. Short-term policy sacrifices may not result in

35. Courts in each of these political systems have become important policy makers. Each was strategically activist during expansionist periods, using cases in which they supported challenged policies to stake claims for expanded power (Smithey 1999).

long-term institutional gains—judges can lose despite their best strategic efforts. Such failure is not by itself proof that judges have not pursued institutional goals. It must be remembered that the concept of strategic activism is offered as a way to predict judicial behavior, not the reactions of others to that behavior. We should expect judges to act in ways that are designed to protect their institutional position, but we should also recognize that they may not succeed.

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Class Activity

Comparative political science searches for patterns of political behavior that are present in different contexts, but it also takes into account the way that rules and behavior vary across nations.

In the chapter you've just read, you learned that judges in three different places and times used a similar strategy when claiming the power of judicial review. Judicial review is often considered the most important power a court can have, since it gives judges a constitutional veto over other policy makers. However, judicial review is only one of a series of powers that a constitutional court may have that allows that court to have a major political impact.

Below there is a list of powers exercised by courts in some constitutional democracies but not in others. Choose one country that is considered a constitutional democracy. For that country, find out which of the powers listed below can be exercised by that constitutional court and describe them in the appropriate box. Then make a note of which powers on the list belong to the US Supreme Court and which ones do not.

Power	*Country of choice*	*US Supreme Court*
Constitutional review		
To certify the acceptability of the Constitution		
To approve or disallow constitutional amendments		
Docket		
To issue advisory opinions to other policy makers		
To decide cases that raise constitutional claims		
To decide cases that raise regular legal claims as well as constitutional claims		
To choose to hear some cases and decline to hear others		
To originate a case, rather than having to wait for others to bring the case to the court		
Separation of powers		
To review the legality of laws before they are passed by the legislature		
To review the legality of laws after they are passed by the legislature		
To review acts of the president or other executive officials		
To review the implementation of policies by administrative agencies		
To enforce the balance of federal power (between the national and provincial or state governments)		
Oversight		
To review and decide on the impeachment of government officials		
To review and decide on corruption charges against government officials		
Electoral review		
To decide whether political parties are allowed to compete in elections		
To review the conduct of elections and/or certify election results		
Remedies		
To provide the official interpretation for the meaning of laws and regulations		
To stop the enforcement of laws and/or regulations		

To order other policy makers to rewrite laws and/or regulations		
To rewrite laws and/or regulations directly (sometimes known as “reading in”)		

22. Human Rights and Court Activism in the Mexican Supreme Court

REBECCA A. REID

Courts rarely play a role in scholarship pertaining to the diffusion, or spread, of human rights and the advancement of international law. This absence ignores the increasing reality that domestic courts can take the lead in promoting human rights. Through changes in international and domestic politics, judicialization,[1] and conventionality control, courts have grown in power and are starting to exert their influence in adopting international human rights laws unilaterally.

This chapter argues that courts matter in promoting human rights domestically and in internalizing and institutionalizing international law by translating and implementing international law as domestic, legally enforceable law. As such, this chapter fills the lacuna regarding the role of courts in the expansion and institutionalization[2] of international human rights laws within nation-states.

Why Would Courts Choose to Promote Human Rights?

Domestic courts can promote human rights by increasingly holding violators accountable and expanding rights protections to a larger set of situations or contexts for a larger proportion of society. Why would courts choose to promote these rights? Three possible motivations exist. First, judges serving on courts may sincerely believe promoting rights is morally right or makes good policy. In essence, judge attitudes, political ideologies, or preferred policies align with the expansion of rights protections. Second, judges may be compelled by their perceived inherent duty to acknowledge and promote rights. In other words, judges may promote rights because they want to or because they think they ought to. Third, judges may seek to empower the court as an

1. Judicalization refers to the global expansion of judicial power, where increasing judicialization enables courts to exert substantial influence over policy decisions. This means that courts are playing a more integral part in policy decisions that were originally exclusively determined by legislative and executive bodies (Tate and Vallinder 1995).
2. Institutionalization is the process of incorporating and codifying these legal norms into domestic institutions and laws.

institution by strategically choosing to promote rights to expand public support and legitimacy, thereby making it more capable and effective at constraining state behavior.[3] While this chapter does not distinguish between these possible motivations, it seems plausible that judges might want to expand human rights if they can.

Two general outcomes should appear if courts are deciding to promote human rights. First, courts with discretionary dockets[4] should increase the proportion of rights cases within those dockets. Increases in human rights cases imply increased court attention to rights issues and the desire of the court to rule on these issues. Second, promoting courts should increase pro–individual rights (i.e. pro-rights protection) decisions. Increased attention to rights issues is insufficient for rights protections and expansion; courts must decide cases in a way that promotes human rights protections in order to support these hypotheses. This leads to the following hypotheses:

H1: Promoting courts should exhibit increased proportions of rights cases in discretionary dockets.

H2: Promoting courts should exhibit increased pro–individual rights decisions.

Methodology

I evaluate these two hypotheses predicting changes in discretionary docket and decision outcomes using original and secondary data from Mexico. Mexico is particularly useful because it incorporates complex and contradictory domestic politics, including a recently transitioning judicial system and intensifying organized crime and cartel violence, and significant achievements

3. The capacity for courts to constrain state behavior also depends on judicial independence, where the court is sufficiently autonomous to make decisions contrary to the legislative and executive branches as well as sufficiently effective where these decisions are implemented by lower courts and other agencies to actually constrain state behavior (rather than having the decision ignored, for instance).
4. Courts with discretionary dockets have the power to decide which cases to hear, as opposed to courts with mandatory dockets, where judges have no control over which or how many cases they hear.

in certain areas of human rights. Moreover, Mexico exemplifies the same judicialization trends as experienced throughout Latin America, where, since the 1980s, courts have become increasingly politically important. Latin American courts are asserting rights not effectively guaranteed by the executive or legislature, leading citizens to more frequently resort to courts to resolve issues that were previously reserved for the political sphere (Seider, Schjolden, and Angell 2005). Mexico's Supreme Court of Justice (Suprema Corte de Justicia de la Nación; SCJN)[5] has similarly evolved and transformed through a series of constitutional reforms and changes in the power structures of the Mexican political system (Ríos-Figueroa 2007).[6] As with many other Latin American countries, the Mexican Supreme Court had been perceived as historically subservient to the executive, corrupt, and ineffective. Since the 1994 judicial reforms, however, the Court has adopted a more active role, taking controversial positions and garnering public attention in an unprecedented manner for judicial review and rights cases. This expansion of review powers has emboldened

5. Mexico's Supreme Court of Justice sits atop the judicial hierarchy, much like the US Supreme Court. As the highest federal court, it consists of eleven members: the elected president of the SCJN (similar to the US chief justice) and ten ministers. Justices are proposed by the president of Mexico and confirmed by the Senate of the Republic, much like in the United States. Each justice is appointed to serve fifteen years, and the president of the Court serves under the title for four years (nonconsecutive reappointment is possible).
6. Judicial reforms occurred in 1917, 1994, 1996, and 2008. The 1917 constitutional reforms included changes to appointment procedures and the tenure system, which allowed for considerable autonomy from the executive (Domingo 2000). However, while the Supreme Court adopted a fairly independent position with regard to the executive and ruled against government interests at times, subsequent reforms in the 1920s–30s aimed to curb judiciary action, leading to a more passive, deferential Court (Ríos-Figueroa 2007; Domingo 2000). After taking office, President Zedillo instituted a series of judicial reforms to better insulate the Court from political pressures. The 1994 reforms created a judicial council (el Consejo de la Judicatura), relieved administrative burdens (e.g., lower-court appointments, administration of the judicial budget, disciplinary mechanisms to control corruption), limited the role of the executive in Supreme Court appointments, granted a fifteen-year tenure to provide insulation from the executive, removed executive approval as a requirement for the administration of the judicial budget, reduced the size of the Supreme Court from twenty-six to eleven members, reduced benches from four to two, and forced all current Court members to resign in order to appoint new members. Importantly, the reforms also expanded the Court's jurisdiction of judicial review with policy-setting (erga omnes) effects and increased the accessibility for litigants to promote cases of constitutional review. These reforms created new jurisdiction of abstract review (actions of unconstitutionality) and expanded existing concrete review (constitutional controversies). Reforms in 1996 further expanded Court jurisdiction, enabling it to rule on electoral laws at the federal and state level. Each of the reforms since 1994 has enabled the Court to play a more active and prominent role in Mexican politics.

the Court to deal with controversial issues more openly than in the past (Domingo 2005; 2000). Indeed, the Court openly challenged executive power in 2000, when it resolved a conflict between lower-chamber members of the Congress of the Union and President Zedillo to investigate illegal campaign funds (Staton 2010). Importantly, the increased activism of the Court as a check to executive power has occurred in hand with relatively high compliance to the Court's rulings even when they are politically inconvenient to the ruling party (Staton 2010; 2007).[7]

In 2008, Mexico passed additional judicial reforms that introduced public oral trials to criminal cases and instituted the presumption of innocence in police investigations . While this reform passed in 2008, however, the deadline for full implementation by the Mexican states was 2016. As such, by October 2013, only three of the thirty-two states had fully implemented these reforms; thirteen other states partially transitioned. Finally, in 2011, the Mexican constitution was amended so that ratified international treaties and law are ranked as equal to constitutional law, which further empowers and obligates courts to constitutionally protect these international rights obligations.

In this sense, the case study of Mexico is descriptive, and it provides preliminary evidence to test my hypotheses. While a single case study examining only one country cannot offer a systematic test to generate conclusions that can be applied to countries beyond Mexico, it offers a first step in generating attention to this important topic and in generating empirically testable theories that can be examined in other contexts in future research. As such, the results provided in this chapter are applicable only to Mexico, though future research can examine the extent to which other countries' high courts choose to promote human rights protections. Nonetheless, this chapter is the first to examine trends in domestic high court incorporation of international human rights laws.

I gather aggregate case data from the Mexican Supreme Court's yearly reviews publicly available on its website from 2009 to 2014.[8] Unfortunately, more detailed data on individual cases, issue areas, and panels are not publicly available. As such, my analyses are limited to the self-reported aggregate data. The limitation of aggregate data based on case type, rather than data for individual cases, is that I cannot identify human rights cases at the case level. In other words, I can only identify types of cases that are predominantly rights related; however, I cannot identify the proportion of rights-related cases within each category, the types of rights represented

7. Of course, increased Court activism has not always been met with welcome. In 2004, Partido Revolucionario Institucional (PRI) members called for the impeachment of two Court justices for attempting to review a constitutional action in which President Fox challenged the constitutionality of a congressional override of the federal budget.
8. These statistics are from 2009 until May 2017, located here: https://www.scjn.gob.mx/sites/default/files/pagina/documentos/2017-06/SGAEEM0517.pdf

within each category, or the case outcomes specifically. Nonetheless, I divide case types between mandatory and discretionary jurisdiction and then identify which categories of cases are predominantly rights related and which include identifiable-rights cases.

Within the Court's mandatory jurisdiction, rights cases are represented as amparo cases.[9] As such, this category of cases reflects Court attention and activity on rights issues.[10] Within the Court's discretionary jurisdiction, rights issues appear in action of unconstitutionality cases (acciónes de inconstitucionalidad) and facultad de atracción cases.[11] Action of unconstitutionality cases represent abstract review[12] over the constitutionality of state and federal laws.[13] These include rights-related cases derived from the National Commission for Human Rights (Comisión Nacional de los Derechos Humanos; CNDH).[14] Action of unconstitutionality cases brought by other parties

9. Amparo cases are part of the Court's mandatory docket and appellate jurisdiction, and court rulings in these cases apply only to the particular litigants in that case unless the Court makes the same ruling for five consecutive cases, whereby lower courts must apply the same conclusion to all similar future cases (Ríos-Figueroa 2007). As such, court rulings in these cases generally do not alter national policy (as they would in common-law countries). Also, amparo cases were heard en banc until 2003.
10. All Mexican citizens, civic organizations, indigenous communities, and even the government may bring amparo suits (Staton 2010).
11. The Supreme Court gained this jurisdiction in a constitutional amendment in 1988.
12. Abstract review occurs when a court has the authority to consider issues that are not part of an actual case or controversy, as opposed to concrete review, where courts determine the outcome for an actual dispute between two or more parties. For example, the US Supreme Court has only concrete review powers; it can only hear cases where one or more parties have been directly injured. Abstract review may include an issue where no injury has been suffered (and therefore no actual controversy or case has emerged).
13. Action of unconstitutionality cases became part of the Mexican Supreme Court's docket in 1994 as part of a series of judicial reforms. These represent abstract review over the constitutionality of state and federal laws, whereas constitutional controversies deal with only concrete claims through a posteriori review. Action of unconstitutionality case outcomes apply to general policy when eight or more justices agree on the resolution. Constitutional controversy resolutions may have general policy-setting or specific (litigant only) effects depending on the case. The Supreme Court has exclusive jurisdiction to both case types (unlike amparo suits) and resolves both en banc. I do not include constitutional controversies in the analysis because these cases deal primarily with problems between different levels or branches of the government, such as between the state and national government or between the executive and legislative branches. As such, these cases do not consist of human rights issues.
14. This commission is a national human rights institution accredited by the United Nations and one of

may also be rights related, but we cannot know with aggregate data. As such, this public organization monitors potential rights abuses and brings these cases to the Mexican Supreme Court.

Facultad de atracción cases represent a discretionary amparo jurisdiction, where if a case falls outside of the Court's appellate jurisdiction but the Court deems some element of the case to be fundamentally important to Mexican law, it may rule on the matter itself.[15] Hence *facultad de atracción* cases are rights cases that the Court would not normally have jurisdiction to hear, yet the Court decides to rule on the matter by essentially placing it within its jurisdiction.

Is the Mexican Supreme Court Choosing to Hear More Rights Cases?

In order to evaluate changes in discretionary dockets (H1), I use action of unconstitutionality and *facultad de atracción* cases. These cases represent the only discretionary portions of the Mexican Supreme Court's docket. In other words, these are the only types of cases where the Court can choose whether it wants to take the case. Amparo cases cannot be examined in relation to H1 because the Court is forced to hear these cases; hence, changes in docket reflect not the Court's desire to rule on these issues but changing litigation strategies beyond the Court.

Tables 1–3 show the number of cases within each category and the percentage of the total docket from 2009 to 2014 each represents. The number and percentage of cases (out of the total docket) represent the cases the Court actually accepted and heard (i.e., made decisions on).

the regional members to the International Criminal Court (ICC), and it is autonomous from the federal government (at least since 1990).

15. The Supreme Court gained this jurisdiction in a constitutional amendment in 1988.

Year	*Action of Unconstitutionality (Number of Cases)*	*Action of Unconstitutionality (Percentage of Docket)*	*Total Docket (Number of Cases)*
2009	96	1.04%	9191
2010	37	0.41%	9054
2011	34	0.35%	9749
2012	67	0.57%	11849
2013	43	0.33%	13032
2014	113	0.80%	14195

Table 1. Mexican Discretionary Docket: Action of Unconstitutionality Cases

Year	*Facultad de Atracción (Number of Cases)*	*Facultad de Atracción (Percentage of Docket)*	*Total Docket (Number of Cases)*
2009	127	1.38%	9191
2010	176	1.94%	9054
2011	282	2.89%	9749
2012	437	3.69%	11849
2013	453	3.48%	13032
2014	702	4.95%	14195

Table 2. Mexican Discretionary Docket: Facultad de Atracción Cases

Year	*Action of Unconstitutionality (Number of Cases)*	*Action of Unconstitutionality (Percentage of Docket)*	*Total Docket (Number of Cases)*
2009	223	2.43%	9191
2010	213	2.53%	9054
2011	316	3.24%	9749
2012	504	4.25%	11849
2013	496	3.81%	13032
2014	815	5.74%	14195

Table 3. Total Discretionary Docket of Mexican High Court

Tables 1–3 show that Mexico enjoys discretionary power in only a small proportion of cases. They also reveal, however, that the Court has been increasingly activist in terms of "attracting" cases that would otherwise fall outside of their jurisdiction. The Court has increased the number of *facultad de atracción* cases it hears consistently each year. This means that the Court is

increasingly making decisions and law on cases that would not normally fall within its jurisdiction. Action of constitutionality cases show some fluctuation across years, yet these increases in Court attention to rights issues demonstrate its desire to rule on these issues in ways that affect national law.[16]

Table 4 depicts the proportion of cases by litigant for action of unconstitutionality cases in Mexico from 2008 to 2014.[17] As the percentages indicate, rights cases introduced by the CNDH have garnered increasing attention by the Court.[18] These yearly percentages underestimate the percentage of rights cases, since rights cases are often brought forward by other litigants (which would appear in the other categories).[19] Nonetheless, the percentage of rights cases brought forward by the CNDH that the Supreme Court ruled on increased to nearly 28 percent in 2013.[20] Since these cases represent a discretionary portion of the Court's docket, the Court therefore decided to rule on more rights claims brought forward by the CNDH in 2013 and to a lesser degree in 2011.

16. Unfortunately, there are no data identifying possible trends in which appeals are made to the Court. The Court's total caseload has generally been increasing since 2008, with the largest expansion occurring between 2011 and 2012 (as shown in table 5). Still, even if appeals to the Court have increased, the Court is under no obligation to hear any of them. The evidence presented here reflects only the level of attention the Court has chosen to grant these types of cases.
17. Note that individuals do not have standing for action of unconstitutionality cases.
18. From 2008 to 2014, the average percentage of action of unconstitutionality cases litigated by the commission is 13.89 percent, with a standard deviation of 7.66 percent.
19. Because the only data available are in aggregate, I cannot distinguish between rights cases in other categories or from other litigants. As such, the Commission for Human Rights is the only category of cases that we know are human rights exclusively, thereby underestimating the total number of rights-related cases on the docket overall.
20. However, from 2009 to 2013, action of unconstitutionality cases have declined as a proportion of cases decided by the Court while caseload has increased over the same period (see table 5).

	2008 (Sept-Nov)	**2009 (Dec 2008-Nov 2009)**	**2010 (Dec 2009-Nov 2010)**	**2011 (Dec 2010-Nov 2011)**	**2012 (Dec 2011-Nov 2012)**	**2013 (Dec 2012-Feb 2013)**	**2014 (Dec 2013-Nov 2014)**	***Cumulative* (Dec 2008-Nov 2014)**
Political Party	55%	49%	44.7%	23.5%	23%	27.9%	69.0%	45.3%
Legislative Minorities	20%	17.7%	7.9%	8.8%	6%	11.6%	8.8%	11.0%
Solicitor General	20%	18.8%	36.8%	50.0%	58%	32.6%	8.8%	28.6%
National Commission for Human Rights (CNDH)	3%	14.6%	10.5%	17.6%	13%	27.9%	10.6%	14.3%
Total Number of Cases	20	96	37	34	64	43	113	391

Table 4. Mexico's Supreme Court: Action of Unconstitutional Cases by Litigant

Data compiled from: https://www.scjn.gob.mx/transparencia/paginas/trans_jurisd.aspx (inactive link as of 5/21/2020). Note that 2008 data reflects only the final fourth trimester.

Tables 5 and 6 similarly reveal increased judicial attention and activism in *facultad de atracción* cases. These cases represent a discretionary amparo jurisdiction, where the increased number of these cases indicates that the Court is increasingly choosing to rule on rights issues. Table 6 shows the same data in percentage form, enabling direct comparisons across years and caseload. These results imply an increasingly activist Court, since these cases would normally fall outside of its jurisdiction. By resolving an increasing number of these cases, then, the Court is essentially informally expanding its jurisdiction.[21]

21. Note that this informal expansion of their jurisdiction remains constitutionally valid.

	2009	2010	2011	2012	2013	2014
Action of Unconstitutionality	96	37	34	67	43	113
Direct Amparo	2,448	2,952	3,060	3,951	4,572	6,164
Indirect Amparo	2,292	1,031	883	777	689	965
Constitutional controversy	122	94	130	124	115	121
Facultad de atracción	127	176	282	437	453	702
Total Case Load	9,191	9,054	9,749	11,849	13,032	14,195

Table 5. Annual Trends in Case Type and Case Load of Mexican High Court

Data compiled from: https://www.scjn.gob.mx/Transparencia/Indicadores_Gestion/SGAIG2T14.pdf (inactive link as of 5/21/2020)

	2009	2010	2011	2012	2013	2014
Action of Unconstitutionality	1.04%	0.41%	0.35%	0.57%	0.33%	0.80%
Direct Amparo	26.63%	32.60%	31.39%	33.34%	35.08%	43.42%
Indirect Amparo	24.92%	11.39%	9.06%	6.56%	5.29%	6.80%
Constitutional controversy	1.33%	1.04%	1.33%	1.04%	0.88%	0.85%
Facultad de atracción	1.38%	1.94%	2.89%	3.89%	3.48%	4.95%
Total Case Load	9,191	9,054	9,749	11,849	13,032	14,195

Table 6. Annual Trends in Case Type in Mexican High Court, Percentages

Data compiled from: https://www.scjn.gob.mx/Transparencia/Indicadores_Gestion/SGAIG2T14.pdf (inactive link as of 5/21/2020)

Tables 5 and 6 also show marked increases in direct amparo cases, which also consist of rights cases but are part of the Court's mandatory docket (in blue). Amparo protects individual constitutional rights, and direct amparo consist of appeals of the final judgments in criminal or civil cases.[22] The size of the amparo docket increased by roughly 8.5 percentage points between

22. Indirect amparo (amparo en revisión) are claims heard in the first instance by the federal district courts in response to (a) the publication of laws that by their mere promulgation prejudice the claimant's liberties; (b) acts and decisions not arising out of judicial, administrative, or labor

2009 and 2014, when the most significant trend appears in direct amparo cases, moving from 25 percent to 43 percent of the total docket. Since these cases are mandatory, this substantial increase in cases does not necessarily reveal the Court's desire to resolve these particular rights issues (unlike the changes in the discretionary docket composition), but it implies increased rights litigation.[23]

Case Outcomes

Thus far, this study has addressed Court attention to rights cases. Yet how does the Court decide these cases? Since no case-level data are available, quantitative empirical analysis is not possible to evaluate H2. In other words, there are no data that attach individual cases to Court votes or outcomes. For this reason, I offer qualitative analyses of Court decisions on rights cases. The limitation of this type of analysis is that it cannot offer a systematic analysis across each case, panel, and time frame. Additional research will be necessary to collect case-level (or judge-level) data so as to better determine more detailed, systematic trends in case outcomes as well as driving forces (and motivations) for increased rights protections.

Qualitatively, it appears that the Court has increasingly resolved cases in favor of individual rights. The Court has become especially active in promoting habeas corpus and criminal procedure rights, antidiscrimination and reproductive rights, and civilian rights with respect to military actions. The Court's active promotion of individual rights is illustrated by the UN's awarding of the Defense of Human Rights Award in December 2013. The UN Selection Committee for this award recognized that "The national Supreme Court has accomplished very considerable progress in promoting human rights through its interpretations and enforcement of Mexico's constitution and its obligations under international law. Additionally, the national Supreme Court

tribunals; (c) judicial, administrative, or labor tribunal decisions executed outside the bounds of the trial or after its conclusion; (d) acts within a trial whose executive would cause irreparable damage; and (e) decisions within a trial that affect parties outside the trial (Staton 2010). Hence in these cases, the Supreme Court exercises appellate jurisdiction, often intervening in lower-court proceedings.

23. One may also observe that the Court has reduced its activity in indirect amparo suits. While the cause for this is unknown, it may simply be a function of workload, where increased time and resources spent on direct amparo cases, which are part of the mandatory docket, leaves little remaining resources and time for indirect amparo cases (also part of the mandatory docket). In others words, judges have a finite amount of time and energy to resolve cases, so increases in one area may decrease attention in other areas. Further research is required to address this speculation.

has set important human rights standards for Mexico and the Latin America region."[24] Indeed, the Court has emphasized human rights and has placed increased weight on international treaty obligations. In 2011, the Court declared that judgments by the Inter-American Court of Human Rights (IACHR) represent the "law of the land," and the Court ruled in 2013 that rights guaranteed by international human rights treaties have equal weight to those guaranteed by the Mexican constitution. Furthermore, court decisions include substantial references to international laws, including treaties, conventions, IACHR rulings, and other supranational court decisions.

Perhaps the most significant policy change instituted by the Mexican Supreme Court is the reduction of military jurisdiction and the extent to which the military enjoys in-house criminal or disciplinary procedures. In 2011, the Court ruled to reform Mexico's flawed military justice system to hold soldiers accused of human rights violations accountable for their crimes. It declared that no civilian or human rights case should be tried in the military justice system. The ruling also stated that courts are obligated to comply with IACHR judgments and that its jurisprudence should be taken into account by Mexican judges. In 2012, the Court formally declared unconstitutional part of the military code requiring service members charged with a crime against civilians to be tried before a court-martial. The Court further published a formal order confirming its ruling and directing ordinary federal criminal courts to henceforth assume jurisdiction. The same year, the Court conferred legal standing to third parties who were not themselves direct victims of military aggression, which enabled family members of civilians killed by military forces to intervene procedurally in such cases.

Since 2008, criminal and procedural rights have been at the forefront of Supreme Court promotion—so much so that the Court has faced significant public controversy. While the 2008 reforms to move the country to faster public trials and an adversarial system, where prosecutors and defense attorneys can present evidence and oral arguments (like in the US), represented a significant shift in criminal procedure, these reforms have not yet been fully instituted nationwide. As noted, by 2013, only three of the thirty-two states had fully transitioned, while thirteen states had partially transitioned. Hence full implementation of these institutional protections was not expected prior to 2016 (the deadline), especially with the difficulty of retraining prosecutors, lawyers, police, and judges. Yet the Supreme Court has moved to enforce criminal and procedural protections, especially through the presumption of innocence and firm conviction to due process rights. In 2013, the Court ruled that evidence obtained through torture and other violations of human rights is inadmissible. The Court also released a Canadian national who was in custody for eighteen months on charges of attempting to smuggle one of Muammar al-Gaddafi's sons into Mexico on the grounds that his due process rights were violated. Even more controversially, the Court also ordered the immediate release of Florence Cassez, a French national who had been in

24. See http://www.ohchr.org/EN/NewsEvents/Pages/hrprize.aspx

prison for eighty-five months after being convicted of kidnapping and murder as one of the heads of the Los Zodiacos gang, because her rights to due process were violated.

In terms of women's rights and discrimination, the Court has also made significant moves toward actively promoting rights. In 2012, the Court reinstated the original attempted murder charge in a domestic abuse case and remanded the prosecution to a judge for a new trial, saying that the victim's legal rights were violated when the charge was reduced by a lower-court judge. From 2011 to 2013, the Court expanded abortion rights through a series of cases by striking down state laws that declared that life begins at conception and decriminalized abortions. The Court also upheld state laws authorizing gay marriage in 2012 in a series of cases and required the recognition of those marriages across all Mexican states. In 2013, the Court ruled that antigay comments and homophobic speech are not protected speech, which marks the first case dealing with hate speech heard by the Court. Indeed, in 2014 the IACHR applauded Mexico's Supreme Court for adopting a protocol that aims to help judges decide cases dealing with sexual orientation and gender identity in ways that conform to internationally recognized rights standards.[25] In essence, this protocol calls on judges to question the neutrality of the law applicable to a case if a situation of disadvantage is identified on account of gender identity or sexual orientation.

Hence even though Mexico has not been considered as pioneering or progressive with regard to rights—even as recently as 2011 (see Helmke and Ríos-Figueroa 2011)—important transitions are under way. Specifically, the Mexican Supreme Court has played an active role in promoting rights and enforcing them through reforms of the judiciary, military code, and criminal codes. For example, consistent with the 2011 Court decision, both houses of the Congress of the Union passed a reform of military justice code in 2014, ensuring that abuses committed by the military against civilians are investigated and heard in a civilian, rather than military, jurisdiction.[26]

Furthermore, Mexico's Supreme Court constitutionalized the IACHR's conventionality control[27] in

25. See http://www.oas.org/en/iachr/media_center/PReleases/2014/095.asp
26. See http://lawg.org/action-center/lawg-blog/69-general/1326-mexico-passes-historic-reform-to-the-military-justice-code- (inactive link as of 5/21/2020)
27. Conventionality control is a tool established by the IACHR, a supranational court, that essentially grants judicial review powers to national courts. In short, conventionality control compels national judges to uphold the American Convention on Human Rights treaty obligations and IACHR case law. This tool empowers domestic courts to review legislation under the parameters of the convention as interpreted by the IACHR. In a sense, conventionality control refers to judicial supervision of national legislation in general as well as declarations of ineffectiveness and declarations of nonconformity. The declaration of ineffectiveness is designed to ensure consistency between domestic and international law, where domestic courts are able to evaluate and declare inconsistency in domestic laws and norms and act according to their competencies and procedures

2011, where the Court recognizes the IACHR decisions as res judicata and thus binding. This 2011 constitutional amendment changed several articles of the Mexican constitution, creating a "new legal system of human rights protections" (Colli-Ek 2012) that places responsibility on all Mexican state authorities to take into account treaties to which Mexico is a party and requiring them to always favor rules that support the person. The Supreme Court has furthered issued decisions that altered the way Mexican judges adjudicate human rights cases by introducing conventionality control applied ex officio by all judges, thereby allowing judges to disregard domestic norms, laws, and administrative actions that breach international human rights treaties. Hence the Mexican Supreme Court dramatically changed the way judges (can) adjudicate.

Beyond the High Court, conventionality control appears preliminarily effective at the lower levels as well. In 2012, just one year after the constitutional amendment, lower-court decisions in three Mexican states (Jalisco, Nuevo Leon, and Oaxaca) made conventionality control arguments in 5.4 percent to 14.2 percent of human rights (direct amparo) cases. Specifically, lower courts in Jalisco made arguments using conventionality control in 5.4 percent of cases, Nuevo Leon courts made the same conventionality control arguments in 13.6 percent of cases, and Oaxaca made conventionality control arguments in their decisions in 14.2 percent of cases (Aguiar-Aguilar 2014). These courts (and lawyers) still defend human rights protections using national laws more often than international law, but they frequently cite the American Convention on Human Rights, International Covenant on Civil and Political Rights, Universal Declaration on Human Rights, and United Nations Convention on the Rights of the Child.

Lawyers cited these international laws as well as conventionality control more frequently than the federal judges, however, which is relatively unsurprising, since Mexican courts' adoption of conventionality control is so recent. In other words, litigation strategies change more quickly than lower-court judicial decisions after changes in domestic policy. Considering that lawyers and their litigation are strategic (Wedeking 2010) and often responsive to changes in human rights laws (Simmons 2009), it seems logical that lawyers add these new legal norms and frames into their litigation strategies.

The virtually immediate appearance of conventionality control and the frequent references to international law at Mexican state-court levels provide some evidence of the use of these legal rationales by both local lawyers and lower courts in addition to the significant changes by the Mexican Supreme Court. While the Supreme Court appears to want to play an active role in

to "disapply" the violating law (Castán 2013). Conventionality control obliges domestic judges to disregard laws that fail to conform to the convention when articulating their arguments in a human rights case. Hence conventionality control is designed to expand domestic (legal) human rights protections by inducing judges to decide cases according to what is established in the convention as interpreted by the IACHR.

catalyzing domestic legal change, promote human rights, and internalize international laws, this preliminary evidence provides limited but optimistic support that the Supreme Court is effectively facilitating international human rights law incorporation.

Conclusions

These preliminary results reflect important trends in the role of courts in actively promoting human rights. In Mexico, the Supreme Court is increasing the number of rights cases they hear in their discretionary docket. This activism has signaled the Court's interest in and receptiveness to rights cases, which may persuade potential litigants to seek out the Court (see Baird 2007). Such a response to this signaling could explain the increase in amparo cases, which increased by roughly 8.5 percentage points between 2009 and 2014. Trends in amparo cases in courts' mandatory dockets suggest that people are increasingly turning to the courts to resolve their rights issues.[28]

Furthermore, judicial rulings by the Supreme Court since the 1994 reform, and especially after 2000, have indicated the willingness of the Court to act independently of the executive and even rule against the government (Domingo 2005). These rulings—along with the high levels of government compliance to them—have signaled to individuals, opposition parties, and political opponents that legal mobilization is a useful means to assert legal boundaries (Domingo 2005).[29]

28. However, while courts are increasingly adjudicating and resolving rights issues, this activity may not be unequivocally positive. One detriment is that it reflects more litigation, causing the mandatory docket of these courts to grow substantially, creating unreasonable workloads for most courts. In response, courts must pay more attention to procedural requirements in order to throw out improper cases. The incentive to reduce caseloads means that some cases are not being heard—primarily due to procedural requirements. This could disenfranchise poor, uneducated, or rural rights-seeking litigants who may not enjoy support from lawyers or NGOs. Massive caseloads can cause delays in trials and resolutions, which may lead to due process, criminal, and procedural rights infringements. Hence increased caseloads in predominantly mandatory dockets mean that courts must eliminate cases on superficial bases and can effect the quality of decisions and their enforcement. Expanding due process rights can also negatively affect the legitimacy of the courts and judicial system when criminals are perceived to be better protected than victims. The release of perceived criminals may incentivize vigilante violence, where individuals take matters into their own hands rather than seek resolution through the judiciary.
29. While the Mexican Supreme Court has become a credible, effective, and active political player, lower courts—for the most part—have not undergone the same transformation. Lower courts remain embedded in their passive, corrupt, and subservient role to the local politics.

These results also suggest that there have been significant shifts in domestic law in terms of rights protections and that domestic courts are actively expanding substantive rights. While these results cannot offer a systematic, widespread perspective on the activities of these courts, they submit that the court plays a meaningful role in the diffusion of human rights and enforcement of international human rights laws, which future research should address. Courts have the ability to promote and expand human rights protections in a unique way. In the case of Mexico, the courts appear to play active roles in determining human rights policy through their decisions.

This chapter only provides a preliminary analysis due to severe data limitations. Data collection is necessary to systematically evaluate Court decisions on rights cases and the causal mechanisms for changes observed, such as judicial ideology, constitutional amendments, conventionality control, and domestic political pressures. Furthermore, it is important to discover whether federal court promotion affects individuals, especially when civil law mandates that most rights cases do not set policy unless a specific majority is reached and/or a series of similar, consecutive decisions occur. In terms of Mexico's judicial reform, will states adequately transition to the new system to make the rights enshrined effectively enforced? Additionally, problems of police corruption rampant in Latin America may cause the region to fall behind in several human rights areas. Also, one must consider how ideologies and the professionalization of justices affect the decision to promote rights. How do international legal changes through conventionality control, for example, compare to domestic institutional changes in their ability to influence international law internalization? Are these recent trends in rights promotion and court activism temporary or part of a longer process of the development of the rule of law? These questions illustrate that these mechanisms and courts are ripe for future research.

Nonetheless, this study suggests that domestic high courts may play a more active role in the diffusion and enforcement of international human rights laws than previously assumed. Even in a country experiencing significant legal transitions, organized crime, intense violence, and widespread government corruption, the Mexican High Court still appears to increasingly prioritize human rights cases, thereby improving the lives of its citizens and promoting the diffusion of rights. As such, the domestic judiciaries of states—even those beyond the typical Western, liberal democracies—may play a more significant role in the development of human rights regimes than credited.

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Class Activity

1. What are the institutional differences between the Mexican Supreme Court and America Supreme Court?
2. How do these institutional differences impact the jurisdiction and decision-making of the Courts?
3. How do the differences in discretionary versus non-discretionary dockets impact judicial decision-making across these two high courts?
4. Are all judges likely to make decisions to protect or expand human rights? Why or why not? What factors may determine whether (and to what extent) a judge is likely to support human rights? Explain your answers.

23. Explaining Dissent Rates on a Consensual Danish Supreme Court

HENRIK LITLERÉ BENTSEN, MARK JONATHAN MCKENZIE, AND JON KÅRE SKIPLE

Danish politics, and Scandinavian politics in general, has historically been popularized as consensual (see Lijphart 1999; and to a lesser extent, see Elder, Thomas and Arter 1982). Any cursory student of Western European politics has encountered this characterization of the Danish political system. By way of example, a Western Europe reference book from 1982 describes the Danish political system as containing "a great measure of underlying stability despite a multi-party system" and asserts that "such stability is due in large part to the Danes' tradition of tolerance and compromise and to the overall consensus about political aims and democratic means" (Thompson 1982, 267). More recent research challenges aspects of this convention (Arter 2006). Nevertheless, this popular characterization of Danish politics as consensual extends to the Danish Supreme Court as well (Christensen 2011b). In a 2011 news article, Danish Supreme Court judge Jens Peter Christensen wrote that the kind of politics observed on the US Supreme Court is absent in the Højesteret (or Danish Supreme Court). Judge Christensen (2011b) describes Danish Supreme Court judges as "boring" when compared to their counterparts on the US Supreme Court. And unlike the political divisiveness observed on the US Supreme Court, Judge Christensen argues that the Højesteret's decisions often end with full agreement among the justices—even on the most important constitutional questions (Christensen 2011b).[1] How accurate are Judge Christensen's claims about the consensual nature of Denmark's highest court? And if the Court is consensual, what explains these levels of agreement? Could the explanation be as simple as that Danish judges are "boring," as Judge Christensen surmises, or does this collegiality arise from an even more mundane explanation of the institutional rules governing Højesteret operations?

In this study of Danish Supreme Court decisions in 2014 and 2015, we set out to explore claims about consensual decision making on the Højesteret. Our research from this time period confirms Judge Christensen's characterization of the court as very consensual. If we define consensus and collegiality as judges expressing unanimous agreement with regard to who wins a case and what the legal explanations are for the outcome, then the vast majority of Danish Supreme Court cases end in unanimity. The more important question, however, is why Danish judges might issue a dissent in the face of this strong norm of consensus. In this respect, our study perhaps raises more questions than it answers. The paucity of cases containing dissents makes it difficult to

1. Christensen notes that the two Maastricht cases regarding Denmark's EU membership and the case on the Iraq War were all settled in unanimous votes (2011b).

pinpoint why Danish justices are so consensual. Nevertheless, we do find that cases involving the European Convention on Human Rights (ECHR) engender significant disagreement among the justices. Furthermore, some institutional features of the Højesteret provide some clues as to the high rates of collegiality.

We begin the study by addressing the question of why courts scholars would study dissent in the Danish Supreme Court. Next, we explain the formal processes of decision-making in the Højesteret and address the typical causes of dissent in the judicial politics literature as they might relate to Denmark. After describing the data for our chapter, we present our statistical results. Finally, we conclude with a discussion on the causes and nature of dissent in the Højesteret.

Why Study Dissent on the Danish Supreme Court?

Both judges and scholars of courts are interested in the nature of judicial dissent and collegiality because such behaviors carry certain benefits or drawbacks for courts (Edwards 2003). For example, dissent could potentially damage a court's legitimacy and impede "the efficient administration of justice, because conflict among judges interferes with orderly disposition of a court's caseload" (Hettinger, Lindquist, and Martinek 2006, 19–20). Meanwhile, collegiality (as evidenced by unanimity) might increase the influence of a high court within a democratic system and foster greater legitimacy and respect for a court's decisions. Consider cases such as the US *Supreme Court's Brown v. Board of Education* (1954) or the Danish case involving an issue over the Iraq War.[2] In each of these momentous decisions, these countries' Supreme Court justices reached unanimous verdicts. Presumably, justices on the highest court in these cases were motivated to issue a unanimous verdict (and avoid dissent) in order to strengthen these courts' influence on policy. If collegiality (as evidenced by unanimity) is a desirable trait for a court, the study of what drives collegiality on Denmark's Supreme Court is interesting because of its scarcity of dissent (see figure 1).

2. In spite of the political controversy in Denmark over the country's decision to join as an active participant in President George W. Bush's "Coalition of the Willing" that invaded Iraq, Danish Højesteret Judge Christensen (2011b) points to the unanimity reached in the Højesteret's decision on a lawsuit related to Denmark's involvement in the Iraq War as evidence of the level of collegiality of that court.

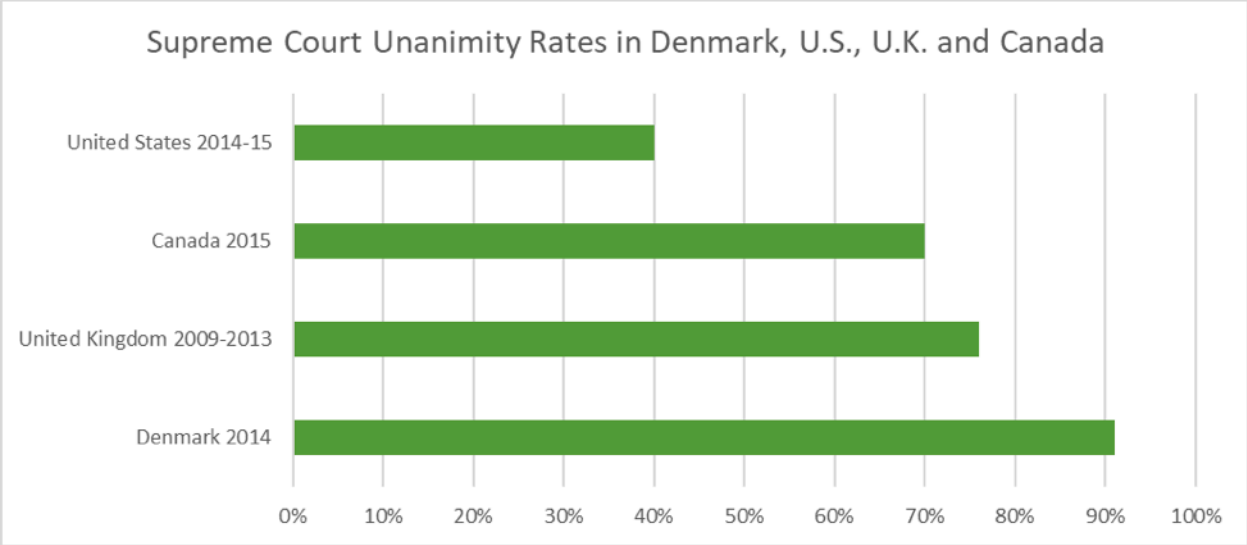

Figure 1.

Judicial scholars continue to search for those universal factors driving the "puzzle of judicial behavior" (Baum 1997), and research on decision-making in courts such as Denmark—a country with a high court that has a different legal culture and different institutional incentives in comparison to the US Supreme Court—can provide us with a fuller perspective on some of the universal factors influencing judicial decision-makers in democracies. The Nordic legal framework offers a unique perspective to accomplish this task. Nordic legal systems are not common-law systems but rather somewhat in between common-law systems and the civil law systems of continental Europe (see Blume 2011; Hirschl 2011; Lindblom 2000). Unlike common-law systems, the Danish legal system does not recognize the concept of binding precedent arising from prior court decisions; however, court decisions can represent an important source of law (Blume 2011). Given the moderate importance of precedent, the Danish Supreme Court will sometimes cite its own past decisions and decisions of international courts, though not every case contains citations to past precedent. Furthermore, unlike the US Supreme Court, where striking down the unconstitutional actions of another part of government is not unusual, such an event is almost nonexistent in Denmark. The 1953 Danish constitution does not provide the Danish Supreme Court with the authority to review the constitutionality of government actions, and for a long time, Danish legal scholars debated whether the Højesteret had this power of judicial review (Christensen, Erichsen, and Tamm 2015).[3] More recently, justices on the Danish Supreme Court

3. We use the term judicial review in this study in its regular meaning in American legal circles—namely, as referring to a court's ability to review the constitutionality of the actions of

have been known to claim the power of judicial review in theory (see Christensen 2011a), and this concept has become more general in Denmark (Christensen, Erichsen, and Tamm 2015).[4] But in practice, the Højesteret has engaged in judicial review only once in the last 150 years (Christensen, Erichsen, and Tamm 2015; Wind 2010). Regardless of the extent of the Court's power of judicial review, it is fair to say that the Danish Court exercises a higher level of deference toward other branches of government (Rytter and Wind 2011) in comparison to either the United States or even its Nordic neighbor Norway. In many respects, Danish judges face different priorities and incentives and a very different legal culture from American jurists, and thus we have much to learn about judicial behavior from Danish courts and judges.

Moreover, when compared to judicial dissents in other democracies, Denmark's highest court provides an interesting perspective on this type of judicial behavior. Figure 1 illustrates the stark differences in dissent rates between Denmark and the common-law countries of the United Kingdom, Canada, and the United States. Looking at a similar time period, one notices that unanimity rates for cases in Denmark exceed 90 percent while unanimous opinions in the US constitute less than half of all opinions for a comparable court term. Even Norway, a Scandinavian neighbor with a similar legal and political system to Denmark, has lower rates of unanimity (Bentsen 2018). Moreover, it seems the levels of unanimity in the Danish Supreme Court are even higher when compared to the 1990s, when a previous Danish study found rates of unanimity at around 78 percent as it relates to five-judge panels and 72 percent for seven-judge panels (Andersen 2003). We'll address possible explanations for these intercountry differences later in the chapter, but while there is no shortage of studies on dissent rates in courts in America (e.g., Brace and Hall 1990, 1993; Epstein, Landes, and Posner 2011; Goldman and Lamb 1986; Hettinger, Lindquist, and Martinek 2006), Canada, the UK, or Norway (Bentsen 2018; Hanretty 2013; Ostberg, Wetstein, and Ducat 2004; Songer, Szmer and Johnson 2011), few studies have examined dissent in the Danish High Court (but see Andersen 2003; Skiple, Bentsen, and McKenzie 2019). And while research on European high courts has increased in recent years (e.g., Hanretty 2012, 2013; Dyevre 2010; Grendstad, Shaffer, and Waltenburg 2015), quantitative political science studies on Danish judicial decision-making are practically nonexistent, with the exception of Wind (e.g., 2009, 2010) and Bentsen, McKenzie, and Skiple (2019).

another branch of government (e.g., Marbury v. Madison 1803). The usage of this term in British English ascribes a different meaning to the concept that we do not employ in this study.

4. In two cases in 1965, the Danish Supreme Court did nullify the parliament's assessment of the constitutionality of a law without nullifying the law itself (Christensen 2011a).

Judicial Decision-Making in the Danish Legal System

The Formal Process of Decision

Before investigating the potential causes of judicial dissent in Denmark, it's important to understand how the Danish Supreme Court's decision process works in a formal sense. The Danish legal system consists primarily of three levels of courts: the district courts (the *byretten*), the Western and Eastern High Courts (the intermediate appellate courts known as the Landsretten) along with the Maritime and Commercial Court (referred to as Sø- og Handelsrettens), and the Højesteret (the Supreme Court). For most cases, trials begin in a district court and, if appealed, go to one of the high courts. In these instances, in order to go further and get into the Supreme Court, litigants have to pass through the Procesbevillingsnævnet (Appeals Permission Board). The Procesbevillingsnævnet is a judicial body that acts as a gatekeeper for the Supreme Court, deciding which cases can proceed to appeal in the Højesteret. The Procesbevillingsnævnet is composed of a noted lawyer, a law professor, two lower-court judges, and a Supreme Court justice. The Supreme Court justice has some influence on what cases the Procesbevillingsnævnet decides to take, but the board operates independently of the Supreme Court. There is also another route to the Danish Supreme Court. While the Eastern and Western Landsretten mostly function as appeals courts, in some kinds of cases—usually deemed important—the Landsretten function as the trial court.[5] In these instances, because all litigants have a constitutional right to appeal to at least one higher court, the Supreme Court is obligated to take these cases. Finally, the Danish judicial system has a special court—mostly for certain types of business and maritime litigation—called the Maritime and Commercial Court. If the trial occurs in the Sø- og Handelsrettens court, then the litigants get an automatic appeal to the Supreme Court. In short, the Højesteret does not have control of its own docket (Bentsen, McKenzie, and Skiple 2019). This lack of control raises the possibility that the Danish Højesteret might have to accept frivolous or easy cases, and it also potentially increases the workload of Danish justices because they cannot limit the number of cases they have to consider for decision (see Bentsen, McKenzie, and Skiple 2019). If we compare the Danish Højesteret to those countries listed in figure 1, we find that all the other courts, including the

5. District court judges (the byretten) can offer to move a case directly to the Landsretten for trial when it appears to be of significant legal importance. If the Landsretten judges accept the district court offer, then the trial happens in the Landsretten, thus giving litigants an automatic appeal to the Supreme Court. Furthermore, serious criminal cases also begin in the Landsretten, and when the Højesteret hears serious criminal cases on appeal, it can only review the length of punishment and is not allowed to rule on guilt or innocence (Rytter and Gøtze 2001).

Norwegian Supreme Court, have almost full control of what cases they will accept to be argued before the court.

The decision-making process at the Court is not lengthy or complicated. The nineteen judges meet in rotating panels—typically of three, five, or seven judges (Blume 2011)—to hear oral arguments and make decisions in a case. Judges do not empanel themselves based on expertise in the law with respect to the issues in the case; rather, all the judges on the court are expected to deal with all manner of legal issues (Zahle 2007). After the parties present their oral arguments, tradition calls for the courtroom to be emptied of the attorneys and public, and the doors to the public entrance are locked, with the judges inside. At this point, one of the judges—called the "leading judge"—lays forth all the legal arguments and facts of the case to her colleagues and suggests a decision. This leading judge is also tasked with writing up an initial draft of the judgment prior to the oral proceedings (Zahle 2007; Christensen, Erichsen, and Tamm 2015).[6] After the leading judge speaks her opinion, the other judges then add their thoughts in order of seniority, and some judges may even have their own draft opinions prewritten as well, which can end up later replacing the draft opinion of the leading judge (Zahle 2007; Christensen, Erichsen, and Tamm 2015). After the formal deliberation ends, the judges leave the courtroom, remove their robes, and retire to another room to begin the opinion-writing process (Zahle 2007). In reality, deliberation can continue in this room as well. The process is very collaborative in a personal way, as all the judges sit together and write out the decision. Even if there are dissenters in a case, those dissenters will also sit and help in the formulation of the judgment.[7] It is also the case that a dissenting opinion may cause the majority to write a lengthier opinion. According to one Danish legal scholar, "The dissenting opinion initiates a process within the majority . . . with the task to justify the majority opinion [so that] . . . judgments with an elaborate dissenting opinion are often more amplified than judgments without dissenting opinions" (Zahle 2007, p. 574–75). Historically, judges were barred from publicly dissenting in cases until 1936, when anonymous dissents were then allowed (Zahle 2007). Judges were not able to express dissents by name until 1958 (Zahle 2007). When a final judgment is written, the opinions are typically not very long and are written fairly quickly. Deliberations and the writing of the opinion typically happen in a couple of days (Christensen, Erichsen, and Tamm 2015). This process is in sharp contrast to the US Supreme Court, where US justices offer very little exchange of ideas during the initial secret conference proceedings, and where the work of opinion writing happens in isolation in a single judge's office over a number of weeks (Perry 1991). The exchange of ideas and bargaining on the US Supreme Court does not really happen until much

6. The judge who is tasked with presenting the case during these discussions and drawing up the introductory sections of the opinion is the most junior in terms of seniority (Christensen, Erichsen, and Tamm 2015).
7. This collaborative account, whereby even the dissenters help write the majority opinion, is based on a conversation that one of the authors had with a former Supreme Court justice.

later, when draft opinions are circulated to other justices on the Court (Wahlbeck, Spriggs, and Maltzman 1998), and by that time, the views of the dissenters and the majority have undoubtedly crystalized, though there are occasional instances where justices may change their minds and switch sides.

The Politics of Decision-Making in Denmark

In terms of the political dynamics of the Højesteret in its decision-making, Danish legal scholars tend to agree that politics (at least in an ideological left/right perspective) appear absent in the decision-making of the Court. While it seems unusual for a supreme court to be devoid of politics, there is currently just not enough empirical evidence to determine to what extent Højesteret judges engage in political decision-making from a left/right perspective (or from some other political dimension). Since reforms on judicial selection were made in the 1990s, judicial candidates for the Danish Højesteret are chosen by an independent judicial selection board called the Judicial Appointments Committee.[8] With the creation of this independent committee, the party in control of government effectively has little influence over new candidates chosen for the Supreme Court. Next, the potential candidate must sit on a number of cases with other Supreme Court judges, who then grade his or her performance. The Supreme Court judges themselves then decide whether to admit the nominated judicial candidate to the Supreme Court. This selection process undoubtedly provides some insulation and political independence for judges that reach the bench, but it could

8. Danish Supreme Court judges are appointed by the Judicial Appointments Committee, which was created July 1, 1999. The Judicial Appointments Committee has six members, consisting of the following: a Supreme Court justice (nominated by the Supreme Court justices), a high court judge (nominated by the high court justices), a district judge (nominated by the Danish Judges Association), a practicing lawyer (nominated by the Danish Bar Council; Advokatrådet), and two representatives of the public chosen by Kommunernes Landsforening and Dansk Folkeoplysnings Samråd (roughly translated as "Local Government Denmark" and the "Danish Adult Education Association"). The committee only makes one recommendation to fill a vacant judicial position. Since the vast majority of judges in our data set were appointed after July 1, 1999, by the committee, the likelihood that the Ministry of Justice has exercised any substantial authority over the appointment process seems low. In short, we find it difficult to justify coding whether the party in power favored the appointing justice given the current appointment process. A recent Danish Courts Administration pamphlet claimed that the Ministry of Justice had never declined the Judicial Appointments Committee's recommendations. And although the Minister of Justice is not absolutely required to accept the nomination by the committee, no minister has failed to comply with the committee's recommendation, at least up through 2012.

also further collegiality.[9] Furthermore, the absence of any significant judicial review[10] performed by the Højesteret and the lack of support for the concept of judicial review among the major political parties,[11] along with Danish legal culture, also work against judges attempting to assert their politics from the bench (Wind 2009). Finally, the Højesteret judges lack control of their own docket, which may require them to hear cases for which there is little ideological disagreement among the judges. Hence, if there are any ideological differences left among the judges given the conditions referenced above, previous research suggests that courts lacking in docket control exhibit less ideological disagreement in their decisions (e.g., Brace, Yates, and Boyea 2012; Hall 1985). Thus there are institutional conditions at the Højesteret that have the potential to reduce incentives for judges to engage in ideological decision-making: (1) the collegial and collaborative process of decision-making and opinion writing as described above, (2) a rather nonpolitical commission for appointing judges that is now disconnected from the Ministry of Justice, (3) a legal and political culture that encourages consensus rather than dissent and individualism, (4) a lack of docket control, and (5) and a lack of tradition in robust judicial review that makes the Court somewhat subservient politically to the desires of the parliament.

9. The Supreme Court appears to have an enormous influence on the appointment of new members. To begin, the Judicial Appointments Committee sends a list of candidates to the president of the Supreme Court. After the president consults with other judges on the Højesteret, he or she then provides a list of suggestions to the Judicial Appointments Committee. As noted, the committee only nominates one candidate. A nominated Supreme Court justice then has to sit through four cases and construct an opinion (though the nominee does not participate in the decision). The other justices of the Supreme Court then grade this potential judge and decide whether to accept the candidate (see Christensen, Erichsen, and Tamm 2015). The authority of the Supreme Court judges to wield what is in effect a veto on who may ascend to the Court would seem to create conditions that would allow for a perpetuation of collegiality on a future court. Candidates who do not mesh well in a work setting with the Supreme Court or are perceived as having the potential to sow discord may have a tougher time surviving this last step in the appointment process. In practice, this prospect of rejection is rare (Christensen, Erichsen, and Tamm 2015). However, Supreme Court justices do have enormous influence over which candidate the committee chooses. According to Christensen, Erichsen, and Tamm, "It is difficult to imagine that the Judicial Appointments Committee would diverge from following the recommendation of the Supreme Court" (2015, 19) Thus this appointment system should further encourage a consensual decision-making process and lessen dissent.
10. The Tvind case (UFR 1999 p.841 H) demonstrates that the Court, at least in theory, has some form of judicial review, though this is the only time judicial review has been exercised in the last 150 years (see Wind 2010).
11. In an op-ed in 2008, the Danish immigration minister stated, "Courts should not do politics, for that we have elected politicians" (quoted in Wind 2009).

Nevertheless, it is a rather unusual proposition in American judicial scholarship to suggest that judges' sociological and political life experiences do not influence their behavior or provide them with perspectives that differ from their colleagues on the bench when arriving at decisions in a case (Baum 2006; Segal and Spaeth 2002; Ulmer 1970; Tate 1981), and Nordic judges are no less human in this regard (see Bentsen, McKenzie, and Skiple 2019; Skiple, Shaffer, and Waltenburg 2016; Grendstad, Shaffer and Waltenburg 2015; [12]. As Grendstad, Shaffer, and Waltenburg argue, "everything we know about the formation of political attitudes militates against the likelihood that these mature, highly educated members of the elite public are without preferences on the full range of social, political, and economic issues that are argued before them" (2015, 6, chap. 1).

Currently, there are a few studies that suggest sociological and political background factors or other nonlegal factors affect judicial behavior in Danish tax cases (Bentsen, McKenzie and Skiple 2019; Skiple, Bentsen and McKenzie 2019), but there is no research exploring whether sociological background factors spur dissenting behavior in the Danish Supreme Court. This study incorporates some sociological background factors in order to test these propositions on a preliminary basis, but mapping out the sociopolitical space of the judges of the Danish Højesteret is beyond the scope of this particular chapter. Here, we focus on the effects of a judge's gender, his or her career characteristics, and his or her birthplace region in the country.

Estimating Dissent in Denmark

In this section, we outline a number of factors that may influence dissenting behavior in the Danish Supreme Court, connecting those factors to the broader political science literature on judicial dissents.

Sociological Background Factors

First, as noted earlier, a primary motivator in dissenting behavior in US courts is ideology (Hettinger, Lindquist, and Martinek 2006). Unfortunately, no similar ideology measure is possible for the Danish Supreme Court, and the current structure of judicial appointment makes it nearly impossible to decipher whether the current party in control of the government and the Ministry

12. For behavioral studies on countries elsewhere in Europe, see, e.g., Hanretty 2012 or Hönnige 2009; see also Dyevre 2010

of Justice favored the court appointment. Absent a reliable way to capture ideology at the Danish Supreme Court, we can still take advantage of a number of social background characteristics of the judges for examining dissenting behavior on the Højesteret. During their career, judges do go through a socialization process (Baum 2006; Grendstad, Shaffer, and Waltenburg 2015; Hettinger, Lindquist, and Martinek 2006). One possible representation of this political socialization Danish judges experience may involve where they were born. In the Norwegian Supreme Court, Grendstad, Shaffer, and Waltenburg (2015) have found some limited instances where judges born in Oslo behaved significantly different from those judges born in the periphery of Norway. Denmark's geographic layout—with a large capital city on the far end of one side of the country—is similar to Norway in the sense that there is an outsized capital and a geographically dispersed population on the periphery. As such, judges with a background born in the periphery might approach politics and law somewhat differently from their Copenhagen-born colleagues (including greater Copenhagen and the island of Zealand).

Social background work experience might also affect how collegial judges will be on a Court. As Blume notes, "Most judges have had a career in the Ministry of Justice although in recent years it has been an aspiration that more judges should have another background" (2011, p. 32). To capture the various judicial backgrounds of the judges, we coded for whether the judge spent any previous time working at the *Ministry of Justice*, whether the judge had been a *law professor* in academia, and whether the judge was ever engaged in *private practice* before ascending to the bench. In previous research on decision-making in Danish tax cases, Bentsen, McKenzie, and Skiple (2019) find scant evidence that past work experience has much effect on Højesteret judges' behavior in tax cases. On the other hand, Bentsen (2018) found that former academics in the Norwegian Supreme Court were significantly more likely to issue dissents compared to their colleagues. Thus the possibility exists that judges with private practice experience or experience in academia may have broader disagreements with interpretations of the law compared to their fellow colleagues, though this possibility seems low for Denmark.

Years of experience on the Højesteret (*seniority*) is another judge characteristic we examine in our study. Judges with less experience may not feel confident enough to begin asserting dissents with their more senior colleagues. In their study of US appellate courts, Hettinger, Lindquist, and Martinek write that "freshman judges may be less inclined to author a separate opinion, because they are simply unsure about the appropriate circumstances in which such opinions are warranted . . . [and] may be more hesitant to challenge senior colleagues by dissenting or concurring from majority opinions" (2006, p. 53). In a particularly collegial court such as the Højesteret, newcomers to the bench may be particularly reticent about dissenting.

Case-Level Legal Factors

To add to our social background variables of judges, we examine a number of contextual factors relating to the cases themselves (Brace and Hall 1990; Hettinger, Lindquist and Martinek 2006). According to Hettinger, Lindquist, and Martinek (2006), "All appellate cases are not created equal" (2006, p. 57), and therefore it is important to account for the types of legal cases that come before the Court. We coded dummy variables for cases involving taxes, crime, labor law, European Union (EU) law, ECHR issues, and contract disputes. We have a number of reasons for examining these types of cases. Criminal cases in the US Supreme Court can be quite divisive and controversial, and we wanted to test for similar reactions in the Danish Højesteret. We also thought that tax cases might evoke dissents not only due to their complexity but also due to their importance because Denmark is a strong social welfare state and is reliant upon a robust tax system. In cases involving EU law, Denmark has shown reluctance to make references to the European Court of Justice (ECJ) compared to other countries (Wind 2010). Most references to the ECJ have been initiated by the Supreme Court or the high courts (Wind, Martinsen, and Rotger 2009). With the Højesteret shouldering a good deal of this responsibility, it is possible that cases involving EU law might generate more dissent, though research from Bentsen (2018) showed no effect on dissent for EU law cases in Norway. Finally, we also account for cases involving issues stemming from the ECHR. The specific incorporation of the ECHR into domestic law has brought some controversy as to how the convention and precedent from the European Court of Human Rights (ECtHR) apply in Denmark (Lebeck 2010). When human rights issues arise in cases, perhaps some Danish judges are looking to narrow the scope and power of the supranational court, the ECtHR. ECHR cases can conjure an array of political debates and conceptions about democracy and the limitations of government. Bentsen (2018) has found that ECHR cases increase dissent in Norway, and thus there is a real possibility that similar effects can be seen in the Danish Højesteret.

Institutional Factors

Finally, we take account of contextual institutional factors that could affect rates of dissent. First, the panel size of the court, which potentially is a measure of case salience, could affect dissent rates. Most judicial panels contain five judges. However, panel sizes can contain more than five judges (in cases deemed more important by the court). The larger the panel size, of course, the greater the possibility for a dissent to occur in a case. Second, we consider whether the Højesteret set the case for oral argument or instead decided the case only under written submission in light of procedural rule (Retsplejelovens) §378. If a case gets slated by the judges for consideration only in writing (without the benefit of oral argument for the parties), then the possibility increases that the case is either not very important or not particularly complicated. In short, this institutional

rule can be a measure of either case complexity or case salience (see Bentsen, Grendstad, Shaffer, Waltenburg 2019). Third, we examine whether dissent occurs more frequently in cases that are the final decision on the merits of the case (called *dom* cases in Danish) versus those cases heard by the Court involving interlocutory appeals (referred to in Danish as *kendelse* cases and frequently involving issues in procedure). Interlocutory appeals are cases where a procedural dispute arises in the court below before the case is finished, and the litigants appeal those procedural issues to the Supreme Court. If the Supreme Court takes up the procedural issue, then the case in the court below is put on hold until the Supreme Court resolves the procedural issue. We expect Supreme Court dissents would be more likely to occur in cases that are final decisions on the merits or outcome of the case rather than preliminary cases involving procedural questions. Finally, we also account for the high court from where the appeal originates.

Unfortunately, we cannot test for the effects of docket control on dissent in our limited study. However, the literature on judicial behavior finds that courts without docket control are less likely to engage in dissent compared to courts with lots of discretion regarding the cases they accept for consideration (Hall 1985; Pruet and Glick 1986; Eisenberg and Miller 2009).

Data on Højesteret Decisions

The data collected for this study include all Højesteret opinions published between January 1, 2014, and April 30, 2015. During this sixteen-month period, the Højesteret issued 250 published decisions, including interlocutory/preliminary appeals (*kendelse* cases) as well as decisions on the final merits of a case (*dom* cases). Yet judges on the court registered disagreements with each other in only 21 published decisions, which means only 8.4 percent of cases resulted in a dissent (see figure 2). This rate comes out to about one to two court cases per month where disagreement exists. During our period of study, twenty judges sat on the court, and seventeen of them issued a dissent in at least one case. There were three judges in our data who never issued a dissent (see table 1). Two very collegial judges were Judge F and Judge I (see table 1), who sat in seventy-seven cases and forty-five cases, respectively, without a single dissent from the majority.

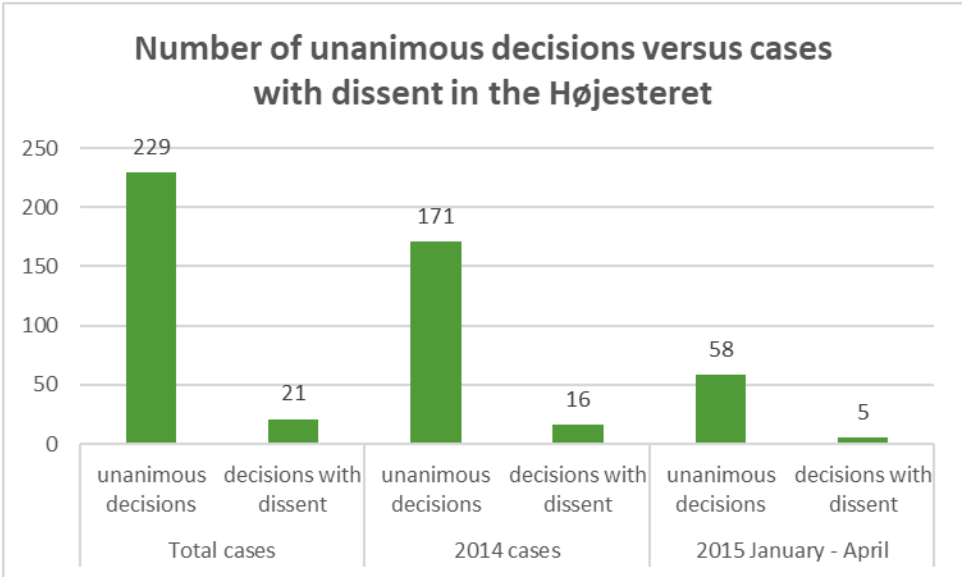
Number of unanimous decisions versus cases with dissent in the Højesteret
250
200
150
100
50
0
229
21
171
16
58
5
unanimous decisions
decisions with dissent
unanimous decisions
decisions with dissent
unanimous decisions
decisions with dissent
Total cases
2014 cases
2015 January - April

Figure 2.

Danish Judge alias (names are redacted)	*When Judge Assumed Bench*	*Dissenting Votes (n)*	*Dissenting Votes (Percent)*	*Votes (n)*
A	2014	1	2.3	42
B	2013	3	6.1	49
C	2012	1	1.8	55
D	2012	1	1.9	51
E	2011	1	1.3	72
F	2010	0	0.0	77
G	2009	1	1.3	75
H	2007	2	2.7	73
I	2006	0	0.0	45
J	2006	0	0.0	3
K	2005	1	1.4	68
Different View	2004	6	8.3	72
L	2003	1	1.3	72
Private Sector	2002	3	4.1	73
N	2002	3	4.2	71
O	2000	1	1.4	70
X	1999	5	7.5	66
W	1997	1	1.2	79
Y	1997	1	1.2	80
Z	1996	1	4.1	24
TOTAL VOTES		**33**		**1217**

Table 1. Dissenting votes of Danish Justices in all published cases from 2014 to April 2015

When compared to the US Supreme Court, this measure of agreement among Danish judges is astounding, and some comparative perspective is in order. As reported, the US Supreme Court's rates of dissent are much higher than the Højesteret, though they have varied considerably over time.[13] Still, at no time in modern history has the US Supreme Court ended a term with a dissent rate as low as 8 percent, which is what the Danish Court produced in 2014. Such a low rate

13. Pritchett (1948) found rates of dissent back in the 1930s as low as 11 percent for one term. However, during that time, the US Supreme Court had somewhat less control over its docket.

of dissent in the US Supreme Court seems impossible. In the 1970 term, for example, dissents occurred in 81 percent of cases at the US Supreme Court (Goldman and Lamb 1986). Even in the recent term of 2013, where the US Supreme Court demonstrated the most collegiality in more than half a century, dissents were still issued in 39 percent of all cases heard that term (Sunstein 2014), over five times higher than the recent years of the Højesteret. The Højesteret's rates of dissent more closely approximate dissent rates in US appeals courts and some state courts.[14]

From an institutional perspective, rates of dissent are lower in US appeals courts and some state courts because many of these courts engage in error correction and have no control over their docket to weed out more mundane legal issues. The Højesteret also has no control over its docket, but that feature may not completely explain the extremely high rates of collegiality, because as noted earlier, the Procesbevillingsnævnet acts as a gatekeeper to keep out frivolous appeals and legal questions that contain an easy legal answer.[15] This review board at the Højesteret is unlike the situation many US federal appeals courts and some state supreme courts face.

At the individual level, only thirty-three dissenting votes were issued by judges in the twenty-one cases where a dissent occurred. This number of dissenting votes is also very low when compared to the number of cases where dissents occur. What it means is that when there is a dissent in a case, more often than not it is only a lone judge dissenting rather than a closely divided vote.

Results: What Factors Explain Dissent on the Court?

In this next section, we examine three kinds of factors explaining dissent before briefly reporting the results of a logistic regression of these various factors.

14. Cross (2007) finds dissent rates across all US appeals courts to be less than 10 percent for many types of cases (rates of dissent in criminal cases are 8.3 percent, and in economic cases, they are 6.8 percent), but in First Amendment cases, those rates are higher than 22 percent. McKenzie (2007) has found rates of dissent in special three-judge US federal courts for redistricting cases to be as high as 25 percent. Goldman and Lamb (1986) note how the DC Circuit Court of Appeals, which hears a lot of political cases, has a higher dissent rate than other appeals courts. But the norm in lower federal appeals courts and state supreme courts is one of collegiality, and this is not surprising given that the federal appeals courts and a number of state supreme courts (especially those that have no intermediate court of appeal, such as Montana) have no control over their own dockets.
15. A Højesteret judge does get to sit on the Procesbevillingsnævnet, but her vote is only one among a number of other members on the board.

Individual-Level Factors

As noted in an earlier section, the sociological background of a judge could explain his or her dissenting behavior. We considered some of these explanations for dissents in the sixteen months of Danish Supreme Court decisions we examined. Table 1 illustrates how the twenty Danish justices engaged in dissents over these months. Due to norms in legal culture about judicial and individual privacy in some parts of Continental Europe, we have obscured the names and genders

of the justices and provided them with aliases.[16] When considering the cases where dissents occurred, the table provides frequencies on the individual justices who dissented (see table 1).

The table shows that judge "Different View" registered the most dissents, both in absolute and relative numbers, with six dissenting opinions, or about 8.3 percent of his votes. There is perhaps nothing unusual about Judge Different View's background before assuming the bench. He was born in Køge (a short train ride from Copenhagen) and attended the University of Copenhagen. He is about in the middle of the pack in terms of his experience on the Supreme Court. He

16. Our decision to remove the names of these Danish justices stems from a number of concerns that require some additional explanation about the differences in legal culture and free speech between the United States and Continental Europe. At least as far back as Marbury v. Madison (1803), Americans have witnessed their courts' involvement in political controversies. In fact, the US Supreme Court's decision in Dred Scott v. Sanford (1857) helped precipitate the American Civil War. In the 1930s, the press labeled the conservative dissenters on the US Supreme Court as the "Four Horsemen"—referencing the biblical apocalypse—because these justices opposed President Franklin D. Roosevelt's New Deal policies. A majority of American state judiciaries select at least some judges by some form of judicial election. In America, viewing courts through a political lens is not unusual. Consequently, in political science studies of American courts, scholars routinely and without hesitation mention the names of individual judges in academic studies when discussing their behaviors on the court. However, in Continental Europe, the idea that judges might be involved in politics is still somewhat controversial. Until recently, many European political scientists "ignored the courts" in their studies of politics, leaving the study of courts to law professors. Meanwhile, "many [European] legal scholars seemed anxious to perpetuate" the idea that courts are not policy makers but instead merely apply the law (Dyevre 2010, 298). And while some European academics are changing their perspectives on the role of courts in politics, some norms about legal culture and academic research persist. For example, in June 2019, France criminalized the statistical analysis and publication of the individual behavior and votes of judges, a step that would be anathema to American notions of free speech (see Simon Tayler, "France Bans Data Analytics Related to Judges' Rulings," Legal Week, June 4, 2019, https://www.law.com/legal-week/2019/06/04/france-bans-data-analytics-related-to-judges-rulings/?slreturn=20190506120236). Violators face up to five years in prison. In Denmark, while it is not criminal to analyze (or publish) the voting behaviors or names of judges, naming how a certain judge voted in certain cases without that judge's express consent might be viewed negatively by those connected to the legal profession or legal academia in Denmark. Furthermore, even aggregating publicly available data about public officials into a single data file for public consumption could raise privacy concerns in Europe, where data privacy laws are stricter than they are in the United States. Thus given these social norms and legal concerns, and also given the fact that identifying which judge dissented the most is not particularly important to our study or final conclusions, we decided to redact the names of the individual Danish justices involved in our research for this chapter and for the accompanying data file.

worked neither as an academic nor in the private sector, but rather spent nearly two decades working in the Ministry of Justice. We could make similar observations about Judge "X," the judge who engaged in the second-highest number of dissents. Judge X was also born near Copenhagen and attended the University of Copenhagen, and he also has no private practice experience. However, Judge X spent most of his career as a lower-court judge. Judge Private Sector has a moderate number of dissents, yet unlike Judges X and Different View, Judge Private Sector spent a considerable amount of his career in private practice. The reality, however, is that dissents are rare even among those justices with the most dissents. Even more important, without more data over a number of years, it is perhaps premature for us to claim that certain justices are more prone to dissent than others.

Going beyond individual judges, we aggregated judges by their social backgrounds in table 2. What we find just by looking at cross tabulations in table 2 is that there is practically no variance in dissenting behavior based on a judge's sociological background characteristics. As for experience on the Højesteret (see table 1), there appears to be no regular pattern evident involving years of judicial experience and dissent. Certainly, the relationship is not linear. While the judges with the most dissents tend to be concentrated among the judges with moderate to moderately high experience on the Supreme Court, we also see that judges with the most experience register very few dissents. In short, there is little evidence to make experience a potential driver of dissent. Perhaps one could conclude that the most experienced justices are typically in leadership roles and are less likely to dissent, whereas very junior judges who are new to the court will be more reticent to dissent as well (leaving the moderately experienced justices as the group most likely to dissent). However, without more data and given the rarity of dissents overall, such conclusions are more speculative than definitive. Our logistic regression analysis confirms this view.

	All Cases	***Born in Greater Copenhagen area***	***Born in the periphery***	***Law Professor***	***Public Sector legal experience***	***Private Sector Legal Experience***	***Worked in Ministry of Justice***
Votes in Unanimous decisions	1184 (97%)	552 (96.5%)	632 (98%)	122 (98%)	1061 (97%)	504 (97.5%)	782 (97%)
Dissenting Votes	33 (3%)	20 (3.5%)	13 (2%)	2 (2%)	31 (3%)	13 (2.5%)	23 (3%)

Table 2. All judicial votes from Jan 2014 to April 2015 divided by judge characteristic

Case-Level Factors

Another potential explanation for dissent concerns the types of cases the Court hears. Some kinds of issues should engender more dissent than others. Table 3 includes a number of different categories of cases in our data. Most types of cases hover around the mean of 8 percent and do not stand out as drivers of dissent.

	Tax	***Crime***	***Labor Law***	***Free Speech***	***Contract Dispute***	***ECHR issues raised***	***EU issues raised***	***Other***	***All Cases***
Unanimous decisions	28	31	21	4	15	22	21	114	229
Cases with dissents (% of cases by topic with dissents)	3 (10%)	3 (9%)	3 (13%)	2 (33%)	2 (12%)	6 (21%)	1 (5%)	7 (6%)	21 (8%)
Total	**31**	**34**	**24**	**6**	**17**	**28**	**22**	**121**	**250**

Table 3. All cases from Jan 2014 to April 2015 divided by topic of case*

*Cells do not add up to 100% because some case topics overlap with others (and not all case types are shown above). For example, 1 of the 2 Free Speech cases is also a criminal case.

Cases that raise questions of interpretation about the ECHR produce the most dissent. Justices dissent in about 21 percent of cases where either part or all of the case concerns the ECHR. In fact, there is a strong statistical correlation between dissenting behavior and ECHR cases, not unlike what Bentsen (2018) found in Norway. This result is interesting, but further exploration into these cases provides inconclusive evidence of the nature of dissent in these cases.

These six ECHR cases in our sixteen months of data involve multiple legal issues, not just ECHR questions. Only one of the dissents out of the six cases actually bothers to mention the ECHR. In two other cases, the dissenter refers to whether the lower-court judge was impartial but never

explicitly mentions the ECHR.[17] Finally, in the three dissents in the other cases, the dissenters focus their discussion on other legal issues.

Given the substance of the dissents in these cases of our study, it's not clear how much the ECHR portion of the issues in these cases is causing disagreement among the justices. From a hierarchical perspective, some Danish legal scholars do not view the supranational ECtHR—which is charged with oversight of European countries who are signatories to the ECHR—as being a higher court compared to the Højesteret; instead, they see it as existing on roughly the same level (Lebeck 2010). Furthermore, the ECHR is incorporated into national law as a statute, and thus from that perspective has no higher-order power over other domestic laws of the Danish state (Lebeck 2010). Nevertheless, perhaps there is something in the facts of these cases—which also involve ECHR concerns—that produce higher disagreements. According to Christensen, Erichsen, and Tamm, "The European Convention on Human Rights . . . has created a legal foundation, which from time to time has brought the Supreme Court closer than previously to a political field of tension vis-à-vis both the executive and the legislative powers" (2015, 49).

Institutional Explanations

Finally, we consider some institutional causes of dissent and collegiality. One real possible explanation for the lack of dissent in the Danish Højesteret is the Court's lack of docket control. Figure 1 provides suggestive evidence because every other supreme court listed in figure 1 has more autonomy over its docket compared to Denmark. Unfortunately, our data cannot really address this question because our study is focused on one country. However, we do investigate some other possible institutional explanations.

Case complexity can influence dissent rates, though how one measures case complexity is not straightforward. One might be tempted to consider opinion length as a measure of case complexity. After all, the more complex a case is, the more explaining justices may have to do.

17. These two cases deal with Article 6 of the ECHR and actually derive from the same set of facts regarding the bankruptcy of some housing cooperatives and the question of impartiality of a high court judge (at the Sø- og Handelsrettens court) after he made some comments off the bench. There was no dispute over the legal interpretation and rules of the ECHR—all judges signed off on the general guidelines. However, the dispute came in the application of the ECHR to the facts. Yet the lone judge who dissented in the case did not specifically raise the topic of the ECHR in her dissent but instead focused on the facts surrounding the judge's actions and whether she thought such actions were impartial.

The word count in the opinions in our study, after excluding the number of words in a dissenting opinion, correlates highly with dissent. The problem with this measure in terms of the causal arrow, however, is that dissenters' behaviors may be causing the majority to write a lengthier opinion in order to justify their decision (Zahle 2007; Epstein, Landes, and Posner 2011). One could count the number of legal issues addressed in a case (Hettinger, Lindquest, and Martinek 2006). However, in the context of the Danish Supreme Court, this method could leave out other issues considered by the justices but not included in the opinion (see Zahle 2007).[18]

There are other measures of case complexity (Hettinger, Lindquest, and Martinek 2006). For example, Bentsen, Grendstad, Waltenburg, and Shaffer (2019) develop a measure based on the length of time the Norwegian Supreme Court sets for oral argument. When a case is more complex, the justices set aside a larger block of time. Unfortunately, we do not have that level of information for Denmark. However, the Danish Supreme Court does have a rule that allows the Court to take cases by written submission only—with no oral argument (Retsplejelovens§387). We assume that while more complex and controversial cases are set for oral argument, cases that are either of lesser importance or of less complexity are considered by written submission. This method is rather more blunt than measuring allotted time for oral argument, but it does have some value. The Danish Supreme Court set twenty-five cases for written submission during our period of study. Table 4 provides a breakdown of dissents in cases with oral argument versus written submission. We find that every single case slated for written submission is decided unanimously in our data. In other words, cases that are more complex engender more dissent, a phenomenon found in other courts in other countries.

	No Oral Argument	***Oral Argument***	***Final decisions on the merits (Dom cases)***	***Preliminary procedural cases (Kendelse cases)***
Unanimous decisions	25 (100%)	204 (91%)	118 (90%)	53 (95%)
Cases with dissents (% of cases by topic with dissents)	0 (0%)	21 (9%)	13 (10%)	3 (5%)

Table 4. All cases from Jan 2014 to April 2015 divided by institutional factors

Another potential useful measure of both case complexity and case salience is the size of the panel. For each case heard in the Højesteret, the standard panel size is five judges, but the panel size can vary greatly sometimes. In our data, panels range from as few as three judges to as many as nine.

18. Zahle (2007) notes that the scope of a Danish Supreme Court opinion is not necessarily representative of all the issues considered by the justices.

If a case is important or complex, the Court might assign nine justices. If the case is not complex or is less important (particularly for cases that are preliminary in nature), then the Court may only assign three judges. Cases with more judges may increase dissent rates because they are more important or more complex or simply because there are potentially more judicial opinions that one has to accommodate as the panel size grows. Our results illustrate that not a single dissent occurs in the three-judge panels. On the other hand, as one increases from five judges onward, the pattern is less clear.

Another institutional factor that could influence dissent is whether the case is a preliminary procedural question (*kendelse* case) or a final decision on the merits (*dom* case). We find in our cross tabulations that there is some difference in levels of dissent, with *dom* cases containing higher rates of dissent (see table 4). However, our logistic regression results—when statistically accounting for the host of factors potentially causing dissent in the Danish Højesteret—do not show this variable as obtaining traditional levels of statistical significance.

Finally, we also examine whether dissents in the Supreme Court are related to the three high courts from which the case originates. For example, might cases from the Maritime and Commercial Court create more dissent than cases from the Western or Eastern High Courts? In the end, we found no statistical difference in levels of dissent when considering the location of the lower-court opinion.

These cross tabulations can be helpful in understanding which factors influence dissenting behavior, but multiple regression models provide a more robust method of determining whether any of the relationships we observe in the cross tabulations are statistically correlated after accounting for other potential independent variables. In other words, a multiple regression model can more accurately pinpoint whether a statistical relationship exists between the independent variables and dissenting behavior. In this study, because our dependent variable—whether the judge dissents or agrees with the majority opinion—is dichotomous, we employed a logistic regression model to determine what factors predict dissent. Of all the factors considered in our statistical model, the only variable that showed statistical significance was whether the cases involved ECHR issues. Cases involving the ECHR were positively and significantly related to dissent. None of the other factors considered in the model were related at traditional levels of statistical significance, though panel size and *dom/kendelse* cases came close to being statistically significant.[19] In short, many of the traditional factors that might explain dissent in a court showed

19. In this logistic regression model, we tested variables to account for the judges' characteristics (whether the judge was born in greater Copenhagen or in the periphery, the gender of the judge, the seniority of the judge on the court in number of years served, and whether the judge had background experience in public or private practice or as a law professor), types of legal cases heard by the Court (whether the case involved ECHR issues, EU law issues, tax issues, labor issues, or

no statistical relationship here in Denmark. However, because the Danish Supreme Court is so collegial and there is so little variance in the judicial votes on dissent, it perhaps is unlikely that one might find very many factors that statistically predict dissent on the Danish Supreme Court.

Conclusion

The findings in this chapter demonstrate that the Højesteret is a very collegial judicial body. Rates of nonunanimous decisions from January 2014 to April 2015 constituted less than 10 percent of the cases. The primary factor that engendered dissent appeared to be ECHR cases. Case complexity and case salience, if measured by whether the Court held oral arguments in the case, also appear related to dissent levels. The Danish Supreme Court registered no dissents in our period of study concerning cases submitted in writing without oral argument.

Given the level of collegiality, it is perhaps not surprising that the Danish periodical *Mandag Morgen* reported in 2009 that the public institutions for which citizens have the most confidence are the Danish courts (Danish Court Administration 2010, 2015).[20] These low rates of dissent are akin to figures in some US circuit courts of appeal as well as some US state supreme courts. Commentators and political scientists often talk about the consensual nature of politics in Denmark and other Nordic countries (Lijphart 1999). As Danish legal scholar Henrik Zahle writes, "There is a tacit but efficacious effort towards agreement" in the Højesteret (2007, 571–572). Yet though US appeals courts have similar levels of agreement, it is unlikely that such remarks about consensual political behavior would be made about them.

Are these low dissent rates explained by the Court's lack of docket control? It is important to remember that unlike some state supreme courts or the US courts of appeal, there is no automatic right by Danish citizens to appeal to the Højesteret. Though the Højesteret cannot

contract disputes), as well as institutional factors (which high court the case was appealed from, the size of the panel on the Supreme Court hearing the case, and whether the case was a final hearing on the merits of the case [dom cases] or whether the case was a preliminary procedural issue [kendelse cases]). The variable on whether the Court held oral arguments or instead considered written submissions could not be included in the regression model because there was a perfect correlation between the holding of written submissions and the absence of a dissent (see table 4).

20. It must also be noted, not surprisingly, that this 2009 poll was promoted by a document published by the Danish Court Administration. In a later 2015 publication of this pamphlet, the Danish Court Administration cited research in 2014 by the Ministry of Justice, which claimed that among forty-seven European countries, citizens of Denmark had the highest level of confidence in their courts.

control its own docket, the Procesbevillingsnævnet exercises this role for cases that are not being appealed from a court of first instance.[21] The Procesbevillingsnævnet presumably acts as a gatekeeper in order to allow only the most important cases or cases with special circumstances into the Højesteret's chambers. Frivolous appeals should thus only rarely arrive at the Højesteret's doorstep. Nevertheless, even if most cases accepted by the Procesbevillingsnævnet are not frivolous, a lack of docket control by the Court means that the Court does not have the authority to choose cases it finds interesting or significant or to control its own workload. The judicial appointment process could also play a role in high collegiality levels. The judges themselves have significant influence when it comes to who they accept onto the Court. In conclusion, while our study cannot rule out the possibility of a consensual politics unique to Denmark, the institutional structures of the Court provide a reasonable explanation for its collegiality.

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Class Activity

Questions for Consideration Using the dataset included with this article. Refer to the codebook for help in manipulating the dataset. (https://github.com/osuoer/open-judicial-politics/raw/master/McKenzie,%20Bentsen,%20Skiple-data.xls)

1. How often do judges dissent in relation to the size of the panel?
2. How often do cases with dissent arise in each month of the dataset?
3. What are dissent rates in cases that originate from the various high courts of Denmark?
4. ECHR cases have significantly higher levels of dissents. Which high courts do these cases originate from?
5. Cases that occur under written submission, with no oral argument, garner no dissents in our dataset. What kinds of legal cases does the Supreme Court slate for written submission?
6. Workload could be a factor in dissents. Judges who are busy may not have time to write dissents. Using the dates of the cases in the dataset, do judges who dissented have many cases assigned to them within the previous month?

CODEBOOK: DANISH SUPREME COURT DATABASE

Variable name	Description
courtcase	This is the name of the parties in the Danish Supreme Court proceeding.[i]
case_no	Unique number for each case
case_year	Year case is decided at the Supreme Court
date_of_case	Date case is decided at the Supreme Court
ufrnumber	UfR (Ugeskrift for Retsvæsen) journal reference number for each case (example: **U.2015.1H**)[ii]
citation	Citation number for cases at the Danish Supreme Court website[iii]
Case	Each separate case in the data is represented by a 1
HighCourt	Lower court from where the case came on appeal to the Supreme Court: Østre = Eastern High Court; Vestre = Western High Court; Sø- og Handelsretten = Maritime and Commerical Court; Grønlands Landsret = Greenland High Court
Eastern_High_Court	1 = Eastern High Court; 0 = Otherwise
Western_High_Court	1 = Western High Court; 0 = Otherwise
Maritime_Commercial_Court	1 = Maritime and Commerical Court; 0 = Otherwise
Greenland_High_Court	1 = Greenland High Court; 0 = Otherwise
Case Factors	
dom_kendelse	1 = Dom (judgments or final merits) and 0 = Kendelse (orders)[iv]
No_oral_arguments387	1 = Cases taken by written submission under Rule 387; 0 = Cases heard in oral argument
panel_size	The size of the panel that heard the case. In this study, the panels varied in number between 3, 5, 6, 7, and 9 judges
dissent_cases	1 = Cases that contained at least 1 dissent 0 = Unanimous decisions
word_count	The number of words in the majority opinion
ECHR	1 = European Convention on Human Rights issue; 0 = otherwise
EU_law	1 = European Union legal issue; 0 = otherwise
Precedent	1 = Precedent from a previous Danish Supreme Court case mentioned in the opinion; 0 = otherwise

Variable name	Description
tax_case	1 = Tax issue; 0 = otherwise
crime_issue	1 = criminal case; 0 = civil case
Labor_case	1 = case dealing with labor law issues; 0 = otherwise
free_speech	1= free speech issue; 0 = otherwise
contract_dispute	1= contract dispute; 0 = otherwise
Judge Factors	
Judge_no	These are the unique numbers we assigned to represent each judge on the court
votedissent1	1 = when a particular judge dissents in the case; 0 = when a particular judge votes with the majority
BIRTHYEAR	This represents the year of the judge's birth. The judge's relative age can be found by subtracting the BIRTHYEAR variable from the case_year variable
CENTRE_PHERIPHERY	1 = Judge was born in Copenhagen or on the Island of Zealand, representing the Greater Copenhagen 0 = Judge was born in the periphery of the country outside the vicinity of the capital city.
GENDER	1 = Male judge; 0 = Female judge
APPOINTMENT_YEAR	This year represents the date that the judge was appointed to the court
PRIVATE	1 = if the judge had any previous private practice experience; 0 = otherwise
PUBLIC	1 = if the judge had any practice experience in government; 0 = otherwise
JUDGE	1 = if the judge had any previous experience as a lower court judge before ascending the bench to the Supreme Court; 0 = otherwise
MINOFJUST	1 = if the judge had any previous experience working in the Ministry of Justice; 0 = otherwise
LAWPROFESSOR	1 = if the judge had any previous experience as a law professor; 0 = otherwise

i. The appellant's name is always listed first. However, keep in mind that this particular dataset does not contain any coding for cross-appeals (cross-appeals are when multiple parties appeal the judgment from below).

ii. Ugeskrift for Retsvæsen is a weekly law journal published by a private company called the Karnov Group. The Supreme Court assists in editing the section containing the Supreme Court cases. This number is the reference number used by the Court when it refers to past precedent in a decision.

iii. Each case appealed to the Danish Supreme Court is given a number. This number distinguishes the case and is also used by the Danish Supreme Court website. The Danish Supreme Court's website, where it maintains a publicly available dataset for approximately the last 10 years of cases, is located at http://domstol.fe1.tangora.com/S%C3%B8geside—H%C3%B8jesteretten.31488.aspx

iv. Technically speaking, there are several different types of orders, with kendelse representing only one type of order; however, all of the orders in this dataset are interlocutory in nature (i.e. preliminary), and the vast majority of them are in fact kendelse. Consequently, for the sake of simplicity, we refer to all orders as kendelse.

24. At the Intersection of Law and Identity

Immutable Characteristics, Voter Preferences, and Strategic Voting on State Supreme Courts

AIDAN GONZÁLEZ, BAILEY R. FAIRBANKS, AND SHANE A. GLEASON

In 1992, Leah Wards Sears became the first Black woman to serve on the Georgia Supreme Court. While Sears was frequently mentioned on President Barack Obama's shortlists for US Supreme Court vacancies, she faced serious electoral challenges in a state where nonpartisan state supreme court races are generally sleepy affairs. This is perhaps best illustrated by the Georgia Republican Party and the Georgia Christian Coalition's campaign to unseat Sears in 2004. This campaign was prompted by Sears's frequent dissents in criminal procedure cases, especially death penalty cases.[1] Sears won reelection handily with 62 percent of the vote and was soon elevated to the chief justiceship by her colleagues. But the concerted effort against her underscores the electoral consequences of decisions that do not align with voter preferences (e.g., Brace and Boyea 2008; Curry and Romano 2018). Since justices on almost all state supreme courts must face voters in some fashion periodically,[2] they engage in strategic behavior to ensure voters give them another term on the court (e.g., Baum 1994; Hall 1992). We argue this strategic behavior is shaped, in particular, by justices' overlapping identities.

Rooted in the idea of judicial accountability (e.g., Bonneau and Hall 2009; Brace and Boyea 2008; Devins and Mansker 2010; Fernandez and Husser 2020), judicial elections prompt justices to strategically alter their votes to be more in line with voter preferences (Hall 1992; Romano and Curry 2018). But not all justices are equally strategic (e.g., Baum 1994). While any number of things might predict strategic behavior (e.g., Hall 2018; Murphy 1964; Peltason 1971), recent studies find it often turns on immutable characteristics such as race or gender (e.g., Collins and Moyer 2008; Nguyen 2019). There is an extensive literature finding diverse justices decide differently from their White and male counterparts in some issue areas and under certain conditions (Collins et al. 2010; Haire and Moyer 2015; Kastellec 2013; Scheurer 2014). However, most studies focus on race or gender; rarely do they explore the intersection of minority statuses.

1. See, for instance, *Wilson v. State*, 271 Ga. 811 (Ga. 1999); *Fox v. State*, 272 Ga. 163 (Ga. 2000); *LaFontaine v. State*, 269 Ga. 251 (Ga. 1998); *State v. Davis*, 283 Ga. 438 (Ga. 2008); *Wilson v. State*, 271 Ga. 811 (Ga. 1999); and *Green v. State*, 266 Ga. 439 (Ga. 1996).
2. Justices in Massachusetts, New Hampshire, and Rhode Island serve for life or until a specified age (usually around seventy).

When existing studies examine female judges they typically mean White women; when they look at Black judges, they usually explore Black men. This is problematic, as a number of studies note overlapping identities create altogether different patterns of behavior (e.g., Crenshaw 1989, 1991; Dowe 2020; Szmer et al. 2015). Ultimately, one of the most fundamental questions in judicial behavior is how a justice's characteristics shape her behavior. If scholars are to answer that question, it is imperative to account for how intersecting identities contribute to voting on state supreme courts.

In this chapter, we explore whether intersectional justices strategically alter their decision-making calculus in election years to account for voter preferences. In doing so, we draw on classic studies of state supreme court justice decision-making which find strategic behavior increases as elections approach (Hall 1992) and literature stressing minority candidates are more strategic and sophisticated than their less diverse counterparts (e.g., Milyo and Schosberg 2000; Nguyen 2019) because of their lived experiences (Anzia and Berry 2011; Fox and Lawless 2005). We test our expectations by analyzing all nonunanimous criminal procedure cases from twelve state supreme courts from 1995 to 2005. We draw on a number of datasets (Fairbanks 2020; Windett and Hall 2013) supplemented with original data collection on election proximity for all 109 justices who served in this time period. We find support for our expectations. Our chapter proceeds in several parts. First, we detail our theoretical expectations. We then overview our data and operationalization. We subsequently present our results. We then discuss our findings in the broader context of the judicial politics literature and acknowledge the limitations of this study. We close with suggestions for future scholars who might build on our study.

Strategic Behavior, Election Proximity, and Justice Identity

Many factors go into judicial decision-making, not the least of which is public preferences. Even federal judges, shielded by life tenure, consider public preferences for the purposes of implementation (Fix et al. 2017; Johnson and Canon 1984), institutional legitimacy (Badas 2019; Christenson and Glick 2019), or the quality of their daily lives (Peltason 1971). Importantly, while the public can critique or ignore the decisions of federal judges (e.g., Dolbeare and Hammond 1971), they cannot actually harm the judge's continued tenure. This is not the case for state supreme court justices who must routinely face voters to secure another term. The precise electoral mechanism varies from state to state. Some justices face voters in competitive (non)partisan elections. In those using the Missouri Plan, voters answer a yes/no question on the ballot about whether the justice should get another term. In a handful of states, the state senate votes on whether the justice should remain on the bench (Goelzhauser 2018). If we accept that elected

officials would like to remain in office (Mayhew 1974), justices must pay attention to voters and their preferences (e.g., Fernandez and Husser 2020; Curry and Romano 2018).

Work on state supreme court decision-making repeatedly finds justices strategically alter their decision-making calculus in high profile cases as elections approach (see for instance: Brace and Boyea 2008; Hall 1992). This work finds much of its genesis in a 1992 study by Melinda Gann Hall; there Hall notes justices are more likely to vote to uphold death sentences in election years. While this may deviate from a justice's sincere preference, she must take care to ensure her decisions are in line with the voters, even if this deviates from personal preferences (Brace and Boyea 2008). The role of an impending election on strategic voting behavior is further underscored by another study examining judicial behavior in death penalty cases when all electoral restraints are removed.

Many states have mandatory retirement ages for their judges. Thus a subset of judges is (re)elected but face no future electoral pressures to consider voter preferences because their age precludes them from seeking another term. Hall (2014) finds these terminal-term justices vote more liberally in death penalty cases than similarly situated justices who are eligible for reelection. In tandem with Hall (1992), this provides strong evidence that justices strategically consider voter preferences as elections approach. But it is important to recall that justices vary in the extent of their strategic behavior (Baum 1994). Research on candidate emergence and campaigning, in judicial races and beyond, finds diverse candidates are often more strategic than their White and male colleagues (Fox and Lawless 2005; Milyo and Schosberg 2000; Nguyen 2019).

In order to face reelection, one must first ascend to the bench. Despite evidence voters prefer diverse justices (Arrington 2018) and do not electorally punish members of minority groups in some instances (Gill and Eugenis 2019), women are more risk-averse when deciding to run for office (Fox and Lawless 2005; Lazarus and Steigerwalt 2018). Indeed, women typically only commit to a race when they are well qualified (Milyo and Schosberg 2000; Nguyen 2019). This hesitancy to run helps explain why many diverse jurists initially take the bench through appointment (Bratton and Spill 2002; Goelzhauser 2020). But even if a justice is initially appointed, she must soon face the voters to continue her tenure. In anticipation of that and subsequent elections, she will likely engage in strategic behavior.

It is, of course, important for us to note that not all members of a given group have the exact same experience; nor is any group monolithic. Ruth Bader Ginsburg and Amy Coney Barrett are both women but have very different views on the law. Likewise, Thurgood Marshall and Clarence Thomas, the only two African Americans to serve on the US Supreme Court, are ideologically distant from each other. However, the fact remains, immutable characteristics contribute to unique experiences that may prompt a different way of looking at the world than one who has not lived that life (e.g., Boyd 2016; Norgren 2018).

Female state supreme court candidates are, on average, more strategic than their male

counterparts (Nguyen 2019). This can be partially attributed to the Jackie (Jill) Robinson Effect (Anzia and Berry 2011). Briefly, diverse officeholders, much like Jackie Robinson when he joined the Brooklyn Dodgers in 1947, have to be twice as good to be considered half as good. To this end, female state supreme court justices are more likely to receive discretionary citations from their peers on other courts (Gleason et al. 2020). In the current context, women and racial minorities are more strategic and should be more inclined to think about how their decisions could impact their fortunes on election day. But questions remain about women who are also racial minorities. Existing research suggests overlapping minority statuses should make these intersectional justices even more strategic.

Intersectionality and Strategic Decision-Making

The scholarship on diversity in judicial decision-making usually looks at women or racial minorities (see, for instance, Boyd et al. 2010; Haire and Moyer 2015; Kastellec 2013; Walker and Barrow 1985). However, what of jurists like Justice Sears who are both female and a racial minority? To this end, Crenshaw (1989) introduces the concept of intersectionality, which occurs when an individual has multiple intersecting minority statuses.[3] Intersectional identities create experiences that cannot be fully captured by just one minority status. Crenshaw (1991) examines the experiences of a Black woman pursuing employment discrimination litigation in the 1980s. At the time, the law allowed for discrimination claims on the basis of gender or race, but not both simultaneously. While there have been gains in recent years, intersectional discrimination claims remain "complex" and complicated by both structural and ideological factors (Mayeri 2015). This makes it difficult to impossible for a Black woman to fully articulate her experience at the intersection of two minority identities. Importantly for our purposes, Crenshaw's (1991) example plays out repeatedly in a growing body of work on intersectional judges.

In the last fifteen years, the number of intersectional judges on state supreme courts has grown rapidly, but they still make up a small percentage of the bench (Goelzhauser 2020). Against this backdrop, there are a small but growing number of studies looking at intersectionality in the legal profession broadly and the judiciary specifically. These studies generally find intersectional identities lead to distinct patterns of strategic behavior. Intersectional attorneys have higher levels of perceived discrimination (Collins et al. 2017), which necessarily results in a more difficult path to the bench. However, after intersectional lawyers ascend to the state trial court bench, they

3. While the potential number of intersectional identities is boundless, we focus here on one of the most common types of intersectional identities, race and gender.

are more ambitious than their counterparts (Jensen and Martinek 2009). Should this ambition lead them to the state supreme court, intersectional justices are more likely to support criminal defendants than their nonintersectional counterparts (Collins and Moyer 2008).

Other research indicates intersectional justices exhibit a distinct judicial style sooner than their unidimensional minority colleagues. Early studies of judicial diversity find women and racial minorities decided similarly to their White and female counterparts under most conditions (e.g., Songer et al. 1994; Songer and Crews-Meyer 2000; Walker and Barrow 1985). However, once women obtain a considerable number of seats on a given court, they exhibit a distinct decision-making style (e.g., Collins et al. 2010; Scheurer 2014). While intersectional justices are few in number (Golezhauser 2020; Szmer et al. 2015) note that intersectional justices take on a distinct decision-making style even when occupying a token number of seats on a court. This underscores that intersectional identities prompt a different strategic calculation than that employed by women or racial minorities. Thus, much as Crenshaw (1991) argues race or gender cannot fully capture the experiences of Black women filing suit, we contend existing accounts of strategic behavior by justices must likewise account for intersectional identities.

For over half a century, scholars have repeatedly found judicial behavior is partially based on a judge's experiences (see, for instance, Boyd et al. 2010; Glynn and Sen 2015; Pelatson 1971). Importantly, experiences are shaped by identities and their intersection (Crenshaw 1989, 1991; Haire and Moyer 2015; Norgren 2018). To this end, accounts of strategic behavior on state supreme courts must account for justice identities and their intersection. We explore this in the context of vote direction as elections approach. We expect to find that while women and minority justices will more strategically consider voter preferences in election years than their less diverse counterparts (e.g., Nguyen 2019), intersectional judges will be the most strategic and exhibit the most attention to voter preferences (Crenshaw 1989, 1991).

Data and Methods

We evaluate our argument with a dataset of all nonunanimous criminal procedure cases from 1995 to 2005 for the states of Alaska, California, Georgia, Illinois, Louisiana, Maine, Michigan, Oregon, Pennsylvania, South Dakota, Vermont, and West Virginia (Windett and Hall 2013). These states are advantageous as they represent a cross-section of state supreme courts with respect to selection mechanism. Additionally, Fairbanks (2020) compiles demographic information on all justices who sat on these courts over the period of our study. This allows us to account for justice race, gender, and length of tenure. Using Kritzer's (2015) data on state supreme court elections, we note the

years in which each jurist faces voters. We ultimately are able to analyze 4,518 justice votes across 776 cases.[4] We now turn to a more in-depth account of how we construct our data.

Hall (1992) finds justices usually vote to uphold death sentences in election years. Thus we use the direction of the justice vote to serve as our dependent variable. This means we need to know whether a justice's vote in a given case is liberal or conservative. Unfortunately, Windett and Hall (2013) do not include a measure of ideological direction in their dataset of state supreme court decisions. However, we are able to create one by utilizing a unique feature of criminal procedure cases; the accused is always liberal and the state actor is always conservative (Gleason and Provost 2016; Segal 1984). Accordingly, we write a text crawler to search the petitioner and respondent variables for words typically associated with the state or law enforcement. Sample words include *state*, *probation*, *sheriff*, and *warden*. Using this technique, we are able to determine which of the two parties represents the state and is therefore the conservative party.[5] We then use the disposition, or summary, variable to determine whether the Court ruled for the petitioner or the respondent. If the justice supports the criminally accused, she has cast a liberal vote and therefore the dependent variable takes on a value of 1. Should she support the state, she has cast a conservative vote and the dependent variable is set to 0.

Our primary independent variables exist on the justice level. We employ two of Fairbanks's (2020) dichotomous identity markers. We set a gender variable to 1 if a justice is female, 0 otherwise. In a similar fashion, we set a race variable to 1 if a justice is Black; 0 otherwise. Since we posit that intersectional judges approach judging differently, we multiply our race and gender variables together. This takes on a value of 1 for Black female justices and 0 for all other justices. We also note if each vote is cast in a year in which the justice faces reelection. We do so via Kritzer's (2015) data on state supreme court elections. This variable is set to 1 if it is an election year for a given justice, 0 otherwise.[6]

We utilize Berry et al.'s (1998) ideology scores to note voter preferences. This measure, updated continuously since its initial release in the late 1990s (e.g., Berry et al. 2010), has two scores for state political preferences: one for citizens and another for state institutions. For each justice,

4. We exclude senior status justices and lower court judges sitting by designation.
5. In a small number of cases, neither of the party names is readily associated with the state. In these instances, we read the procedural history for the case for clues as to which party is the state. Additionally, in a small number of cases, particularly those that are cross appealed or those that have names such as *Ex parte Smith*, we are unable to determine which party is liberal or conservative. We exclude those cases from analysis.
6. Kritzer (2015) only includes data on states where justices are selected via (non)partisan or retention elections. For states in our data where justices are appointed, we utilize state court websites to determine when each justice was next due to face the state senate for reappointment.

we use the score that corresponds to the voters that will decide continued tenure in office. For justices reelected by (non)partisan or retention elections, we utilize the citizen score. For justices retained by the state senate, we employ the state institutions score. The scores range from 0 to 100 with higher values being more liberal. Since we argue strategic behavior is the product of the interplay between identity, election proximity, and voter preferences, we interact with all three variables. That is to say, we multiply our three primary independent variables together. Since we are interested in three separate identities, Black justices, female justices, and Black female justices, we create three interaction terms. The first is (Black justice X election year X voter ideology). The second is (Female justice X election year X voter ideology). The final one is (Black female justice X election year X voter ideology). These are our primary independent variables.

We also include a number of control variables suggested by the prior literature. Since different selection mechanisms tend to attract different kinds of jurists (e.g., Brace and Boyea 2008; Bratton and Spill 2002; Goelzhauser 2020; Hurwitz and Lanier 2003) and can even change a justice's strategic calculation as she heads into reelection (Curry and Romano 2018), we include two variables. The first is set to 1 for justices who are retained via (non)partisan elections and 0 for all others. The second variable denotes justices retained via retention elections. This is set to 1 for justices in Missouri Plan states; 0 for all others.[7] Since justices who are in their terminal term because of age restrictions are less likely to consider voter preferences (Hall 2014), we include a dichotomous marker set to 1 if the justice is ineligible to run for another term because of age (Fairbanks 2020).

A justice sitting on a less professionalized court, which is to say one with a heavy docket, less support, more mandatory cases, or less pay, may be inclined to deal with cases in the most routine manner. Accordingly, we include a measure of court professionalism (Squire 2008). Since a longer tenure likely results in more efficient writing, we include a measure of the total number of years a justice is on the bench (e.g., Savchak and Bowie 2016). Finally, ideology is one of the most powerful predictors of judicial decision-making (e.g., Brace et al. 2000; Segal and Spaeth 2002). As such, we include a measure of judicial ideology (Bonica and Woodruff 2015).[8]

Since our dependent variable is binary, we employ a logit model. Moreover, since it is possible that

7. We also run a control mode where we remove the competitive election variable and replace it with an appointment variable. This does not change our results.
8. There are several measures of state supreme court justice ideology (e.g., Windett et al. 2015; Bonica and Woodruff 2015; Brace, Langer, and Hall 2000). We utilize the cfScore measure developed by Bonica and Woodruff (2015). We also run an alternative specification where we utilize the ideology scores developed by Windett et al. (2015). No matter which approach we use, our results are substantively the same.

idiosyncratic characteristics of each court may shape the decision-making process (e.g., Kritzer 2015), we cluster our standard errors on the state. We now turn to our results.

Results

We find some limited evidence that Black justices are more strategic in election years. We find no evidence female justices engage in this calculus. However, we find strong evidence that intersectional justices strategically consider voter preferences as elections approach. Our results underscore that while identity is a powerful predictor of behavior on state supreme courts, not all identities operate in the same way. Indeed, intersectional identities shape judicial decision-making differently than a given identity in isolation. We now turn to a detailed discussion of our results.

Our results are presented in table 1. An initial glance at the results indicates that Black justices are more likely to vote liberally. Female justices are less likely to vote liberally. Black female justices, for their part, are more likely to vote liberally. It also appears that voter preferences and election-year decisions do not have an impact on the probability of a liberal vote. However, it is important to remember that we argue that identity, voter preferences, and election proximity *operate in tandem*. That is to say, we cannot evaluate our expectations without considering all three independent variables *at the same time*. For this we must look to our interaction terms.

Typically, we assess a hypothesis by "star gazing" at the table and looking for stars next to our variable of interest. If we do that for the interaction terms, we might conclude Black justices and Black female justices are more mindful of voter preferences in election years, but female justices overall are not. This approach to quickly assessing statistical significance does not work for interaction terms because interaction terms have to consider all possible combinations of all the variables included in the interaction. Fortunately, interaction terms can be easily assessed via a graphical plot (Brambor et al. 2006).

Variable	Coefficient	Std Error	
Black justice	4.086	(1.186)	***
Female justice	-0.902	(0.529)	*
Black female justice	3.336	(1.77)	*
Voter ideology	--0.001	(0.008)	
Election year	0.014	(0.533)	
Black justice X voter ideology	-0.072	(0.021)	***
Female justice X voter ideology	0.020	(0.012)	*
Black female justice X voter ideology	-0.072	(0.034)	**
Black justice X election year	-1.834	(0.561)	***
Female justice X election year	1.199	(0.743)	
Black female justice X election year	-7.812	(0.864)	***
Black justice X voter ideology X election year	0.033	(0.013)	**
Female justice X voter ideology X election year	-0.020	(0.018)	
Black female justice X voter ideology X election year	0.182	(0.016)	***
Retain by contested election	-0.913	(0.419)	**
Retain by retention election	-0.396	(0.439)	
Mandatory retirement	-0.070	(0.285)	
Court professionalism	0.130	(0.407)	
Tenure	-0.005	(0.018)	
Justice ideology	0.071	(0.172)	
Constant	0.613	(0.569)	
N	4518		
Area under ROC	0.611		

Table 1: Predictors of justice liberal vote in non-unanimous criminal procedure cases

Standard errors clustered on state

*** = 0.01

** = 0.05

* = 0.10

We create three separate three-way interaction plots, one for each of the interaction terms. In each, the first panel displays the interaction in nonelection years, the second panel displays election years. The y-axis displays voter preferences, with higher scores representing more liberal

electorates. The x-axis shows the impact of justice identity on the probability of casting a liberal vote. That is to say, higher values reflect a probability that the justice's identity will shape the propensity to vote liberally. The solid sloped line represents the effect of the justice race on the probability of casting a liberal vote *at that particular value of voter preferences*. A positive slope means that as the liberalism of the voters goes up, the more likely justice identity is to shape the decision to vote liberally. A negative slope means that as voter liberalism goes down, identity has less of an impact on the justice's decision to vote liberally. Importantly, at y = 0, there is a reference line. Should the dashed lines, which represent the 95 percent confidence intervals, include the reference line, the interaction is not significant at that particular value of voter ideology.

We now turn to interpreting the interaction figures. Figure 1 shows the interaction for Black justices. In the first panel, which represents nonelection years, we find as voters become more liberal, the justice race has a diminishing effect on predicting Black justice liberal votes. Importantly, once voter preferences pass approximately 50 (which is a pure moderate), voter preferences cease to predict Black justice liberal voting (as the dashed lines include the reference line). We note much the same in election years in the second panel. This suggests that in both nonelection and election years Black justices' liberal votes are shaped by voter preferences; but only when the voters are more conservative.

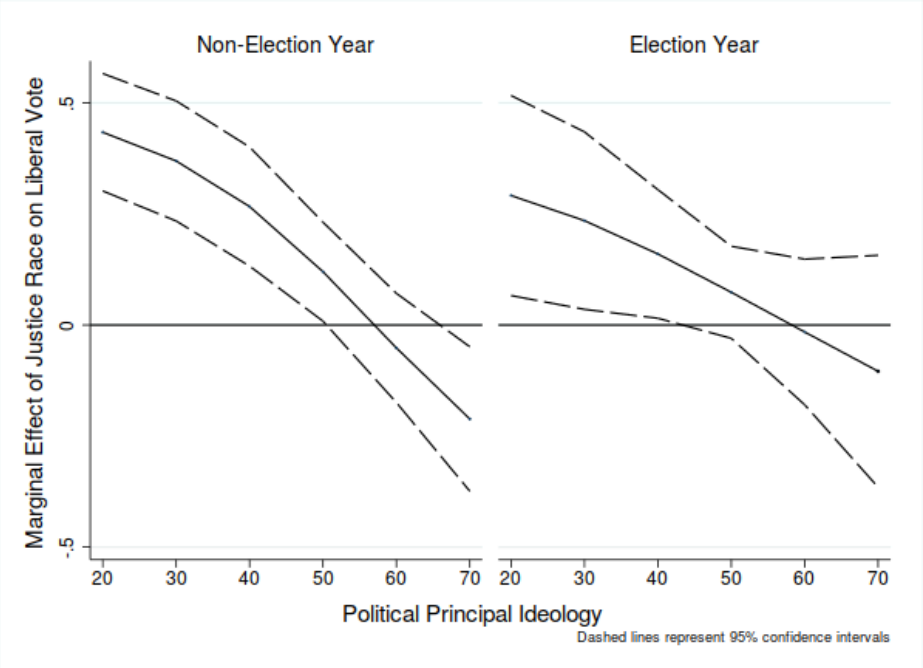

Figure 1: *Interaction between election year, justice race, and voter liberalism*

In figure 2 we evaluate the interaction term for female justices. The layout and interpretation of the figure are the same as in figure 1. In both nonelection years and election years, we note the

dashed lines always include the reference line at y = 0.[9] This indicates identity does not shape female justice votes at any level of voter liberalism.

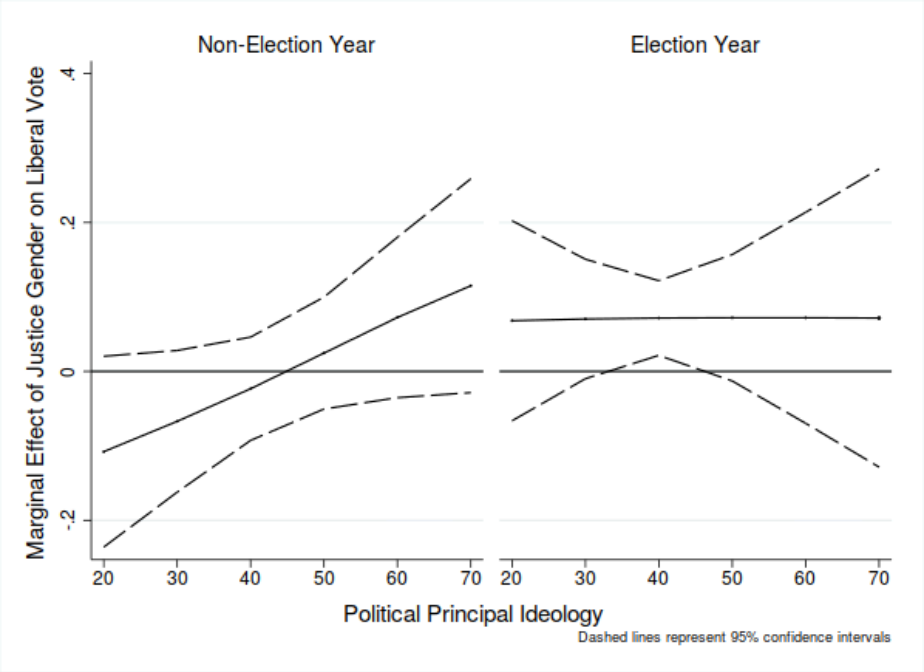

Figure 2: *Interaction between election year, justice gender, and voter liberalism*

Figure 3 displays the three-way interaction for intersectional justices. Looking first at nonelection years, we note Black women are shaped by voter preferences at the extremes. That is to say, Black women consider voter preferences when a state is quite conservative. As a state becomes more liberal, identity exerts less influence over Black female justices' votes in nonelection years. When a state is moderate there is no statistically significant effect. In election years, however, we find intersectional justices are highly strategic. When voters are conservative, Black women are less likely to vote liberally. As voters become more liberal, Black female justices become more likely to cast liberal votes. This demonstrates that intersectional justices are attentive to voter preferences in election years and provides support for our expectations that intersectional judges are more strategic than single-dimension minorities and all justices writ large. We also note one of our control variables reaches statistical significance. Justices retained by contested elections have a

9. In the election year panel, the reference line is excluded briefly from a voter liberalism score of approximately 35–45. However, given the effect line is largely flat, we feel confident in saying that voter preferences do not meaningfully shape female justice voting in election years.

predicted probability of casting a liberal vote of 0.22 lower than their peers retained by other means.[10]

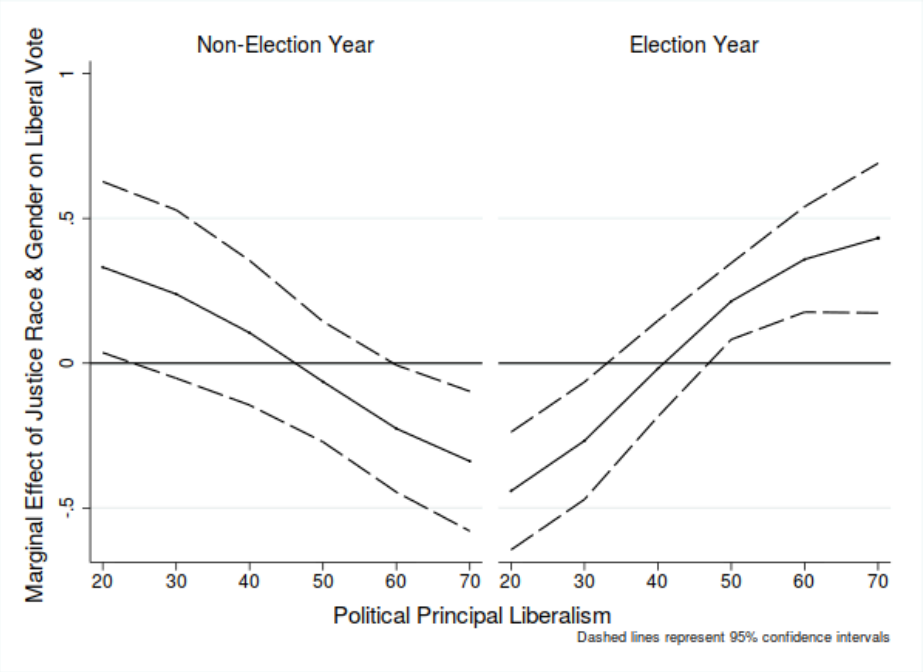

Figure 3: *Interaction between election year, justice intersectionality, and voter liberalism*

Discussion and Future Directions

Judicial decision-making is a strategic enterprise in which justices weigh a number of competing factors (e.g., Baum 1994; Maltzman et al. 2002; Murphy 1964; Spriggs and Wahlbeck 2002). Of course, strategic considerations are shaped by the context at hand (e.g., Campbell and Wilcox 2020; Peltason 1971). At state supreme courts, these considerations include the justice's continued tenure on the court, particularly as election time approaches (Hall 1992; Curry and Romano 2018). While retaining office is a powerful motivator (e.g., Mayhew 1974), not all justices are equally strategic. We demonstrate that strategic behavior is tied to justice identity.

Importantly, we note that not all identities are equally associated with strategic consideration of voter preferences. The most strategic justices are intersectional. Whereas Black judges appear to be strategic only when a state is quite conservative and women do not appear to be strategic in election years, we note that Black women are highly strategic. When the electorate is conservative she is less likely to vote liberally. As the voters become more liberal, she becomes more likely to

10. Since logit coefficients are unintuitive, we transform the coefficient to a predicted probability here.

vote liberally. This provides support for our expectations and underscores the importance of lived experiences; identities can often overlap and intersect in ways that create unique experiences and alter the strategic calculus (e.g., Crenshaw 1989, 1991). While our findings add to our overall knowledge of strategic behavior, they also pose a number of new questions brought on by both limits to our design and our results. In both instances, we encourage future scholars to more fully explore this topic.

Perhaps one of the primary limits to our study is the scope of our data. A future study, inclusive of the other 39 states and more recent terms, will allow scholars to produce a more nuanced understanding of how identity shapes judicial decision-making. This is particularly true as a number of scholars (Brace and Boyea 2008; Brace and Hall 1998; Curry and Romano 2018) stress that changing institutional context shapes the strategic considerations a justice enters into. In recent years elections have gotten more competitive (Hughes 2019, 2020; Kritzer 2015) and the ideological map has changed. To this end, we find Alaska in 2000 is the most conservative state (ideology score of 21.4). This is not surprising and is consistent with 2021 popular understandings of ideology. However, the most liberal state in our data is West Virginia in 1998 (ideology score of 70.7). This is surprising in the 2020s, an era where West Virginia is one of the most reliably "red" states. But in the late 1990s, it was still a Democratic stronghold. While we suspect the main patterns of our results would hold in the more contemporaneous and diverse landscape today, the contours of our results would change slightly.

Beyond the changing institutional and ideological map, one of the primary benefits to expanding the temporal scope of our data is the growing diversification of state supreme courts. While thirty-six Black women have served on state supreme courts from 1960 to 2016, twenty-two of them took the bench after 2005 (Goelzhauser 2020). Since our data stops in 2005, we are only able to analyze three intersectional justices. It is possible that our findings are the product of a Leah Ward Sears effect rather than an intersectionality effect. The addition of almost twenty additional intersectional justices would lend greater confidence to our findings and perhaps allow for further nuanced understanding of other overlapping identities.

Future studies should also look beyond criminal procedure cases. We adopt this restriction because Windett and Hall's (2013) data does not contain a direction variable. Given the rapid progress in state supreme court case-level data (e.g., Brace et al. 2000; Hall and Windett 2013), we are hopeful future scholars will expand analysis to other issue areas. This would be particularly valuable as the impact of identity on judicial decision-making is often issue area specific (e.g., Boyd et al. 2010; Songer et al. 1994). Relatedly, legal considerations often restrict the range of options available to justices in a given case (Epstein and George 1996). To this end, perhaps one of the largest limitations of our study is the omission of case-level legal factors from analysis, such as the presence of dissent on the intermediate court or whether the defendant alleges unconstitutionality (e.g., Segal 1984). We omit these factors from our model because our data

source does not include them. We are hopeful that future work will be able to take this into account.

Future studies might also look beyond the justice vote. While the justice vote is central to the study of judicial behavior, it is hardly the only activity of interest. Justices ultimately justify their view in written opinions. Importantly, opinions can be written to avoid retribution during retention (Curry and Romano and 2018). Scholars already know intersectional justices are more likely to pen dissenting opinions than their nonintersectional peers (Szmer et al. 2015). Might, however, electoral proximity alter the extent to which justices dissent? Drawing on recent work analyzing the content of opinions (e.g., Corley 2008; Fix and Fairbanks 2020; Fix and Kassow 2020), we suspect justices may temper the language in their opinions as elections approach (e.g., Bryan and Ringsmuth 2016). Particularly as data on state supreme court decisions are becoming increasingly available, we encourage future scholars to more fully explore this topic.

Opinions are further complicated by the back-and-forth that occurs between coalition members (Maltzman et al. 2002). While dissents can be solo affairs, in closely split cases dissent authors often hope to seize the majority. A robust literature explores how justices accommodate or reject requests from their colleagues in crafting opinions. While the literature indicates women are more conciliatory and collaborative (Bear and Woolley 2011; Boyd 2016), there is evidence that intersectional jurists are more likely to break from the group and stand alone in dissent (Szmer et al. 2015). Given these dynamics, we encourage future scholars to more fully explore what we suspect is the highly nuanced relationship between identity and coalition formation.

Building upon expansive work on race and gender, we contribute to the small but growing scholarship on intersectional state supreme court justices. We find intersectional justices are strategic in ways different from Black justices and women justices. While previous work explores this in the context of deciding to dissent, we have explored it here in the context of strategic consideration of electoral factors when casting votes in criminal procedure cases. Our results indicate intersectional justices are highly strategic. While our study has limitations, we encourage future scholars to revisit our results with more expansive data. We also encourage future studies to explore the new questions posed by our results here.

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Discussion Questions

1. The authors argue that justices' strategic behavior is shaped by their various identities. While the choice to use race and gender was guided by data availability, what other justice identities do you suppose might shape judicial behavior? How might they interact?
2. Think about your own identities. How do they alter the way you view the political world? The law? Your daily life?
3. Judicial decision-making is the product of political, legal, and strategic factors. However, because of limited data availability, the authors do not include legal factors in their model. How might this alter their results?
4. The authors use a compendium of data from the 1990s to the early 2000s. Since then diversity in regard to gender and race in the state courts has vastly improved. What impact do you think this has had on the interpretations of the law? Are there any particular issue areas that you think would have seen more of a change than others? Why?
5. While the authors focus on representation and identity in the judiciary in the state supreme courts, what effects do you think a more diverse representation at other courts, such as trial courts, will have on the law?
6. The focus here is on justices. While they are important, many other actors are present in the courtroom, ranging from lawyers to court reporters. How do you suppose diversity in these positions might have an effect?

Group Activity

Visit http://oyez.org and click on "Cases" and select a few cases from the list. Read through the "Facts of the case" and the "Question." Imagine you were a justice on that case and note your answer to the question. Then in a group with your classmates, discuss how you arrived at your answer. Even if everyone in your group agreed, did you arrive at your answers by different means? How did your various identities (be it as someone from an urban/rural area, a first-generation student, someone with a relative in a particular job, religious views, etc.) shape your thought process?

25. To Publish or Not Publish

Exploring Federal District Judges' Published Decisions

SUSAN W. JOHNSON, RONALD STIDHAM, KENNETH L. MANNING, AND ROBERT A. CARP

The federal district courts are the trial courts in the federal judicial system. Their rulings are available to the public through the *Federal Supplement*, the official publication for the federal district courts. The *Federal Supplement* does not include all decisions of the federal district courts; rather, its volumes include only those cases that are deemed sufficiently important for publication by the federal district court judge presiding over the case. Since many researchers rely on published cases as their data source, it is important to understand the motivation federal district court judges have in selecting certain cases for publication. The *Official Publication Guidelines* of the US Judicial Conference outline criteria for publication; however, whether a case meets the criteria is at the discretion of the presiding judge. This study explores patterns of federal district decision publication to determine whether and the extent to which judges rely solely on the official publication criteria when publishing their decisions. Understanding why judges publish some decisions but not others may be helpful in elucidating the overall trial court decision-making process and understanding factors that motivate judicial processes and behavior.

Prior Research on the Federal District Courts and Publication

As the major trial courts in the federal system, the US District Courts "represent the basic point of input for the federal judiciary and are the 'workhorses' of the federal system" (Carp, Stidham, and Manning 2010, 14). Roughly 10 percent of all decisions rendered in the federal district courts are published (Vestal 1970; Rowland and Carp 1996; Songer 1988). This small percentage presents several questions. Are those cases selected for publication representative of all decisions rendered by the federal district courts? What are the factors that lead to their selection for publication?

Formally, published opinions in the *Federal Supplement* are those "which are of general precedential value" (Songer 1988, 206). Because the *Federal Supplement* only publishes "those decisions which the judges themselves (or their clerks) regard as inherently significant and worthy," many scholars argue that decisions published in the *Federal Supplement* represent the major policy decisions of the federal district courts (Rowland and Carp 1996). In these cases, we expect judges to exhibit judicial discretion (Dolbeare 1969) and enact new legal policy. Published decisions are also important because practitioners suggest the *Federal Supplement* is the "means

by which the opinions of the district courts are made available to the legal profession" (Vestal 1966, 74). Thus it seems reasonable that publication in the *Federal Supplement* is a good indicator of the policy business of the federal district courts for both researchers and practitioners.

However, other scholarship argues that without examining unpublished decisions of the federal district courts, researchers cannot be sure that published decisions are representative of the entire business of the federal district courts. Songer (1998) questions the sole use of published decisions in judicial behavior research, finding that "there are a substantial number of unpublished district court decisions which cannot be assumed to be trivial" (Songer 1988, 213). Despite this criticism, Rowland and Carp (1996) contend that published cases constitute a random sample of all district court decisions and are of significant precedential and policy-making value. It is important that researchers understand the factors that lead to publication in order for them to conclude that judicial behavior research based solely on published decisions is representative of the entire decision-making patterns of the federal courts. Again, only one or two out of ten federal district courts decisions are published (Swenson 2004). If unpublished decisions differ substantially from published decisions, this could indicate that judicial behavior research based only on published decisions might be skewed and not offer an accurate or complete picture of judicial behavior. Judicial scholarship research does not often include unpublished decisions; these decisions are harder to obtain and more numerous, thus more difficult to process. To the extent that these unpublished decisions establish new precedents or solve politically salient issues of law, their omission from judicial behavior research may result in incomplete results and reduce our understanding or create misunderstandings of the policy-making function of the federal district courts.

Uncovering the factors leading to publication may shed more light on the question of whether published opinions are indeed those that are likely to be of a policy-making nature. Several studies utilizing various approaches have attempted to uncover the overall publication patterns of federal district court judges' opinions. In a study of opinion writing by federal district judges, Stidham and Carp (1999) find that publication rate per judge varies widely. Using data consisting of all published decisions from the Federal Supplement from 1933 to 1995, they found that of 1,589 judges, 25 had authored more than two hundred opinions over an average career spanning 23.5 years. They also found these judges tended to write more during the middle third of their careers, concluding that perhaps judges embark on a period of socialization during the first third of their careers, with greater propensity to publish written opinions as they gain more experience (Stidham and Carp 1999).

Other research suggests judge characteristics and workload affect publication. Taha (2001), analyzing a smaller sample of 188 decisions (55 published and 133 unpublished), finds that older judges, judges with political backgrounds, and those with higher ABA ratings are more likely to publish their decisions (Taha 2001). Taha (2001) also finds that higher caseloads result in lower

publication rates but does not find evidence of judges publishing as a means of advertising for elevation to a higher-level appellate court. Similarly, a study of appellate court judges' publication patterns finds they are not particularly strategic in their decision to publish (Law 2006).

Swenson (2004) finds that federal district court judges are more likely to publish when the case meets the criteria of the *Official Publication Guidelines* of the US Judicial Conference. Additionally, her research suggests that opinions are more likely to be published if powerful, well-placed litigants and their attorneys are parties to the suit. Swenson's findings suggest that these powerful, "repeat player" litigants (Galanter 1974), who have more resources and are better equipped to litigate based on their frequent use of the legal system, may implement a long-term strategy of "playing for the rules" as opposed to winning their cases outright as a short-term strategy (Swenson 2004). These litigants, she concludes, "would wisely treat publication of favorable precedent as part of their strategy" (2004, 126). These repeat player litigants are also more likely to be involved in more salient cases, thus increasing the likelihood that decisions in their cases would be among those that are published.

Swenson also finds that federal district judges are more likely to publish if their judicial circuit emphasizes a culture of publication over nonpublication (Swenson 2004). In some circuits, publication norms may be stronger than in other circuits (Swenson 2004). In fact, studies show that publication rates vary from one circuit to another, ranging from 10 percent by district courts in some circuits to closer to 50 percent in others (Mckenna, Hooper, and Clark 2000). A regional culture exists in the circuits that carries over to the federal district courts. Rowland and Carp (1996) note that district courts in different circuits "follow important sectional lines that mark off historical, social, and political differences that give them a distinctly regional character" (1996, 96). Thus circuit publication norms may influence the frequency with which federal district court judges publish their opinions.

Beyond socialization and experience, other factors potentially influence federal district court judges' publication decisions. Baum (1997) suggests that lower court judges concentrate on multiple goals simultaneously, unlike US Supreme Court justices who retain more discretion enabling them to focus solely on their policy-making goals. Such goals include career ambition for higher office, limiting their immense workloads, and addressing several audiences at once, such as the community in which they live and the legal profession. Thus it is plausible that a variety of factors could influence all facets of a federal district judge's career activities, including which decisions they submit for publication in the *Federal Supplement*.

Federal district judges' goals might also include maintaining professional reputations by following the official publication criteria. Baum (1997) suggests judges' goals may extend beyond furthering their legal policy goals and include operative goals, such as maintaining personal standing with court audiences and good relations with other judges. Irrespective of policy goals, whether judges pursue such operative goals, such as following official publication criteria to maintain personal

standing with their colleagues and others, remains an "open question" theoretically and empirically (1997, 55). Baum further explains, "Much of what judges do to enhance their standing with people who are important to them can be considered semiconscious. Judges may do various things to win the favor of legal scholars, for instance, without fully recognizing that this is what they are trying to accomplish" (1997, 12). Publishing decisions, either because it comports with norms or follows publication criteria, might then be a goal of federal district court judges. Promotion concerns might also be a motivation for maintaining professional reputations through consistently following circuit norms of publication and official criteria because it "is directly in the hands of federal officials" (Swenson 2004, 126).

Federal district court judges have a higher probability of promotion than do federal appeals court judges (Baum 1997) and nonpublication of controversial decisions (Carp et al. 2020) renders such opinions "essentially invisible" (Swenson 2004, 125). Though Swenson (2004) finds no empirical support for publication as promotion behavior, she notes that even if district judges have no ambitions of promotion, they still want to have an "agreeable working environment" with other federal officials, including the "U.S. Attorney's Offices they interact with daily" (2004, 126). This professional reputation concern is more immediate and thus might increase the likelihood a judge will choose to publish.

Based on this body of prior research, we suggest that multiple factors may play a role in the decision to publish opinions.

Hypotheses

Because the federal district courts have an enormous workload,[1] we expect that prior professional specialization may play a role in the decision to publish an opinion both as a means of decreasing workload and to further career fulfillment and enjoyment. For instance, Brenner and Spaeth (1986) find evidence of issue specialization in opinion assignment in the US Supreme Court during the Burger Court. Maltzman and Wahlbeck (1996) find issue specialization on the Rehnquist Court, as well. Similarly, Cheng (2008) finds evidence of issue specialization and opinion writing in the federal courts of appeals. Thus research suggests that judges with previous experience in specialized areas of law are more likely to publish decisions within those issue areas. Previous experience in a specialized area of law presumes that judges have a deeper level of experience and knowledge of the topic, requiring less research and time in producing a publishable opinion.

1. Recent data indicates the workload of the federal district courts well exceeds three hundred thousand cases filed annually (Carp et al. 2020).

Cases in areas outside the judge's previous career experience would require greater preparation. Furthermore, judges with experience in specific areas of law likely gravitate toward those issues and may gain more personal or career fulfillment in producing opinions on those case topics.

H1: We expect that judges who specialize in certain areas of law will be more likely to publish their opinion in those cases than nonspecialists would be.

Similarly, judges with prior judicial experience at other court levels also may require less research and preparation in writing formal opinions for publication in the *Federal Supplement*. In our data, 21 percent of the judges who published one hundred or more opinions were former state judges. We expect that previous experience as a judge, particularly in the state courts, will positively relate to opinion publication. Only a small percentage of the judges in our sample were federal judges, such as magistrate or bankruptcy judges, who do not routinely publish opinions.

H2: We expect judges with prior judicial experience to be more likely to publish a decision than judges from nonjudicial backgrounds.

Our expectation is informed by Carp et al. (2020) who note that increasingly district court judges come from experienced backgrounds, having served as local or state judges. They note that a fairly large plurality of recent federal district court judges had previously served as judges elsewhere. Over 40 percent had served as former judges, under George H. W. Bush through Obama, an increase from earlier eras. Service as a judge previously, especially on a state court where opinions are published and released, may provide federal district court judges with confidence in publishing opinions because they have fewer start-up costs in becoming familiar with the job, especially as a new federal district court judge.

Strategic considerations by federal district court judges might also play a role in publication. Randazzo (2008) finds that US district judges condition their decisions on the expectation that the US Courts of Appeal may reverse their decision. Few decisions, roughly about 25 percent, are reversed by the circuit courts (Songer and Sheehan 1992). This suggests that when the US Courts of Appeal reverse the federal district courts, they do so because the trial court decision was an extreme divergence from the law. This principal-agent theory of judicial constraint suggests that lower courts are constrained by the American common law doctrine of stare decisis and

typically fear reversal.[2] Songer and Sheehan (1990) find that true noncompliance by lower courts with precedents set by appellate courts above is unusual. While outright defiance is unusual (Carp et al. 2020), other less apparent mechanisms might be used by lower court judges as strategies to appear that they are complying with a decision even if they are not fully doing so. These techniques might include narrowing the application of the precedent or describing it as dicta.[3] A technique that has not been examined as fully is the decision to publish the opinion.

As Randazzo (2008) explains, the US Courts of Appeals exert more influence in monitoring the work of the US District Courts than the US Supreme Court because they directly oversee the work of the federal district courts. Since all decisions appealed from the federal district courts must be heard by the US Courts of Appeals, unlike the Supreme Court, which has discretionary control of its docket through *certiorari*,[4] the courts of appeals exert a stronger constraint on the federal district courts (Randazzo 2008). Federal district judges are also constrained by the court of appeals above them as they cannot predict which appellate panel will decide each individual case.[5] Therefore, it is possible that in certain cases where judges anticipate being reversed because the decision diverges from settled law, they may be *less likely* to publish their opinions in the *Federal Supplement* as a strategy to avoid further scrutiny of their decision. On the other hand, it is also possible that judges may anticipate reversal in a decision that falls in a gray area of the law and, therefore, those jurists may be *more likely* to publish the decision as a means of justifying it to the appellate court.

We expect a relationship to exist between publishing decisions and eventual reversal of the decision. However, the literature is not clear in offering a direction for the relationship between reversal and publication. On the one hand, judges may choose to publish a novel decision in order

2. *Stare decisis* is the doctrine of following precedent. Judges are bound to follow prior precedents set by their own courts' previous decisions (horizontal *stare decisis*) and by precedents set by appellate courts above them in the judicial hierarchy (vertical *stare decisis*). Principal agent theory suggests lower courts are the agents of higher courts in the judicial hierarchy and that their primary role is norm enforcement by applying legal precedents to cases before them as handed down by the appellate courts above. Principal agent theory as applied to judicial behavior examines the extent to which lower courts comply with appellate courts above them, especially when their policy preferences differ from the decision handed down from the appellate court (Baum 1997).
3. *Dicta* refers to language in a case that is not central to its holding.
4. The US Supreme Court decides less than one percent of all cases appealed to them from state supreme courts and the US Courts of Appeals by selectively granting certiorari to the few cases they deem to be cert-worthy (Carp et al. 2020). Cases are typically granted certiorari when they raise significant national issues and when conflict in the rule of law exists between the various circuits.
5. The US Courts of Appeal operate using rotating panels of three judges randomly assigned.

to justify their opinions because the legal issue is one that is new and needs explanation for higher courts. Alternately, judges may choose not to publish a novel decision in order to avoid notice and potential reversal. Scholarship suggests both potential relationships may exist. For instance, Randazzo (2008) finds that federal district court judges act strategically when casting votes in civil liberties cases, but that they do not do so in criminal cases where there is less policy discretion. Similarly, Boyd (2015) finds that federal district court judges are less likely to publish opinions when the circuit above is ideologically diverse, presumably because they anticipate a greater likelihood of reversal than from an ideologically congruent circuit. We test for the possibility of either relationship as an effect on publication, as it may vary given the variation in policy-making opportunities for district court judges across different types of cases.

H3: We expect judges who anticipate reversal will be *less likely* to publish their decision.

H4: We expect judges who anticipate reversal will be *more likely* to publish their decision.

Federal district judges decide important cases that matter greatly to the individual litigants appearing before them. However, though all cases are important, not all raise significant legal questions that broadly impact the rule of law. The *Official Reporting Guidelines* provides several criteria indicating case importance. The *Federal Supplement* includes a case if it is of "considerable interest to the general membership of the bar," "advances understanding of that area of law, as opposed to a more 'routine' opinion dealing with well-settled or established principles of law," and "was reached within two years of the filing date" (Platt 1996). These criteria leave quite a large area of discretion to the individual judge in determining whether a case meets them (Swenson 2004).

Given that judges desire to maintain their professional reputations in following the standards of the *Official Reporting Guidelines*, we expect judges will be more likely to publish an opinion in a case if its criteria meet the guidelines for publication. Swenson (2004) notes that judges will take seriously the guidelines governing publication even though they are not mandatory because they "are the primary source of law on the matter of what a judge should and should not publish" and are "the result of a respected rulemaking process" (2004, 123). The respect judges have for the rulemaking process governing their profession and the respect judges seek from their professional

community (Baum 1997) may motivate judges to publish decisions that meet the official criteria despite the lack of any enforcement mechanism.

> **H5**: We expect judges will be more likely to publish their decision if it is an important case—that is, if it satisfies the *Official Publication Guidelines* criteria.

Ideological agreement with the decision might also lead a judge to publish an opinion in a case. Federal district court judges decide cases alone, unlike appellate court judges, who typically sit on three-judge panels. However, it is quite plausible that a district court judge could reach a decision that she does not necessarily agree with; rather, the governing precedent and legal rules require her to reach that outcome. In these instances, judicial politics scholars would classify such judicial behavior as following a legal rather than an attitudinal model. The legal model of judicial behavior (Baum 1997) argues that judges follow the dictates of *stare decisis* because their training and professional socialization emphasize the importance of applying precedent. *Stare decisis* ensures the law maintains predictability and stability. Therefore, if judges behave as the legal model predicts, they will follow precedent regardless of their personal feelings about the outcome of the case.

On the other hand, the attitudinal model of judicial behavior (Segal and Spaeth 1993, 2002) argues that judges reach decisions consistent with their ideological views, commonly classified as either liberal or conservative. The attitudinal model presumes that judges have sincere ideological preferences in cases and that they pursue their policy preferences through the decisions they reach. We hypothesize that these models of behavior may impact the decision reached in a case, and they may also influence the decision to publish the ruling. That is, the decision to publish may be tied to or affected by an individual judge's views on the outcome of the case. These two models' predictions about judicial behavior lead to two competing hypotheses in the context of federal district court publication. We expect judges will publish cases regardless of whether the decision is consistent with his or her personal political views under a legal model interpretation of behavior. However, we also expect that judges will be more likely to publish rulings that are consistent with their political ideology under the attitudinal model of judicial behavior. Following Randazzo (2008) and Boyd (2015), we test both competing hypotheses to determine if ideological congruence has either a positive or negative relationship to the decision to publish and whether that relationship differs across case categories.

H6: We expect judges will publish their decision irrespective of its congruence with the judge's political ideology.

H7: We expect judges will publish their decision if it is congruent with the judge's political ideology.

Data and Methods

The data were derived in a two-part process from the US District Court database (Carp and Manning 2016) and from the US Courts of Appeals database (Songer 1998). The US District Court database contains coded decisions published in the *Federal Supplement* from 1927 to 2005. We first select judges from that database who had published at least one hundred opinions. We choose one hundred opinions as our cutoff point for several reasons. First, we reason that patterns of publication rates will be most prominent in judges whose careers span a relatively longer time. Stidham and Carp (1999) find that district court judges tend to publish most often in the middle stages of their careers. Judges serving only a few years likely encounter socialization effects that might flatten out over a longer period. Second, we reason that in order to have a sufficient sample of judges with both published and unpublished appealed opinions, the cutoff point should be rather large. Our one-hundred-case cutoff point also provides us with a sufficient number of judges from each professional experience category.

We then identify those judges' opinions in the US Courts of Appeals database, which contains both published and unpublished opinions appealed to and decided by the nation's appellate courts. Prior studies justify our decision to utilize appealed decisions as our primary data source. Swenson (2004) finds no substantial differences in appealed decisions versus decisions not appealed. Her data source for analyzing published versus unpublished opinions includes only appealed decisions.

We can also be reasonably certain that published and unpublished opinions are not so different that they cannot be utilized for comparison. Songer (1988) and Olson (1993) find no substantial differences of importance between published and unpublished opinions appealed to the US Courts of Appeals. Others find that many unpublished opinions still have precedential value (Reynolds

and Richman 1981; Robel 1989; and Mueller 1977), which explains why the Advisory Committee on Appellate Rules of the Judicial Conference of the United States voted to allow lawyers to cite unpublished opinions in federal appeals courts beginning in 2007 (Mauro 2006). Though systematic differences between published and nonpublished decisions after 2007 are beyond the scope of this study, future research might explore whether differences exist. The vote to modify existing rules and allow unpublished opinions to be cited by lawyers, at minimum, suggests an acknowledgment that unpublished opinions are important and raise salient points of law. These unpublished opinions are not binding precedent but may be cited as persuasive authority (Magnuson and Frank 2015).

Previous findings thus suggest that appealed published and unpublished opinions are comparable for our research purposes. Given the preceding studies, we can be reasonably certain that utilizing the US Courts of Appeals database to compare unpublished and published decisions of federal district court judges is a valid and reliable data source of determinants of publication. The two-part data identification process yielded 149 federal district court judges and 3,926 total cases appealed to the US Courts of Appeals.

The dependent variable is a dichotomous variable, ***Published***, coded as "1" if the decision was published by the federal district judge and as "0" if the decision was unpublished.

For the ***Specialist*** variable, we rely on the Federal Judicial Center's federal judge database to obtain background information for each judge in our data. We then categorize judges as specialists for each area of law we model separately, coded dichotomously with "0" indicating nonspecialist and "1" indicating the judge has prior career specialization in each specific area of law. Many of the judges are specialists in more than one area. The career specialist variables we include are for criminal law, civil liberties, and economic case specialties. Using the same data source, we also separately code background career information for each judge indicating whether they previously worked as a ***Politician***, ***State Judge***, ***US Magistrate***, ***Law Professor***, or ***Private Practice*** attorney. Each of these variables is coded dichotomously with "1" indicating the judge previously served in the role, "0" indicating they did not.

The second category of independent variables includes specific case characteristics. The first case variable we characterize as case importance.[6] This variable is coded "1" if the decision was

6. For our purposes, we rely on the US Courts of Appeals database classification of case importance (Swenson 2004) since the federal district court database includes only published opinions and the appeals court database includes both published and unpublished. While relying solely on the appellate court's determination of case importance could potentially exclude some cases deemed "important" by the federal trial court, it is the only consistent measure of case importance available across both published and unpublished decisions (Swenson 2004).

Important, "0" if not. The case importance variable indicates whether the decision by the federal district court meets the criteria of the *Official Publication Guidelines*. We rely on data from the US Courts of Appeals database to determine if the case raised an important issue of constitutional law or federal law. These we deem as important issues.

The second case-specific variable is ***Reversal***. We code this variable as "1" if the appeals court reversed the district court's decision and "0" if it affirmed it.

The final case-specific variable is ***Ideological Congruence*** with the decision. If the federal district judge's ideology is congruent with the decision they made, we coded it as "1"; otherwise it was coded as "0." Cases are classified as liberal or conservative in their outcomes and judge ideology is classified as Democrat or Republican-appointed.[7] In our models, this variable is coded dichotomously with ***Democrats*** coded as "1," Republicans coded as "0."

Besides political party affiliation, our models also control for personal attributes, including sex and race of the judge, to determine whether differences in publication within various case categories exist between judges from various backgrounds. In the federal district courts, some research shows that women and minorities may behave differently from their colleagues when managing their caseloads or communicating with litigants (Boyd 2013). Other research shows freshmen effects and self-silencing behavior may occur more frequently among women and minorities (Karpowitz, Mendelberg and Shaker 2012; Childs and Krook 2006; Allen and Wall 1993). We include these controls to examine whether opinion-writing patterns also reveal self-silencing or freshmen effects behavior.

Females are coded as 1, and males are coded as 0. ***Minority*** judges are coded as 1, and Caucasians are coded as 0.

The cases are divided into three general case categories, relying on the coding of the US Courts of Appeals database: criminal, civil liberties, and economic cases. Since our dependent variable—publication—is dichotomous, we use logistic regression to estimate each model.[8]

7. We utilize political party of the appointing president as our measure of judge ideology because it is a consistent measure across our time period, unlike other measures of judge ideology for federal judges.
8. Initially, we specified models with narrower case categories to correspond with the judge's specific career specialization, but these did not yield sufficient observations suitable for analysis. We also specified models that controlled for the federal circuit where the federal district court resides. In all alternate models tested, the general trend was that judge attributes varied in their significance levels and were not consistent across models. However, consistently across various model specifications, the importance variable remained statistically significant and positive. Unfortunately,

Results

First, we present summary charts of the distribution of published and unpublished decisions in our data by issue area. Figure 1 shows only 23 percent of criminal cases in our data are published, compared with roughly 40 percent of civil liberties and economic cases. Overall, about 35 percent of cases in our data are published opinions. Figure 2 shows the background characteristics of the judges in our data. Over half were appointed by Democrats and only a small percentage, less than 5 percent, are women or minorities. The career backgrounds are about evenly distributed between private practice attorneys, former state judges, and politicians, with just over 20 percent for each. Fewer former law professors and US magistrates appear in our data. Our data do not, unfortunately, subcategorize former state judges by the level of court they served on previously.

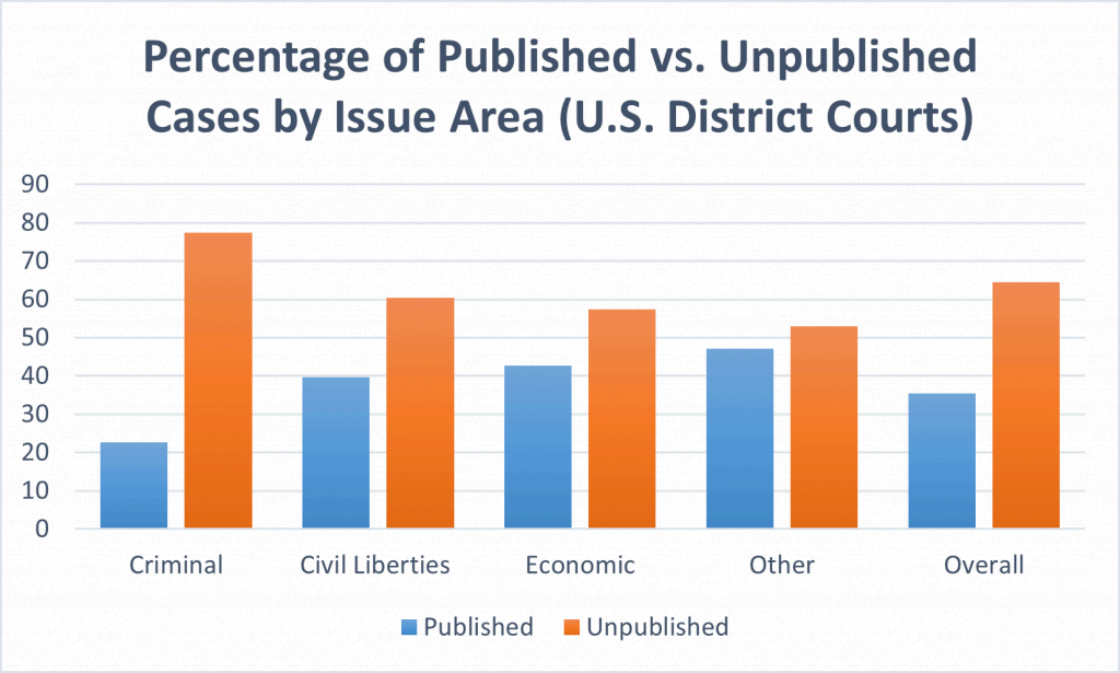

Figure 1: *Published opinions by issue area, Federal District Court judges with 100+ published opinions*

alternate specifications with circuit controls could not be successfully estimated across all case categories due to insufficient variation in judge characteristics across the various circuits.

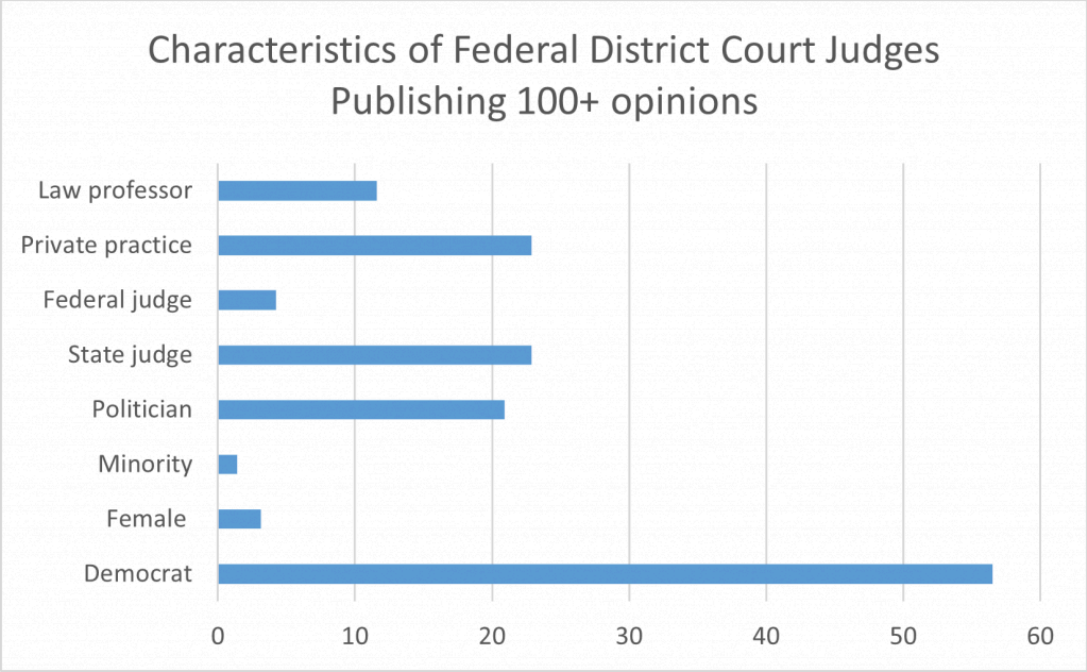

Figure 2: *Judge attributes, Federal District Court judges with 100+ published opinions*

The results of the logistic regression analyses are shown in Appendix A. The overall model and all three case-category models are statistically significant at the 0.000 level. Across all four models the variable, ***Important***, is positively signed and statistically significant, providing support for H_5. We are thus confident that case importance increases the likelihood a decision will be published, irrespective of the legal issue raised. Figure 3 shows the predicted probability of case importance on the likelihood of publication. For cases overall, the predicted probability of a published decision when a case is deemed "important" is 0.42. In comparison, cases not classified as important have a 0.32 predicted probability of publication. The predicted probability of case importance increases to 0.46 when it presents a civil liberties issue and 0.52 when the case involves an economic issue.

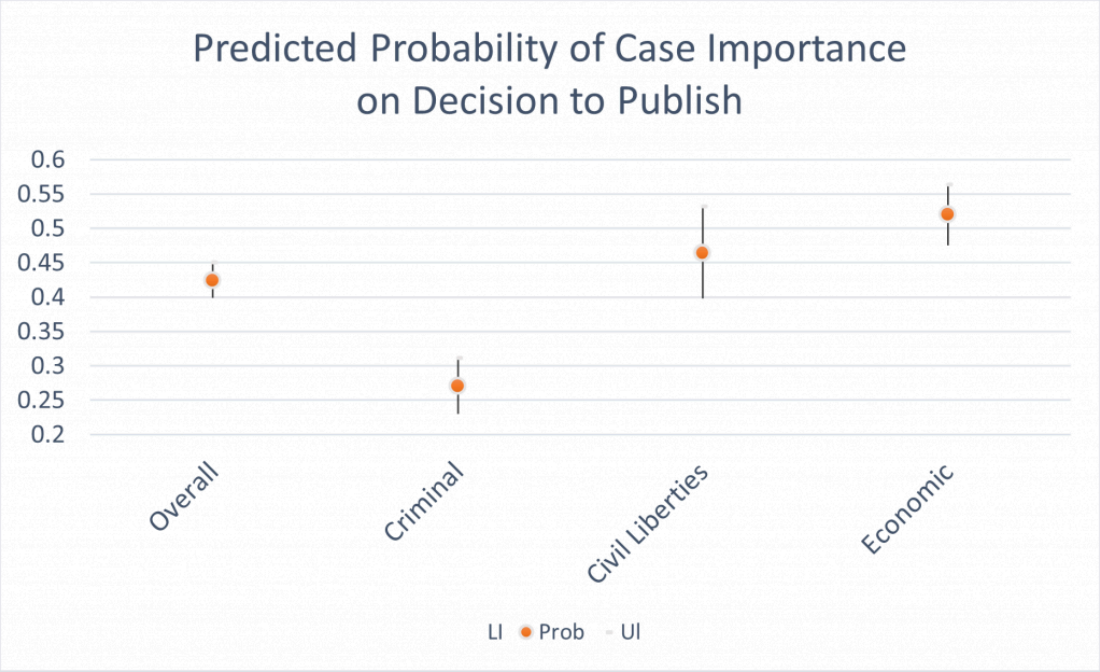

Figure 3: *Predicted probability of case importance on the decision to publish in the Federal Supplement*

Anticipation of eventual reversal by the US Courts of Appeals also appears to impact publication.[9] Overall and in criminal cases, eventual reversal predicts publication, providing support for H_4. However, in civil liberties cases, eventual reversal has a negative impact on publication, consistent with H_3. That is, civil liberties cases that are eventually reversed are less likely to be published. The predicted probabilities for reversal are shown in figure 4. Overall, the predicted probability of publication in cases that are eventually reversed is 0.39. In criminal cases, district court judges have less policy discretion because cases often turn on factual evidence in a criminal trial (Randazzo 2008). However, in civil liberties cases, Randazzo (2008) finds district court judges have greater levels of policy discretion. In areas with greater policy discretion, it appears district court judges may anticipate reversal and thus suppress their decisions via nonpublication. However, in criminal cases where there is less policy discretion for district court judges, they do not anticipate reversal, and in fact, it appears they may seek appellate court input in applying legal standards to factual evidence.

9. While reversal is not a perfect measure of anticipated reversal, it is the most consistent across our data for both published and unpublished decisions and is most often used by previous research to measure anticipated reversal (Bowie, Songer, and Szmer 2014; Randazzo 2008).

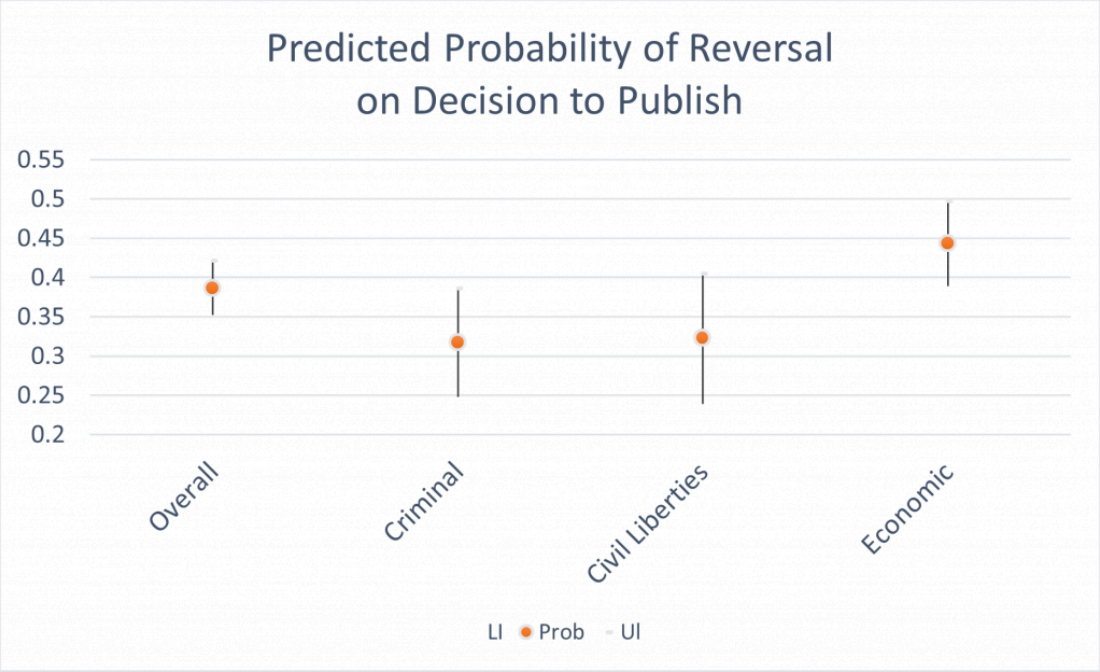

Figure 4: *Predicted probability of eventual reversal by the Court of Appeals on the decision to publish in the Federal Supplement*

Finally, of the case-specific factors, ideological congruence has a statistically significant impact on publication overall and in criminal and economic cases. Appendix A shows a positive relationship between publication and the ideological disposition of the judge in criminal cases, consistent with an attitudinal model of behavior and H_7. However, in economic cases, ideological congruence decreases the likelihood of publication, consistent with a legal model of judicial behavior and H_6. These results are illustrated as predicted probabilities in figure 5. The predicted probability of a judge publishing a decision that corresponds to his or her political ideology is 0.41. That is, the data indicate that in economic cases jurists are more likely to publish their decision if it is consistent with their own ideological viewpoint. Again, these differences are likely due to differences in the amount of policy-making discretion district court judges have in different areas of law (Randazzo 2008).

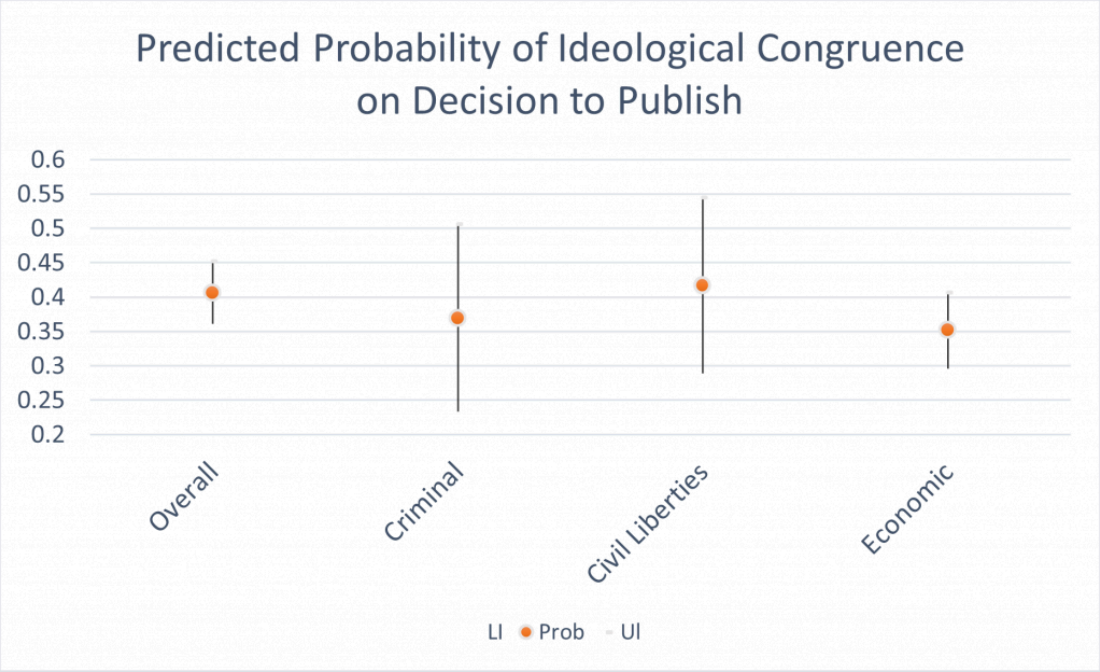

Figure 5: *Predicted probability of ideological congruence with the Circuit on the decision to publish in the Federal Supplement*

The judicial background variables reach statistical significance in some of the models but are not consistently impactful across various case categories, suggesting partial support for H_2. For instance, Appendix A shows that the minority judges in our data are less likely to publish overall, and particularly in economic cases that could be due to a possible self-silencing effect. Former state judges are less likely to publish their rulings in criminal cases but are more likely to publish if the case raises an economic issue. In fact, in economic cases, judicial backgrounds have the largest impact on the likelihood of publication. The predicted probabilities for publication in economic cases are shown in figure 6. In economic cases, former federal magistrates publish more often than others, while former law professors publish less often. Also, only in economic cases does the ***Specialist*** variable reach statistical significance. If a judge formerly worked in the area of economic law, he or she is more likely to publish decisions that are economic in nature, providing partial support for H_1.

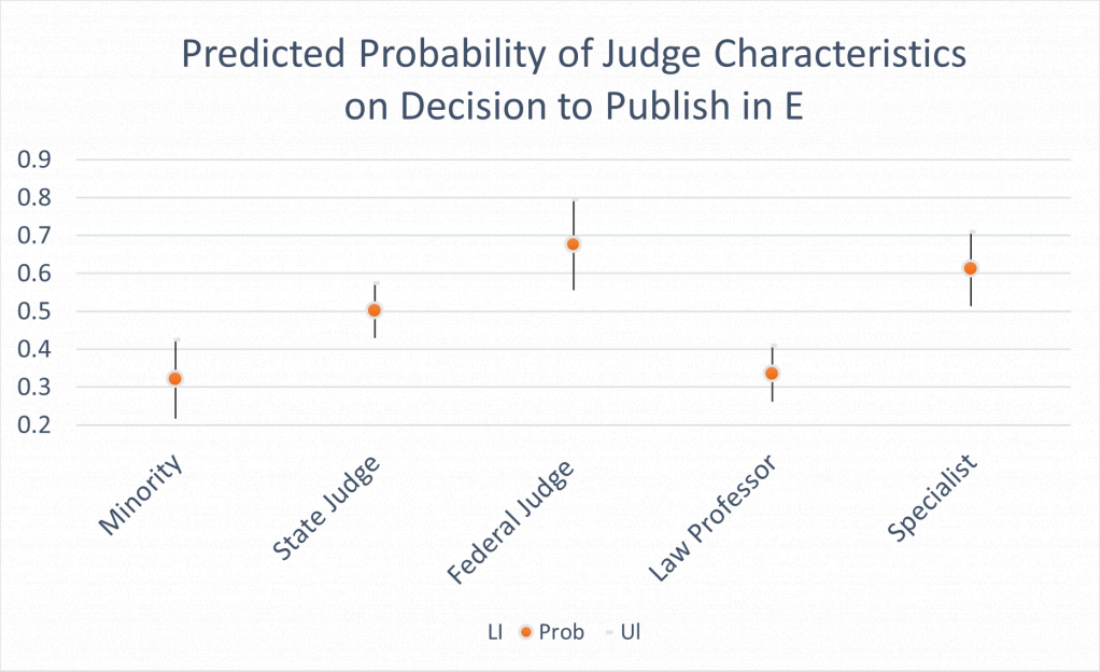

Figure 6: *Predicted probability of judges' backgrounds on decision to publish in the Federal Supplement in economic cases*

Discussion and Conclusion

We can surmise several important findings from the analyses. First, case importance consistently affects whether a case is published. The consistency of case importance in the decision to publish suggests that federal district judges act as professionals in their compliance with the *Official Publication Guidelines*. This indicates that the professional standards of publication are generally adhered to by federal district court judges, even though the language of the guidelines could be interpreted broadly and with a great deal of discretion.

Second, the findings suggest federal district judges only in certain circumstances act strategically to avoid reversal. They are more likely to publish decisions that eventually are reversed by the US Courts of Appeals overall and in criminal cases, suggesting lack of strategic action. It may be that judges publish opinions that are eventually reversed because the case raises a legal issue that requires resolution by an appellate court, or the case introduces a new issue in a newly developed area of law. Judges might also be motivated to publish opinions, even if they are eventually reversed, because they desire to provide more support and justification for their ruling to the appellate court or because the case turns on a factual determination where reversal cannot be anticipated.

However, in civil liberties cases, judges were actually *less likely* to publish if the decision was eventually reversed. Civil liberties cases—which include matters like freedom of speech, reproductive rights, and religious liberty—raise issues that in some respects are more salient to the public and potentially controversial. Thus it is possible that federal district judges act strategically in civil liberties cases by failing to publish opinions where they anticipate reversal. Randazzo (2008) argues that if the "federal trial judges anticipate a negative response on appeal, then they curtail their ideological influences," and he finds that "this pattern remains consistent when one examines civil liberties and economic cases, but not for criminal cases…where judges do not possess the discretion to act according to their ideological preferences, and consequently, do not anticipate how their decisions will be treated by the appeals courts" (686).

Consistent with previous research, we find that federal district court judges largely follow the *Official Publication Guidelines* when deciding which cases to publish. However, we also find some key distinctions across different case types, with strategic anticipation of reversal playing a role in publication along with policy-making discretion. Where federal district judges are less constrained—that is, in civil liberties cases—they publish less when anticipating reversal. However, in criminal cases where there is less policy discretion, judges cannot as easily anticipate eventual reversal. This finding on reversal and publication is largely consistent with Bowie, Songer, and Szmer (2014) who find that judges on the US Courts of Appeals do not worry too much about reversal because they do not have a good sense of which decisions will be granted cert by the US Supreme Court. However, a much higher likelihood of review and probability of reversal exists for district court judges. Thus as Randazzo (2008) finds, they do act strategically to an extent. Further, Bowie, Songer, and Szmer (2014) in interviews with federal appeals court judges find that they behave in ways to maintain their professional reputations. Our findings suggest these same concerns exist for federal district court judges, as well.

Judges appear to publish decisions that correspond to their ideological views overall and in criminal cases. However, in economic cases, ideological congruence is less likely to lead to publication. This might suggest that some areas of law raise issues that are more significant to a judge's personal view, while these same judges are perhaps less passionate about cases that touch upon economic matters. In fact, the results show that economic cases' publication is impacted differently than criminal and civil liberties cases. Judges' backgrounds and expertise explain more frequent publication in economic cases. This is not surprising given the technical nature and expertise required in many complicated economic cases. However, while career background and expertise matter more in economic cases, these factors largely do not explain publication decisions in other areas of law. Consistent with Boyd (2015), personal characteristics have less impact on publication overall than do case-specific factors such as case importance, anticipation of reversal, and ideological congruence.

It is worth noting that there are a few caveats to keep in mind in the interpretation of the

results. We limit our analysis to include only judges who serve long enough to have decided 100 cases or more, which reduces the number of women and minorities in our data. We also include only cases that had been appealed to the US Courts of Appeals. And because of the nature of our models, we were unable to control for circuit effects because of lack of variation in judge characteristics across each circuit. Other research on publication in the federal district courts (Boyd 2015; Swenson 2004) examine circuit effects and do not limit the analysis to judges deciding at least one hundred cases. However, these studies are limited by examining only a few circuits (Swenson 2004) or select case categories (Boyd 2015), while our study focuses on a longer period and across all circuits and case categories.

These limitations aside, one interesting indication of this line of research is that case importance, where analyzed, positively affects publication. Together, the body of research suggests that federal district court judges generally adhere to the *Official Publication Guidelines* when publishing cases and they do so consistently. In this aspect of the decision-making process, federal district court judges can be viewed as unbiased professionals who largely follow the norms and expectations of the legal community even when they seemingly have a large amount of discretion. Our findings also suggest that judges tend to publish decisions that correspond to their own ideological views. In this way, our research indicates that judicial ideology is an important factor influencing judges' decisions to publish their rulings.

Appendix A: Logistic Regression Model, Likelihood of Publication in the *Federal Supplement*

	Overall model MLE (SE)	Criminal MLE (SE)	Civil liberties MLE (SE)	Economic MLE (SE)
Democrat	0.038 (0.081)	0.159 (0.149)	0.228 (0.218)	0.038 (0.131)
Female	-0.050 (0.246)	-0.240 (0.465)	0.354 (0.725)	-0.238 (0.381)
Minority	**-0.325*** (0.162)	-0.320 (0.345)	-0.343 (0.394)	**-0.533*** (0.259)
Politician	-0.012 (0.098)	-0.332 (0.222)	0.310 (0.248)	-0.191 (0.174)
State judge	-0.140 (0.111)	**-0.454*** (0.229)	-0.206 (0.246)	**0.336*** (0.177)
Federal judge	0.091 (0.141)	-0.177 (0.350)	-0.475 (0.497)	**1.078**** (0.302)
Private practice	0.023 (0.093)	0.004 (0.208)	0.205 (0.261)	0.206 (0.161)
Law professor	0.005 (0.115)	0.228 (0.234)	0.232 (0.273)	**-0.501**** (0.195)
Specialized in issue area	----	-0.229 (0.194)	0.340 (0.708)	**0.800**** (0.229)
Important issue	**0.470**** (0.628)	**0.369**** (0.129)	**0.505**** (0.196)	**0.524**** (0.116)
Reversed by appeals court	**0.180*** (0.089)	**0.571**** (0.191)	**-0.439*** (0.229)	0.051 (0.143)
Ideological congruence with decision	**0.272**** (0.105)	**0.767*** (0.313)	0.124 (0.308)	**-0.466**** 0.145
Constant	-0.845** (0.086)	-0.229 (0.194)	-0.732** (0.211)	-0.386** (0.139)
	N=3720 Chi^2 = 68.48*** Count R^2 = 64.9	N=1398 Chi^2 = 45.69*** Count R^2 = 77.4	N=526 Chi^2 = 22.32** Count R^2 = 62.7	N=1322 Chi^2 = 89.82** Count R^2 = 60.7

Appendix A: Logistic Regression Model, Likelihood of Publication in the *Federal Supplement*

*Significant at .05 level, **significant at .01 level, two-tailed tests.

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Activity: Survey the Data

First, navigate to https://www.umassd.edu/cas/polisci/resources/us-district-court-database/ to download the US District Court database by Carp & Manning (2016). After downloading the data, tabulate the frequencies of judges contained in the database. Each observation represents a single, published case. For Stata users, the command to tabulate frequencies is "tabulate judge, sort." This command will provide a list of judges sorted by frequencies of their published opinions.

Second, navigate to: https://www.fjc.gov/history/judges. Explore the biographical information for a selection of the judges who published one hundred or more opinions from the frequencies list

above. Create background profiles for a few of these judges. What background characteristics do they have in common? Based on your preliminary survey of the judges, what additional variables would you include to predict publication in certain types of cases? Are there variables you would include that are not included in the authors' model presented in the study?

PART IV

PUBLIC OPINION

In his dissent in *Baker v. Carr* (369 U.S. 186 [1962]), Supreme Court Justice Felix Frankfurter identified the dependence of the US Supreme Court (or any US court, for that matter) on its legitimacy among the mass public: "The Court's authority—possessed of neither the purse nor the sword—ultimately rests upon sustained public confidence in its moral sanction" (369 U.S. 186, 267). To put it simply, without legitimacy, without the public's acceptance, or at least tolerance, for its decisions, the Court is powerless. While Justice Frankfurter was speaking to the US case, his sentiments, as the studies in this section show, can be applied more broadly. Thus studies examining the forces associated with public confidence in the judiciary are a staple in judicial politics research. This section contains five such examples. First, Professors Fix, Randazzo, and Martin widen our lens to the judiciaries of Eastern Europe and examine how public confidence in the courts might develop in newly democratized nations. Perhaps not surprisingly, they find that how far along a country has traveled toward democracy as well as strong institutional bases for the judiciary make a considerable difference in public support. However, these effects are not independent of general support for other governmental institutions, revealing that the echoes of a unitary system are not easily shrugged off. Professor Miles Armaly asks whether the pointed criticism of elected officials can affect the Court's legitimacy among those politicians' supporters. Employing an experimental design, he finds this to be the case, a result of some significance given the current era of hyperpolarization where even the courts have become targets of partisan arrows. Professor Morgan also examines the Court's resilience in the face of attack. Using an experimental design, he finds that partisan attacks on the judiciary's democratic credentials may land glancing blows at best. In short, the Court's reservoir of legitimacy remains resilient. Professors Kenneth Fernandez and Jason Husser examine the forces that systematically affect variation in public support for state courts. After reviewing the nature of the judicial systems across the fifty states, they focus their analysis on survey data measuring public support for the state courts in North Carolina. They find that levels of support vary with forces such as education, age, race, and ideology. Their findings are highly relevant given the large policy-making role the states play in our federal system. Finally, Professors Strother and Johnson take up the question of the degree to which the US Supreme Court responds to mass public opinion. Settling a long-standing debate in the discipline, they find little empirical support for the Court bending to the whims of the public's preferences.

Fix, Michael P., Kirk A. Randazzo, Ana R. Martin. "The Impact of Democratic Consolidation on Public Confidence in Courts."

Armaly, Miles. "Influence of Politicians on Public Support for the Judiciary"

Morgan, Kyle J. “Experimentally Measuring Responsiveness to Criticisms of the US Supreme Court as Antidemocratic.”

Fernandez, Kenneth and Jason Husser. “Public Attitudes toward State Courts.”

Johnson, Ben, Logan Strother. “Does the US Supreme Court Respond to Public Opinion?”

26. The Impact of Democratic Consolidation on Public Confidence in Courts

MICHAEL P. FIX, KIRK A. RANDAZZO, AND ANA R. MARTIN

Over the last several years, scholars of the judiciary have noticed substantial increases in the politicization of the judiciary across numerous countries. This "judicialization of politics" (Tate and Vallinder 1997; Brinks 2012) has manifested itself in several ways, including increased requests to adjudicate presidential elections. For example, the Ukrainian presidential election of 2004 witnessed high levels of outrage and frustration in response to a ruling by the Ukrainian Supreme Court. Yet in the United States, the justices of the US Supreme Court rendered a decision in *Bush v. Gore* (2000) that was widely accepted by society. What explains the differences in these reactions?

In large part, the different public responses may involve the fact that the United States is an established democracy with a long tradition of Supreme Court legitimacy, whereas Ukraine is a semiconsolidated democracy whose Supreme Court has yet to develop such solidification. If this is indeed the case, then it is important to better understand the mechanisms that facilitate high levels of public support for the judiciary, especially in relatively newly democratized nations. While a vast literature on trust in courts seeks to explain many of these factors in the context of the United States (e.g., Caldeira and Gibson 1992; Gibson, Caldeira, and Spence 2003), other established democracies (e.g., Gibson, Caldeira, and Baird 1998), and postconflict areas (e.g., McMahon and Western 2009; Bergling 2008; Sannerholm 2007), less attention has been paid to countries experiencing postcommunist and nonviolent democratic transitions. The comparative lack of attention by judicial scholars is disconcerting, and this piece begins to bridge an important gap in the literature. If public trust is truly integral in the ability of a court system to realize its intended, democratically reinforcing purpose, it is important to understand the factors that facilitate such support in as many developmental contexts as possible.

This chapter addresses these issues by focusing on levels of support for the judiciary across several countries in Eastern Europe and the former Soviet Union. Almost thirty years after the collapse of the Soviet Union, the new nations that emerged chose many different paths in determining their own identities. These countries are ideal for comparison, as they all share a history of communist rule (whether they existed as Soviet Republics or as independent nations under the Soviet Union's sphere of influence) and all broke away at approximately the same time. Since transitioning, these states have also been subject to external threats to their sovereignty from Russia and have had to confront internal issues of extensive corruption by organized crime

(Shelley 1995; Cheloukhine 2008). Additionally, a limited number of states, such as Poland and Hungary, have recently experienced a rise in right-wing political groups that increasingly focus attacks on the courts in an effort to scale back judicial authority and/or undermine institutional legitimacy.

Our analysis of 2008 survey data from twenty-one of these countries reveals evidence that public confidence in a country's justice system is impacted by both individual- and country-level factors.[1] At the individual level, we find confidence in the justice system is most strongly influenced by confidence in other governmental institutions. At the country level, we find that the level of democracy and the institutional development of the judiciary are the strongest predictors of high levels of confidence in the justice system. Not altogether different from existing literature on Latin America suggesting that individual support of the judiciary is linked to one's ideological standing as it relates to the regime (Walker 2016), these findings appear to support our theory that legitimation is a two-level process of both system-level and personal evaluations of a government. Put simply, the kind of trust in the courts necessary to facilitate a consolidated, liberal judiciary results from the following components: viability of democratic institutions and individual approval of the regime.[2]

Trust as a Two-Level Process

That the "institutionalization" of new democratic structures is necessary to effectively transition toward liberalism is nothing new, as ambiguous as the concept may be (e.g., Ghani and Lockhart 2008; Betts and Orchard 2014). Accordingly, the question of which factors on the international and intrastate levels precipitate societal confidence in these developing institutions is fundamental. In addition to channeling the interests of domestic political elites (e.g., Zurcher et al. 2013) one proposed solution to strengthening underdeveloped democracies at the system level has been to

1. While we recognize that conditions in individual countries may have changed since 2007 (in some cases dramatically), the use of this data is still highly useful for identifying general trends. Our theory is not time-bound, nor does it seek to explain specific responses in specific countries. Thus these data are still useful for understanding general patterns. Moreover, the systematic changes that have occurred in most of these countries in the intervening period have moved them further from the transitioning stage. This early data may capture the dynamics during transition more closely than current data would.
2. Much like the term *liberal democracy*, our use of *liberal judiciary* is unrelated to *liberal* in an ideological sense. Rather, we use the term to reference an independent judiciary in a democratic system.

establish an independent judiciary (Widner 2001; Ghani and Lockhart 2008; Walter 2015; Pritchett et al. 2013, Reno 2008). A strong and independent judiciary can aid in the transition to democracy by helping a nation develop a legal culture free from corruption and political interference (Herron and Randazzo 2003; Larkins 1996). Yet this is easier said than done.

This is largely because understanding the mechanisms behind judicial independence is difficult. While most scholars see judicial independence as vitally important, it remains a concept for which scholars cannot agree on a uniform definition. Larkins (1996) provides one of the more thorough definitions when he states, "Judicial independence refers to the existence of judges who are not manipulated for political gain, who are impartial toward the parties of a dispute, and who form a judicial branch which has the power as an institution to regulate the legality of government behavior, enact neutral justice, and determine significant constitutional and legal values" (611).

While it is assumed that the presence of greater judicial independence in postcommunist countries will facilitate the establishment of the rule of law and thus smooth the transition (or potentially complete the transition) from authoritarianism to consolidated democracy, many features of the nation's authoritarian past hinder the development of judicial independence, thus slowing this transition or leading to backsliding toward authoritarianism after democratic gains have been made (Herron and Randazzo 2003). Namely, a central concept of Soviet ideology was the consideration of the state as a unitary actor drawing all its power directly from the proletariat (Howard 2001). Since the idea of an independent judiciary presumes a system of separated powers, this concept is difficult to reconcile with the legacy of the communist legal system. Consequently, when transitioning to more democratic systems of governance, former Soviet countries not only have had to develop new legal systems, they also have to develop a culture of constitutionalism among the mass and elite publics. These struggles are unique to the postcommunist states, distinguishing them from other states, such as Chile or Argentina, that began their transitions to democracy peacefully and with some level of established constitutionalism (Walker 2016).

Again, this raises the question of how countries can escape this paradox, and avoid assumed antidemocratic path dependency. If judicial independence is necessary to establish the rule of law and facilitate the transition from authoritarianism to democracy, but remnants of the authoritarian legacy constrain the development of an independent judiciary, then how is democratization to move forward? As Howard (2001, 103) points out, "prospects for a constitutional culture are enhanced when state actors come to see the legitimacy of judicial review and are willing to accept decisions they do not like." In other words, when a judiciary is able to demonstrate enough institutional legitimacy to rule against the government and have its decisions obeyed, then it has acquired a level of independence necessary to facilitate development of the rule of law and democratic transition.

Yet the development of judicial legitimacy does not occur simply through the creation and international support of a new system of law and government (Zeeuw 2005). At least one additional

mechanism is necessary: public support. This leads us to the second component of our theory regarding the determinants of citizen trust in post-Soviet court systems. Institutional legitimacy derived from public support should allow for the evolution of increased judicial independence, in turn easing the transition to democracy.

To this end, much of the research on legitimacy—or *diffuse support*, as it is commonly termed[3]—focuses on this buildup of institutional support into a "reservoir of favorable attitudes or good will that helps members [of the public] to accept or tolerate outputs to which they are opposed" (Easton 1966, 273). Absent this reservoir of goodwill, it is argued that courts will lack the ability to rule "against the preferences of the majority, even when it may be necessary or wise to do so" (Gibson, Caldeira, and Spence 2003, 356), thus making popular legitimacy a central component not only for the development of judicial independence but also for the type of trust needed for facilitating the overall consolidation of democratic regimes.

At its most basic level, trust in a political institution is simply an evaluation of how the institution is performing vis-à-vis one's normative expectations as to how it should be performing (Hetherington 1998). Yet even at this level, it is difficult to disentangle short-term support for specific policy outputs from long-term support for the institution itself. This conceptual problem has led to a great deal of debate in the literature about how to measure trust, and whether trust—even if it can be measured—accurately reflects legitimacy.

Much of this debate focuses on the use of survey items that ask respondents about their level of trust or confidence in a political institution. Some scholars argue that these confidence measures are useful only as a measure of *specific* support and not *diffuse* support (Caldeira and Gibson 1992; Gibson, Caldeira, and Spence 2003; Gibson, Caldeira, and Baird 1998), where *specific support* refers to satisfaction with the institution's immediate policy outputs and *diffuse support* reflects long-term institutional support or legitimacy. However, the evidence provided by these scholars comes mostly from established democracies, where there is arguably a distinct difference between specific support and diffuse support. In transitioning democracies, there simply has not been enough time for various institutions to develop similar levels of diffuse support. This is especially accurate for countries of the former Soviet Union, where public trust has not had ample time to accumulate. As Justice Todorov of the Bulgarian Constitutional Court noted, instances of the court standing up to the nation's powerful political forces "actually raised the Court's stature in the public's eyes and elevated its institutional prestige" (quoted in Howard 2001, 103). Thus in these newly established courts instances of public confidence in specific court outputs help to build up this reservoir of diffuse support.[4]

3. *Diffuse support* and *legitimacy* are generally used synonymously (Gibson, Caldeira, and Spence 2003).
4. A similar pattern arguably occurred in the early United States. After the Supreme Court established

Further complicating the assumption that confidence is not an accurate measure of diffuse support is the admission by the strongest proponents of this view that even in established democracies specific and diffuse support are related (Caldeira and Gibson 1992; Gibson, Caldeira, and Spence 2003; Gibson, Caldeira, and Baird 1998). It seems intuitive to predict that this relationship would be even stronger in new democracies where there has not been sufficient time to build up the long-term institutional loyalty necessary to produce distinct levels of diffuse support among the public (Mishler and Rose 1997). Therefore, while specific and diffuse support may be distinct, albeit related, concepts when evaluating public opinion of courts in established democracies, there is sufficient evidence to suggest that this may not be the case in the newly established courts of post-communist Central and Eastern Europe. Not only do these new courts lack the reservoir of goodwill that courts in established democracies have developed over decades, but the only institutional legacy their constituents have to draw on is one in which courts served as a mechanism by which governments coerced their citizens into obedience (Mishler and Rose 1997; Howard 2001).

Here again it is important to recognize the legacy of centralized rule on perceptions of support and regime legitimacy. Namely, the presumed unity of institutions under Soviet rule may have indelibly shaped the way citizens in these nascent democracies evaluate both the judiciary and their governing institutions at large. Support for one branch of the government may naturally foster confidence in another.

In light of these challenges to democratic consolidation, scholarship describing the legitimation (or lack thereof) in both developed and postconflict settings gives us reason to believe that trust in the judiciary may be an interactive function of recognition and commendation. Put another way, to display confidence in their court system, citizens must be able to discern its integrity and simultaneously extend approval to it as a part of the greater governance of their regime. Either condition alone is insufficient to garner the trust necessary to foster democratic consolidation. The Afghan and East Timorese cases provide glaring evidence of this. In the aftermath of the conflict, the international community poured resources into developing and sustaining sophisticated, liberal court systems in both states. However, it quickly became apparent that, despite the demonstrable independence and aptitude of these court systems, citizens were generally refusing to utilize them due to pervading perceptions that the postconflict regime was not culturally suitable to govern (Hohe 2003). Additionally, research on support for the judiciary in Latin America suggests that general predispositions toward a regime powerfully influence individual approval of the courts.

the power of judicial review in the case *Marbury v. Madison* (1803), it did not exercise this authority against a federal statute until the *Dred Scott* case over fifty years later (*Scott v. Sandford* [1857]).

Theoretical Expectations and Hypotheses

In summary, previous research on judicial support in established democracies indicates that several factors influence public trust in courts (Caldeira and Gibson 1992; Gibson, Caldeira, and Spence 2003; Gibson, Caldeira, and Baird 1998). Our analysis focuses on two sets of influences: one set at the system (or state) level and the other at the individual level. It is our contention that the combination of system- and individual-level factors provides the most appropriate explanation of confidence in the justice system.

At the system level, one potential influence on public confidence in courts is the level of democratic consolidation within a country. As countries develop their democratic norms and institutions, one should expect to see increased attention paid to concepts such as the rule of law and procedural fairness. While confidence in courts is essential for building the level of judicial independence necessary for the development of a robust rule of law, without some baseline level of democracy this public support cannot begin to develop and grow. Moreover, once that baseline has been reached, increased democratic consolidation should lead to further growth in public confidence in their country's judiciary. This is especially important for countries breaking away from communist control and the policies developed by the former Soviet Union, as citizens would need to see a clear break from the prior legal system before they could develop the high levels of confidence often found in established democracies. Therefore, our first hypothesis states,

> **H1**: As the level of democracy in a country increases, individuals in that country will be more likely to express greater levels of confidence in their judicial institutions.

A second system-level influence on public confidence is the level of institutional development within a country's judiciary. This level of development is important because it determines the viability of an institution to meaningfully affect laws, regulations, and norms across society. A nonviable institution can issue edicts and/or orders; these, however, are likely to get ignored by other actors in the political system. Along with the development of democratic norms and institutions more generally, Bumin, Randazzo, and Walker (2009) show the specific importance of courts attaining certain levels of institutional viability before they can play a significant role in democratic consolidation. Building on their initial conclusions, we argue that public confidence in courts is likely to increase as the level of institutional viability becomes more developed. Consequently, our second hypothesis claims,

H2: As the level of judicial viability in a country increases, individuals in that country will be more likely to express greater levels of confidence in the courts.

In addition to the system-level influences, we expect individual-level factors to impact respondents' attitudes toward their country's justice system. Most importantly, previous research on Eastern Europe demonstrates that citizens often cannot distinguish among governmental institutions, and therefore equate questions of confidence in a specific institution to confidence in the government, broadly speaking (Mishler and Rose 1997). While this relationship is likely true for all important government institutions, levels of confidence in parliament (as the central law-making body) and the police (as the most visible enforcers of the law) would have the greatest influence on levels of confidence in the justice system as a whole. Therefore, we hypothesize,

H3: Individuals will express higher levels of confidence in their judicial institutions as their confidence in parliament and the police increases.

Data and Methods

To test our hypotheses regarding the impact of this set of system-level and individual-level influences on confidence in a country's justice system, we use data from a variety of sources. This approach is common in social science research as the collection of large-scale datasets is costly, both in terms of time and resources. When researchers gather large amounts of systematic data on a topic of interest to other scholars, they will typically make this data available for public use. This reflects core values of science and encourages the replication of analyses and the expansion of knowledge through a series of independent research projects. Our primary data source is the 2008 wave of the European Values Survey (EVS 2011).[5] The EVS is a large-scale survey that

5. Nonetheless, we would have ideally updated the analysis using more recent data. However, release of the data from the 2017 wave of the EVS was delayed due to the COVID-19 pandemic and is not yet available.

asks a set of questions to citizens across most European countries. Because we are interested in countries that were either former Soviet republics or that were formerly communist and within the Soviet Union's sphere of influence in Eastern Europe, we do not examine respondents from other European countries. Additionally, we drop observations with missing data for any key variables. This leaves us with meaningful responses from 28,903 individuals spread across twenty-one countries.[6]

Our dependent variable is an individual measure of Confidence in the Justice System from the EVS. This is an ordinal measure capturing the level of confidence in the justice system of the respondent's country. Each respondent in the survey was asked to rate their confidence in their country's judicial system on a four-point scale. We reverse coded this four-point scale so that 1 represents a response of no confidence at all, 2 is not very much confidence, 3 is quite a lot of confidence, and 4 is a great deal of confidence. Figure 1 shows the average response to the survey item by country. As the figure shows, the average response in four countries is above 3 (Albania, Bulgaria, Croatia, and Ukraine), indicating that the average respondent from those countries has a high level of confidence in their judicial system. In contrast, three countries fall below a 2.5 average (Azerbaijan, Belarus, and Estonia), indicating that the average level of trust in those countries is significantly lower. All other countries have respondents with an average level of trust between 2.5 and 3.

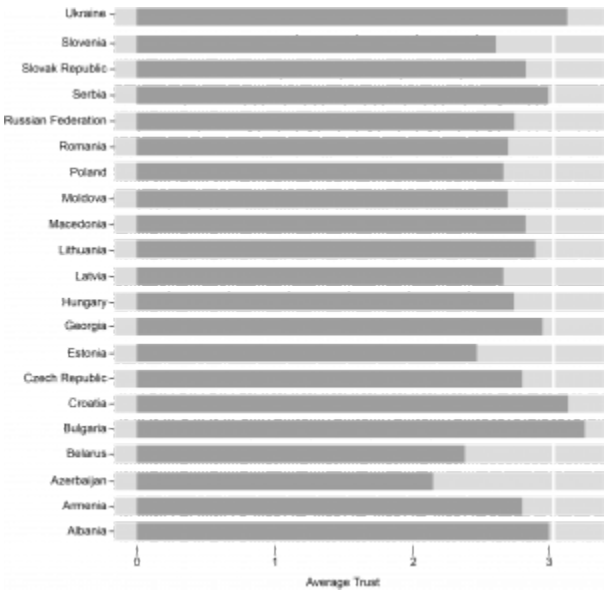

Figure 1: *Average level of respondent trust in their justice system by country*

6. The twenty-one countries are Albania, Azerbaijan, Armenia, Belarus, Bulgaria, Croatia, Czech Republic, Estonia, Georgia, Hungary, Latvia, Lithuania, Macedonia, Moldova, Poland, Romania, Russia, Serbia, Slovakia, Slovenia, and Ukraine.

As our primary theoretical interest lies in the relationship between the level of democratic development in a country and the level of public confidence in that nation's justice system, we include a variable measuring the Level of Democratic Development. This measure is obtained from the Polity IV data. It is generated from measures of a nation's level of democracy or autocracy along the following dimensions: competitiveness of political participation, regulation of political participation, competitiveness of executive recruitment, openness of executive recruitment, and constraints on the chief executive (Marshall, Gurr, and Jaggers 2014). Per our first hypothesis, we expect that this variable will be positively related to Confidence in the Justice System.

Our theoretical model indicates that levels of judicial independence also affect public confidence in the courts. As a proxy measure for judicial independence, we rely on the Judicial Viability Index developed by Bumin, Randazzo, and Walker (2009). This measure focuses specifically on countries from the former Soviet Union and measures institutional development (i.e., viability) across three major dimensions: *differentiation*, *autonomy*, and *durability*. As the authors explain in their article, these dimensions capture the extent to which courts are distinguishable from other governmental institutions (differentiation), whether they possess independent authority to affect laws and regulations established by the political branches of government (autonomy), and the length of time that they have had direct control over internal operating mechanisms (durability). The Judicial Viability Index combines specific indicators of these dimensions into a single empirical measure that fluctuates annually. As the authors note, "according to our analysis of annual court data across several countries, myriad aspects pertaining to differentiation, durability and autonomy represent a single, underlying dimension of viability that explains 89% of the variance in judicial institutions" (2009, 149). Because we believe that greater levels of institutional development within the judiciary will lead to higher levels of public confidence, we expect a positive relationship to exist between the Judicial Viability Index and our dependent variable.

While judicial institutionalization is related to traditional notions of independence, it is still conceptually distinct. As such, we also include a more direct measure of de facto judicial independence. Specifically, we use Linzer and Staton's (2015) latent judicial independence measure, which combines multiple existing judicial independence ratings along eight dimensions while adjusting for measurement error and missing data in the existing measures.

The final country-level variable is a measure of per capita GDP to account for the economic conditions of each country. This data comes from the ERS International Macroeconomic Data Set (Heerman 2015), with all values reported in 2010 US dollars. While we have no specific theoretical expectations regarding this variable, economic conditions are likely to impact citizen perceptions of their government broadly, and potentially their perceptions of the justice system specifically, despite its muted impact on economic conditions.

At the individual level, we include several measures drawn from various questions included in

the EVS. Since the legacy of the previous communist regimes still looms large in many of the nations of postcommunist Central and Eastern Europe, there is theoretical evidence—as well as evidence from previous research—to suggest that many respondents in these countries may still view their national government as a unitary institution (Mishler and Rose 1997). Moreover, even if this implicit view of the government as a single unit diminishes over time systematically as people begin to become more familiar with their new government structure, there is still likely to be a strong relationship between trust in one part of government and trust in others (Rohrschneider 2005). Thus we expect that confidence in parliament and confidence in the police will be positively related to confidence in courts. Additionally, we include measures of the standard demographic variables of gender, age, and education, although we do not hypothesize a directional relationship.

Results

To test our theory, we apply a statistical model to our data that evaluates the relationship between the different levels of the dependent variable and the independent variables we believe may have an effect. Since we expect that each country in the dataset will be affected to some extent by its unique characteristics and history, the model also accounts for potential differences (variation) between the individual countries included in the dataset. The results from this model (shown below) suggest that both system- and individual-level factors influence levels of public confidence in a nation's justice system in a way that is consistent with our theory.

Fixed effects	**Coefficient** (Std. Error)	**p-value**
Polity score	0.068 (0.025)	0.01
Judicial viability	0.594 (0.284)	0.04
Judicial independence	-0.771 (0.682)	0.26
Per capita GDP	-0.002 (0.002)	0.25
Confidence in police	0.973 (0.017)	0.00
Confidence in parliament	0.935 (0.018)	0.00
Female	-0.121 (0.023)	0.00
Age	0.006 (0.001)	0.00
Education	0.050 (0.007)	0.00
τ_1	2.392 (0.289)	0.00
τ_2	5.265 (0.290)	0.00
τ_3	7.715 (0.292)	0.00
Random effects	Variance (Std. Dev.)	
Residual (e_{ij})	0.099 (0.031)	

Fixed effects	**Coefficient** (Std. Error)	**p-value**
N	28903	0.00
$\chi 2$	9057.25	

Table 1: Determinants of confidence in the justice system

Dependent variable is respondent's level of confidence in the justice system measure on a four point ordinal scale from 1 (None at all) to 4 (A great deal). Cell entries for the fixed-effects portion of the model are ordered logit coefficient estimates, with standard errors in parentheses.

A country's level of democratic consolidation—as measured by its Polity score—and degree of judiciary institutional development positively impact the level of confidence in the justice system expressed by its citizens. However, neither judicial independence nor national economic strength appears to have an important relationship with citizen confidence, according to our model. These results are in line with the expectations outlined in our first two hypotheses, suggesting that individual-level confidence in a country's justice system is positively impacted by increased levels of general democratic consolidation and institutional development within the judiciary more specifically. These effects are independent of any individual-level factors.

These results align well with our theoretical expectations and prior research suggesting that while public trust in the judiciary is an essential component for building up its institutional legitimacy, and that judicial independence is necessary for a state to enjoy the rule of law, necessary levels of this trust cannot be reached until a baseline level of democracy and institutionalization of the judiciary has first been achieved. Moreover, while not the focus of our analysis, these results suggest that once such a baseline level is reached, further democratic consolidation and increased levels of trust in courts are likely to build off each other. Put simply, based on these results, we expect that increases in one should lead naturally to increases in the other in something of a positive feedback loop.

Our results also largely support our expectations regarding the individual factors contributing to confidence in a country's judiciary. The positive effects of confidence in parliament and confidence in the police on confidence in the justice system are squarely in line with the predictions expressed in our third hypothesis. While this finding might seem intuitive for any country to some extent, the strength of the relationship here is likely a reflection of an internalized tendency among citizens in post-Soviet states to view their current government as a single, unified entity, the way they did in their communist past. Finally, while the statistical association between the dependent variable and the demographic variables included in the model indicate there might be an important relationship, the substantive effects of these variables appear to be

quite small, suggesting that the impact of these variables on confidence in the judiciary is not meaningful.

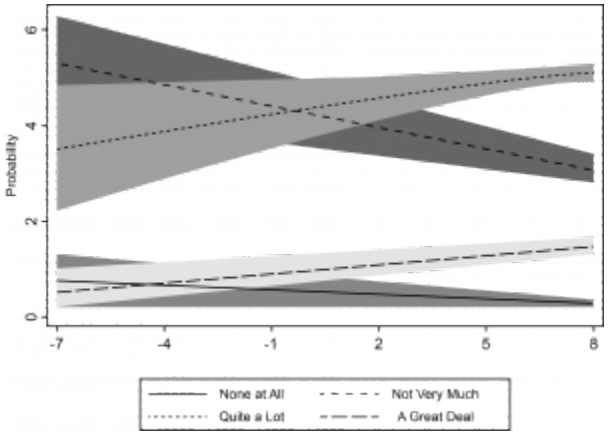

Figure 2: *Marginal effects of country's polity score on respondent's trust in the justice system*

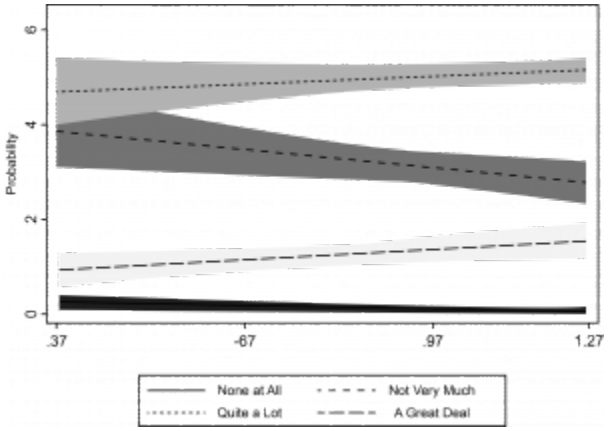

Figure 3: *Marginal effects of country's judicial viability index on respondent's trust in the justice system*

Figures 2–5 more directly illustrate the effects for our variables of interest. First, figures 2 and 3 show the substantive impact of shifting the two key country-level variables from their minimum to their maximum values on the probability a respondent will express a given level of confidence in courts (holding all other variables constant). In figure 2, we observe that moving from the lowest Polity score (Azerbaijan and Belarus) to the highest (Hungary, Lithuania, Poland, Slovakia, Slovenia, and Ukraine) equates to a significant increase in the likelihood a respondent will have quite a lot (by approximately 7.6 percent) or a great deal (by approximately 15.4 percent) of confidence in the justice system. That same shift in the Polity score of a respondent's country corresponds to a

decrease of about 19.5 percent in the probability she will claim to have not very much confidence in her justice system and a decrease of about 4.8 percent in the probability she will express no confidence at all.

Similarly, as figure 3 illustrates, shifting the judicial viability index of the respondent's country from the minimum (Belarus) to the maximum (Slovenia) value corresponds with an increase in the likelihood of an individual expressing that she has quite a lot (approximately by 16.2 percent) or a great deal (approximately by 8 percent) of confidence in the justice system and a decrease in the likelihood of her expressing not very much confidence (approximately by 10.4 percent) or none at all (approximately by 1.7 percent).

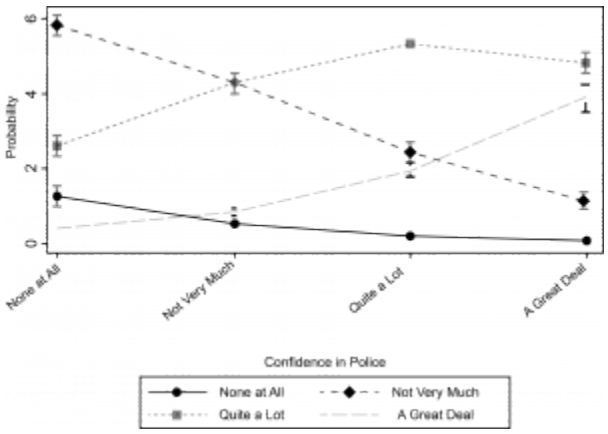

Figure 4: *Marginal effects of respondent's trust in police on respondent's trust in the justice system*

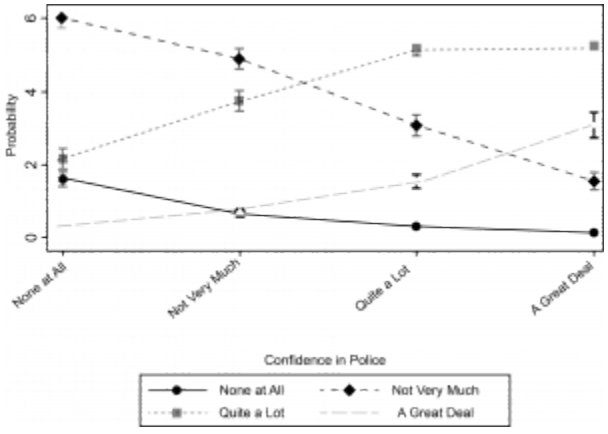

Figure 5: *Marginal effects of respondent's trust in parliament on respondent's trust in the justice system*

Finally, figures 4 and 5 show that the impact of the key individual-level variables of interest is significantly greater than the impact of the key system-level factors. Shifting from the lowest level of confidence in the police or confidence in parliament to the highest level dramatically increases the probability that a respondent will have quite have a lot (by approximately 22.5 percent and 24.1 percent, respectively) or a great deal (by approximately 36 percent and 29.8 percent, respectively) of confidence in the justice system, while noticeably decreasing the probability of expressing not very much confidence in the justice system (by approximately 46.8 percent and 36.5 percent, respectively) or none at all (by approximately 11.9 percent and 17.1 percent, respectively).

Conclusion

Our inquiry focused on levels of support for the judiciary across several countries in Eastern Europe and the former Soviet Union. Specifically, we attempted to determine the various influences on public confidence in the courts of postcommunist countries. Additionally, our theoretical model attempted to address how confidence in the judiciary facilitates democratic consolidation within these transitioning countries. Over the course of this research, several noteworthy findings and conclusions emerged.

First, our empirical models provide evidence that a country's level of democracy and the institutional development of the judiciary strongly affect public confidence in the judiciary. This is important for our understanding of the development of strong, healthy democracy generally, and the rule of law specifically. While prior work has focused on the central role of judicial legitimacy in the development of the rule of law (O'Donnell 2004; Teitel 1994; Widner 2001), our findings suggest that the converse is also true, as the high levels of support necessary for legitimacy cannot form without some degree of judicial institutionalization and democratization. Future research should further examine the complex interdependence of these concepts and the implications of this relationship on facilitating successful democratic transitions.

Our second general conclusion relates to our individual-level findings. While a country's level of democracy and the institutional development of its judicial system were important determinants of an individual's confidence in the justice system, these effects were muted in comparison to the impact of that individual's confidence in other governmental institutions, specifically parliament and the police. The mere existence of a positive relationship is quite intuitive. However, the strength of these relationships suggests that the legacy of a communist system where the government existed as a single unitary entity continues to echo in the collective memory of these nations nearly twenty years later.

These results raise additional questions about the current environment for courts in the

postcommunist countries. As we stated earlier, a limited number (such as Poland and Hungary) has recently experienced a rise of right-wing political groups who increasingly focus their attention on the judiciary and actively work to undermine judicial independence and legitimacy. To what extent have these groups been successful at decreasing public confidence in the courts? Fortunately, new waves of data from both the World Values Survey and the European Values Survey are set for public release in the near future. These datasets will contain the results of surveys conducted across multiple countries from 2017 to 2020. Once the data are publicly available we will be able to compare the results from this study to the more recent survey responses and determine the extent to which the conclusions remain consistent.

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Student Activity

1. For the following countries, identify the specific structure of their judiciary (how many

levels of courts, names of court institutions). To what extent are the courts viewed as independent?

   a. Azerbaijan
   b. Belarus
   c. Czech Republic
   d. Georgia
   e. Kazakhstan
   f. Lithuania
   g. Moldova
   h. Russia
   i. Slovakia
   j. Turkmenistan

2. For the countries listed above, how likely is it that average citizens will express trust in their judicial institutions? What effect will this trust (or lack of trust) have on the rule of law? Why?
3. Pick one of the countries where you stated that average citizens should have a lack of trust in their judicial institutions in Question 2. If a specific citizen in that country has a high level of trust in their country's parliament and police, do you think that individual citizen would also have a high level of trust in their justice system? Why or why not?

27. Influence of Politicians on Public Support for the Judiciary

MILES T. ARMALY

Conventional wisdom suggests that members of the American mass public are strong proponents of an independent judiciary, and as a result, support for the Supreme Court is unaffected by the behavior of the political branches. Indeed, decades of evidence show that most Americans support the US Supreme Court even when it makes decisions with which they disagree (Caldeira and Gibson 1992; Gibson, Caldeira, and Spence 2005). This chapter asks what might happen to support for the judiciary if the political branches began attacking the Supreme Court.[1] In other words, would ordinary citizens continue to support the Court, or would they listen to their preferred politicians? And what might this mean for the judiciary?

By and large, Americans support the federal judiciary. According to a 2018 Gallup poll, nearly 80 percent of Americans said they had at least some confidence in the Supreme Court; only 50 percent of people said the same for Congress. The reasons for this support are myriad. For starters, even though many do not believe the Court to actually be removed from politics, it does not behave like other political institutions. For instance, the Court's debates occur in secret, whereas congressional debates—such as confirmation hearings—are broadcast on television and are often open to the public. Thus if there is hostility among the Supreme Court justices, such rancor is hidden from the public; the same is not true for Congress. Additionally, the judiciary tends to ground its decisions in legal precedent, lending more credibility to its claims. Moreover, the Court uses many symbols—such as robes and gavels—that remind people about the importance of the law and justice; these symbols lead people to have a "positivity bias," or a favorable predisposition, toward courts (Gibson and Caldeira 2009; Gibson, Lodge, and Woodson 2014). These differences between the judiciary and the other branches of government frequently help gird support for the institution. However, the single-most glaring difference between the judiciary and other institutions—that its members are appointed, not elected—can place the Court in a unique and precarious position that influences the legitimacy on which the Court relies.

1. Generally speaking, researchers consider two types of support for the judiciary. Specific support is job satisfaction, or support for a particular decision. Diffuse support is the (lack of) willingness to make lasting changes to the institution or decrease its independence. This chapter focuses on the diffuse variant, and I use the terms legitimacy, institutional support, and diffuse support interchangeably.

Institutional legitimacy is a prerequisite for governing. Institutions that are considered legitimate are viewed as having rightful and justified authority to exercise the powers that are vested in the office. In the United States, most institutions—such as the presidency, Congress, and state legislatures—are seen as legitimate due to free and fair elections. Even people who are disappointed with electoral outcomes still perceive the winners to have the authority to enact laws and enforce them. However, because members of the federal judiciary are appointed instead of elected, they do not receive this important form of political capital (i.e., the ability to make respected decisions; political influence) through elections. Instead, institutional legitimacy for the federal judiciary must come in the form of public support. Public support is essential for the Court because it relies on the other branches to enforce its decisions. As Alexander Hamilton wrote in Federalist 78, the judiciary has "no influence over either the sword or the purse. . . . It may truly be said to have neither FORCE nor WILL, but merely judgment." That is, the judiciary has neither the power nor the funds to execute its decisions. Instead, the president, legislature, and state governments (i.e., elected officials) must enforce them. However, members of the elected branches are primarily motivated by reelection (Mayhew 1974). They are unlikely to enforce a Supreme Court decision when the Court is unpopular (i.e., when doing so may cost them votes in the next election). For proof, we need look no further than the refusal to desegregate schools in the American South after *Brown v. Board of Education of Topeka* (347 U.S. 483, 1954) or, more recently, the refusal of some county clerks to issue marriage licenses to same-sex couples after *Obergefell v. Hodges* (135 S. Ct. 2584, 2015). So the Court derives its legitimacy via public support for the institution and its decisions. If the public supports the institution, elected officials will enforce its decisions (Clark 2009; Ura and Wohlfarth 2010).

The major question, then, is whether politicians are capable of diminishing the Court's legitimacy and thereby its ability to make decisions that are enforced. For the reasons mentioned above, conventional wisdom suggests that politicians cannot. Generally speaking, people support a judiciary that is free from meddling by the political branches. However, in recent years, Americans have become increasingly reliant on "cues," or pieces of information on how to act, from politicians. These cues are said to have a "dominating impact" on citizen's positions (Cohen 2003), such that they "follow the leader," or simply adopt a preferred politician's policy positions (Lenz 2012). And these cues have been shown to influence attitudes regarding the Supreme Court, where Democrats like a specific court decision more when they believe a "Democratic majority" reached it and vice versa (Nicholson and Hansford 2014), as well as the willingness to pass legislation that reduces the judiciary's ability to act (Clark and Kastellec 2015). So despite the conventional wisdom that average citizens are predisposed to have positive attitudes about the Court (Gibson and Caldeira 2009), there is reason to believe that statements regarding the Court from a preferred political figure might impact views of the judiciary.

To find out if politicians can influence public attitudes about the Court, I conducted two survey

experiments—one about Hillary Clinton and one about Donald Trump.[2] Participants were asked a series of questions that measure how legitimate they think the Court is. These legitimacy questions, designed by Gibson, Caldeira, and Spence (2003) and listed below, ask how much one agrees or disagrees, on a 5-point scale, with statements regarding the Court's independence. More specifically, they gauge an individual's willingness to make lasting changes to the institution. Those supportive of making such changes believe the Court is less legitimate than those who disagree with making these changes.[3]

1. If the Supreme Court started making decisions that most people disagree with, it might be better to do away with the Court.
2. The right of the Supreme Court to decide certain types of controversial issues should be reduced.
3. The US Supreme Court gets too mixed up in politics.
4. Justices who consistently make decisions at odds with what a majority of the people want should be removed.
5. The US Supreme Court ought to be made less independent so that it listens a lot more to what the people want.
6. We ought to have a stronger means of controlling for actions of the US Supreme Court.
7. The Court favors some groups more than others.

To determine how much legitimacy an individual thinks the Court has, I take his or her average response across all seven legitimacy items. A high score means that somebody thinks the elected branches should leave the judiciary be, whereas low scores indicate that somebody thinks the Supreme Court has too much authority and should be less independent.

Some respondents were randomly assigned to answer these legitimacy questions a second time (after answering demographic questions such as age, income, and education so that they wouldn't remember their original answers). Others were randomly assigned to read the following sentence:

Recently, in a speech given to supporters, Democratic presidential candidate Hillary Clinton [in the Trump experiment: "president-elect Donald Trump"] made some controversial remarks

2. Data were collected using Amazon's Mechanical Turk platform in October 2016 (Clinton experiment, N = 708) and November 2016 (Trump experiment, N = 503).
3. Note that agreement with these questions indicates a lack of legitimacy, or illegitimacy. So to measure legitimacy, I subtract each response from 6 to reverse the scale. For example, if somebody strongly agreed—a response of 5, the highest option possible—to a question, I merely subtract 5 from 6 so that score is now 1 (the lowest option possible, or a lack of legitimacy).

regarding the United States Supreme Court. Below, some of her [his] critiques will be paraphrased. Please indicate your level of agreement with Hillary Clinton's [Donald Trump's] statements.

The people who read this sentence were asked the original legitimacy questions again, but this time, they were told that Hillary Clinton (in Experiment 1) or Donald Trump (in Experiment 2) had made those hostile statements about the Court. For example, instead of responding to the question above, they read, "Hillary Clinton commented, 'The Supreme Court ought to be made less independent' so that it listens a lot more to what the people want. Do you agree or disagree?"[4]

To find out if these statements changed people's minds about the Supreme Court after hearing the hostile statements, I subtract the average response from the first set of answers from the average response from the second set. I then rescale this variable from −1 to 1, such that positive values mean an increase in institutional support, or legitimacy, and negative values mean a decrease in institutional support. Importantly, I also ask people how they feel about Hillary Clinton and Donald Trump. To do so, I employ a "feeling thermometer," which measures "affect," or one's emotional reaction, toward the political figure. Temperatures range from 0 to 100, where 0 means a person is extremely "cold," or does not like the politician, and 100 means he or she is extremely "warm," or very much like the politician. The midpoint, 50, means a person neither likes nor dislikes the politician. This is a useful way to determine how one feels about the figure purported to denounce the Court, as we can be more certain that this measure of pure affect relates directly to the politician as opposed to his or her ideology or the party he or she represents. Consider the specifics of the 2016 election; many Democrats did not like Clinton, and many Republicans did not like Trump. Measuring individuals' emotional reactions to these figures is different than asking if they like the political party, if they respect the candidate, or if they agree with the candidate ideologically.

The expectation is that people who like Donald Trump will exhibit less support for the Court upon hearing his negative comments about the Court. A person may think, "I like (i.e., am affectively positive toward) Donald Trump, and he just criticized the Court, so I must like the Court less than I thought." Conversely, people who dislike Donald Trump may have the opposite reaction: "I loathe Donald Trump, and he seemingly dislikes the Court, so I must like the Court more than I thought." I expect the same relationship regarding Hillary Clinton; her supporters will believe the Court to be less legitimate after hearing her statements, and her detractors will offer more support to the Court.

4. Importantly, these are general claims about the Court, but they do not focus on a particular decision. As such, we cannot determine how attacks on specific cases might influence the public.

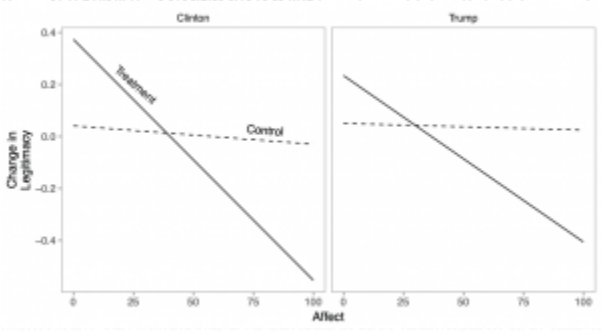

Figure 1. Change in legitimacy across affect for Clinton and Trump, by treatment.

Figure 1 shows the degree to which affect toward either Trump or Clinton influences institutional support for the Supreme Court for both people in the experimental treatment (i.e., those who believe Trump or Clinton said negative things about the Court) and those in the control group (i.e., those who simply responded to the legitimacy questions twice without reading any statement by Trump or Clinton). People who are not led to believe that Trump or Clinton said the Court should be less independent should not change their views about the Court whatsoever. This is precisely what is borne out in the data. In both the Clinton panel (at left) and the Trump panel (at right), the solid line marked "control" is relatively flat (i.e., is not statistically different from 0). In other words, support for the Court is consistent, meaning control-group individuals respond to the seven legitimacy questions in a similar fashion the first time they encounter them as the second time.

When looking at the dashed lines marked "treatment," however, a different story unfolds. Beginning in the Clinton panel, individuals who dislike Clinton—that is, those whose affect toward her is between 0 and 30—increase their level of support for the Court after hearing her negative statements. Thus these individuals may think, "I dislike Clinton, and she dislikes the Court, so I must like the Court." This effect is similar for those opposed to Trump; from affect levels from 0 to 20, individuals increase their support for the Court upon hearing Trump's negative statements. For both politicians, the effect is statistically different from the control group for these values (at $p < 0.05$ level).

When examining those who are middling in their affect toward both figures—around 30 to 55 for Clinton and 20 to 50 for Trump—the effects are inconclusive. That is, individuals in those ranges do not change their opinions about the Court; the effect is not statistically different from the control group for these values (i.e., is not significant). This is sensible. People who aren't sure

how they feel about Trump or Clinton but neither love nor loathe them are less likely—relative to somebody who for certain knows her feelings toward the figure—to bring that affect to bear on the Supreme Court.

Finally, those who are generally positive toward the figures—around 55 to 100 for Clinton and 50 to 100 for Trump—decrease their support for the Court. The effect is statistically significant (i.e., statistically different from the control group) in this range. That is, a Trump supporter might think, "I love Trump, and he dislikes the Court, so I must dislike the Court." And these effects are largest for the staunchest Clinton and Trump supporters, such that individuals who adore these politicians end up disliking the Court. Overall, these are substantively large effects. Across the range of affect, the decrease in legitimacy is 0.64 units, or about 32 percent of the range of change in legitimacy, for Trump; for Clinton, these values are 0.93 units and 46 percent of the range. In other words, relative to people who dislike the politicians, those who like them have radically different views of the Court upon hearing the figure speak of the judiciary.

This is a problematic discovery for the constitutional role of the Supreme Court in American democracy. The Court is intended to be immune from political pressures. As Hamilton suggests in Federalist 78, federal judges are appointed for life precisely to avoid consideration of the political whims of the day. Yet the Court requires public support in order to expect compliance with and enforcement of its decisions. The executive, legislature, and state governments must assist the Court in implementing its decisions. And they are likely to do so when the public supports the Supreme Court. However, as these results show, political figures themselves are able to influence public support for the Court. Democratic theory suggests that political figures ought to be bound by public will; here, we see that they can influence what the public wants. Consider a politician who suspects that the Court will rule to uphold affirmative action. The results here suggest that the politician can merely promote dislike of the Court among his supporters in order to create a circumstance where (A) he does not have to enforce the affirmative action ruling and (B) he is potentially not punished for failing to enforce the ruling.

More broadly, politicians may rhetorically attack the Court in order to avoid the repercussions of failing to acquiesce to an unfavorable Court decision or to turn public tides away from the Court. Consider President Trump tweeting, "How broken and unfair our Court System is," or suggesting that the Ninth Circuit Court of Appeals should be broken up into two or three courts (Brennan Center for Justice). Certainly, his supporters would be suspect of any decisions from the Ninth Circuit, and they may believe the Supreme Court to be less legitimate in cases where it upholds a decision from the Ninth Circuit. Importantly, Trump is not the only political actor to criticize the Supreme Court (although few have done so as blatantly); President Obama was a vocal critic of the judiciary (Jaffe 2015).

Affect, or Learning about the Court?

Above, I assert that affect toward Donald Trump or Hillary Clinton influences people's attitudes regarding the Supreme Court. Indeed, people who like the politician express dislike for the Court and vice versa when they hear the politician publicly decry the judiciary. One alternate explanation for this effect is that people are learning something about the Court. Most people do not know much about the Court's political position (Bartels and Johnston 2013). Many people can rightly state that Congress is either liberal or conservative at any given point in time. They can do the same for the president. But they struggle mightily to accurately complete this task for the Supreme Court (Hetherington and Smith 2007). So it may be that hearing information from Trump or Clinton reveals to an individual whether the Court is ideologically similar to him . Thus instead of thinking, "I like Clinton, and she dislikes the Court, so I must dislike the Court," an individual who learns something from Clinton's statements might think, "I know Clinton is liberal, and she dislikes the Court, so the Court must be conservative." In other words, one might update how ideologically distant he feels from the Court and alter his level of support accordingly. If this were the case, it would be much less worrisome for the Supreme Court. For an individual to react negatively to an institution with which he politically disagrees is much less troublesome than a politician's ability to influence public attitudes about the Court.

To find out if affect or learning something new about the Court influences institutional support, I use the data described above. To determine how ideologically distant one feels from the Court, I ask survey respondents to describe their own ideology on a 5-point scale, ranging from extremely liberal to extremely conservative. Then I ask them to describe where they believe the Court is on the same 5-point scale and take the absolute value of the difference between these two properties. I ask respondents to do this both before and after they read the comments by Trump or Clinton about the Court.

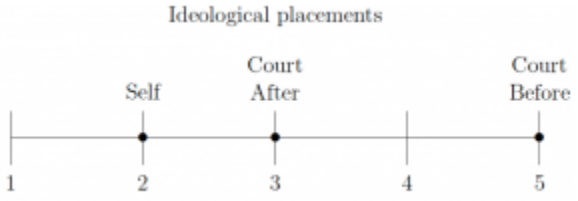

Figure 2. Ideological placement of self and Court, before and after treatment.

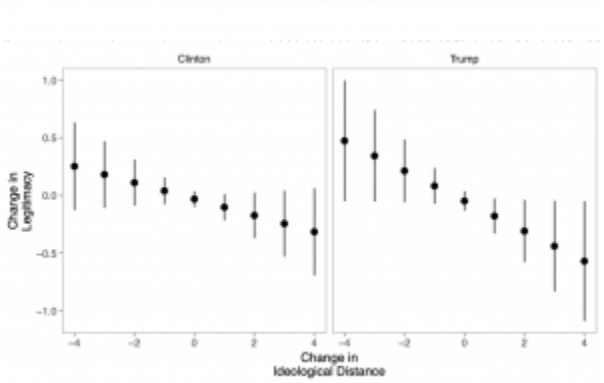

Figure 3. Change in legitimacy across change in ideological distance from Court.

Consider figure 2, which gives an example of this 5-point ideology scale. An individual places herself at a moderately liberal position, 2. Before she hears Trump or Clinton's statements, she perceives the Court to be at an extremely conservative position, 5. Thus her perceived ideological distance from the Court is 3 units. After hearing the statements, she adjusts her position of the Court, now perceiving it to be moderate, at 3, which is 1 unit from her position. The variable of interest is the change in perceived ideological distance. To calculate this, I subtract the before distance (3) and from the after distance (1). So in the example in figure 2, the change in ideological distance equals −2, which means the perceived distance between an individual and the Court decreased. That is, the respondent in figure 2 perceived the Court to be closer to her in ideological space based on the statements she heard from the politician. This variable ranges from −4 to 4, where positive values mean the perceived distance between oneself and the Court has grown larger after hearing a politician's negative statements, and negative values mean one feels closer to the Court in ideological terms.

Figure 3 shows the effects of change in ideological distance on the change in institutional support. Each dot is the estimated effect of the change in ideological distance on the change in support, or legitimacy. The vertical lines around the dots are 95 percent confidence intervals. When one of these vertical lines also intersects 0.0 on the y-axis, it means there is no meaningful effect at that level of change in ideological distance. So despite the downward slope, there is no actual effect of change in ideological distance on change in diffuse support; the effect is not statistically significant. This means that respondents are not learning new information about the Court when they hear Trump or Clinton's negative statements about the judiciary. That is, they are not ideologically updating. Instead, as we learned in figure 1, it means people react to the politician's statements based exclusively on whether they like the politician. Respondents who like Clinton

suddenly dislike the Court not because they find out the Court is more conservative than they originally thought but because they like Clinton.

During his 2010 State of the Union address, President Obama rebuked the Supreme Court's recent decision in Citizens United *v*. Federal Election Commission (558 U.S. 310, 2010). He began, "With all due deference to the separation of powers" before lambasting the Court for reversing "a century of law." Vice President Joe Biden was less subtle in the days that followed. He said the decision was "dead wrong" and that "we have to correct it," calling into question the Court's final word on a constitutional matter. Moreover, he noted that President Obama "questioned the judgment" of the Court. Although a single decision ignited this political kerfuffle, not everybody believed this was merely a complaint about the *Citizens United* case. Senator John Cornyn, a Republican, more directly tied Obama's comments to the constitutional justification for independence. He remarked, "I don't think the president should have done what he did in trying to call out the Supreme Court for doing its job. They are the final word on the meaning of the United States Constitution, even when we don't like the outcome" (Williams, O'Donnell, and Strickland 2010).

What happens when political figures speak out against the Supreme Court? The evidence here suggests that politicians can compel their supporters to disagree with the Court. However, it also suggests that those opposed to politicians may support the judiciary more based on politicians' statements. Nevertheless, malleability in the evaluations of the institution that provide it with political capital is problematic.[5] Should we worry about the Supreme Court's legitimacy? It seems that some justices already do. In a 2017 speech, Chief Justice John Roberts remarked, "It is a real danger that the partisan hostility that people see in the political branches will affect the nonpartisan activity of the judicial branch" (quoted in Greenhouse 2017). Although Roberts did not discuss how the Court might react to this hostility, it is clear the judiciary is considering the way it is discussed and how that may influence members of the mass public. Even members of the elected branches have recognized this threat. President Obama warned that when people "just view the courts as an extension of our political parties," public trust in the judicial branch can be harmed (quoted in Lithwick 2016). So as the evidence presented here suggests, Chief Justice Roberts and President Obama may rightfully be concerned about the political branches actively seeking to influence public attitudes regarding the Supreme Court.

An important component of this influence is that prominent politicians may be required to actively decry the Court in order to compel followers to disagree with the judiciary's rulings (although

5. It is important to consider that the effects of experimental treatments may fade as time passes. In other words, one's assessment of the Court's legitimacy may "bounce back" in the absence of reinforcing statements about the Court. However, as is noted here, criticisms of the judiciary and its decisions have increased in recent decades; reinforcing statements may not be as sparse as they once were.

we cannot conclusively test this with these data). This fact may assuage concern among some, as historically speaking, criticism of the Court by political figures was rare (Totenberg 2017). Modern presidents increasingly voice disappointment with the Supreme Court and about rulings with which they disagree. For instance, one journalist asked, "Why does President Obama criticize the Supreme Court so much?" (Jaffe 2015). Another noted that President Bush once remarked, "We'll abide by the Court's decision. That doesn't mean I have to agree with it," and even though past presidents have been harsh with the Court, President Trump is "out of line with past presidents" (Totenberg 2017). Altogether, it seems that major political figures do criticize the Court, making very real the possibility that they might compel their followers to ignore the Court and thereby reduce the power of its rulings.

One critical consideration is whether there are differences in criticizing a particular decision (which might decrease specific support) and criticizing the Court and its justices more generally (which might decrease legitimacy). In this chapter, I do not differentiate between the two types of criticisms, nor can we ascertain how they may influence the public from the analyses above. However, one way for the Court to build legitimacy is by deciding a sequence of cases with which one agrees on policy grounds (Gibson, Caldeira, and Baird 1998). But people do not know much about the Court, nor do they necessarily understand if a decision was pleasing. And as the quote by Senator Cornyn suggests, complaints about a particular decision reflect more broadly on the institution itself. So I suspect that a politician to whom one looks for cues may be able to influence attitudes toward the Court, whether the criticism be of a single decision, of the Court itself, or of a particular justice. Interested readers should consider the difference and how various political attacks might differentially influence the Court.

Finally, what is not considered here—and that curious readers may ponder—is how notorious one needs to be to influence public attitudes regarding the Supreme Court. Can only presidents and presidential candidates influence the public? What about congresspersons, or governors, or political media personnel? For what reasons may these individuals be able to influence the public? For what reasons might they not be able to? If only the most influential political figures are capable of harming the Court, we may rest easy. However, should many individuals be capable of influencing public evaluations of the judiciary, consternation may be more warranted.

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Empirical exercise

Students calculate their diffuse support scores and their perceived ideological distance scores, and the class determines if there is a correlation (either by calculating or guesstimating, based on responses) between the two.

Diffuse support score

Indicate whether you strongly agree (1), somewhat agree (2), neither agree nor disagree (3), somewhat disagree (4), or strongly disagree (5) with each of the items below. Be sure to keep track of your score.

1. If the Supreme Court started making decisions that most people disagree with, it might be better to do away with the Court
2. The right of the Supreme Court to decide certain types of controversial issues should be reduced
3. The U.S. Supreme Court gets too mixed up in politics
4. Justices who consistently make decisions at odds with what a majority of the people want should be removed
5. The U.S. Supreme Court ought to be made less independent so that it listens a lot more to what the people want
6. We ought to have a stronger means of controlling for actions of the U.S. Supreme Court
7. The Court favors some groups more than others

Then, add all seven number together and divide by 7. This is your diffuse support score, on a scale from 1 (low support) to 5 (high support).

Perceived ideological distance

Respond to the following two items:

1. Would you consider yourself very liberal (1), liberal (2), moderate (3), conservative (4), or very conservative (5)?
2. Would you consider the U.S. Supreme Court very liberal (1), liberal (2), moderate (3), conservative (4), or very conservative (5)?

Then, subtract the two numbers and take the absolute value. This is your perceived ideological distance score, on a scale from 0 (no distance) to 4 (large distance).

As a class

Depending on the classroom size, the instructor could calculate the product moment correlation, or could graph each point to determine if there is a trend, or could otherwise summarize the data.

Discussion Questions

1. The evidence suggests that a politician can influence public views of the judiciary when he or she criticizes the Court as a whole. Consider what might happen when a politician is critical of a particular decision the Supreme Court makes. Will it have the same influence? Now consider what might happen if a president who has nominated multiple justices criticizes the Court.
2. Consider how famous an individual has to be before his or her statements about the judiciary can influence views of the Supreme Court. Can only the most notorious politicians—such as presidents, presidential candidates, or high-profile individuals—move views of the Court? Or can lower-profile individuals—such as governors, representatives, or members of the media—influence the public? Finally, consider the role of affect and partisanship for these lower-profile figures; do one's feelings toward the figure matter more or less as they decrease in notoriety?

28. Experimentally Measuring Responsiveness to Criticisms of the US Supreme Court as Antidemocratic

KYLE J. MORGAN

In roughly the last ten years, the Supreme Court of the United States has handed down decisions on some of the most controversial social and political questions of the day: from gay marriage and gun control to abortion and affirmative action. Furthermore, in recent years the Court has not been a consistent friend nor foe to either the right or left, making decisions each term that both sides alternately praise or condemn. It is therefore surprising that according to public opinion surveys the US Supreme Court has consistently been rated as the most trusted branch of government. The Supreme Court in this regard is interesting, with the decisions that it hands down appearing not to affect the Court's core public support.

When talking about the Court, support takes on two different meanings. First there is specific support or agreement with the current behavior of the Court and its decisions. This specific support has been found to mirror the level of agreement or disagreement with recent Court decisions, but it is also fleeting and has been found to be disconnected from the broader support for the Court as an institution (Gibson and Nelson 2014, 2015; but see Bartels and Johnston 2013). Of more interest is the second kind of support, the Court's diffuse support or legitimacy, which has been defined as "a psychological property of an authority, institution, or social arrangement that leads those connected to it to believe that it is appropriate, proper, and just" (Tyler 2006, 357). When speaking about the Court, this has been conceptualized as "institutional loyalty" or a resistance to making fundamental changes to the way in which an institution operates or functions (Gibson et al. 2003a).[1]

Since the Court's decisions do not appear to influence its legitimacy in the eyes of the public, where does this legitimacy come from? Gibson (2007) argues that the Court's legitimacy stems from a belief in core democratic values and beliefs as well as exposure to symbols and messages that present the Court as "different" from normal politics. However, there has also been considerable hand-wringing over the concern that the Supreme Court and its power of judicial

1. Note: throughout this chapter unless otherwise specified, when referring to support or approval of the Court, this is referring to the Court's legitimacy. This is done simply to aid with the flow and readability of the paper.

review are potentially antidemocratic; this is often called the "countermajoritarian difficulty." This project uses an experiment to explore the potential for public attitudes toward the Court to be influenced by messages highlighting the Court's potentially antidemocratic behavior and functions.

While this is an exploratory study, it does provide critical new insights into several scholarly questions. First and foremost, this provides empirical evidence to advance the scholarly debate over whether judicial review is compatible with a democratic system of government. There has been limited scholarly attention to what those who are potentially thwarted by judicial review think about this countermajoritarian difficulty. If we want to further the discussion over judicial review's democratic credentials, we should be aware of what the public thinks.

Second, there has been a robust scholarly debate over judicial legitimacy, with much of the research finding that the Court's legitimacy is not impacted by specific decisions. This project takes this analysis in a new direction and explores the extent to which the public's perceptions of the Court's legitimacy can be influenced by the language used by elected officials when they discuss the Court. The language used in the experiment differs from previous studies that have focused on specific decisions and instead uses criticisms that raise more fundamental concerns about the role of the Court.

The study will proceed as follows: First, I provide an overview of the existing literature around judicial legitimacy and public attitudes toward the Court more generally. I also provide a brief overview of the debates around the compatibility of judicial review with democracy, and how this relates to the discussion of the Court's legitimacy. Next, I introduce the methodology and discuss the specifics of the experimental design. This is followed by the analysis, and last, I conclude by situating these results into the larger literature around judicial legitimacy and offering suggestions for future research and consideration.

Judicial Support, Legitimacy, and Public Opinion

Using a variety of public opinion surveys, Gibson and his coauthors have found little evidence that disagreement with specific policies or decisions, also known as *specific support*, influences attitudes toward the Court's legitimacy, also known as its diffuse support. The finding, that there is a disconnect between specific and diffuse support, seems surprising as we would expect voters

to evaluate the Court based on the decisions it hands down.[2] If that is not the case, then the next logical question is why.

Gibson and Calderia (2009) proposed the "positivity bias" as an explanation of why the Court retains public support in the wake of decisions that voters may disagree with. They argue that through exposure to the Court—for example, when watching coverage of a recent decision—voters are exposed to "symbols of judicial legitimacy." These symbols include the robes, bench, and the imposing marble "temple" that is home to the Supreme Court, all of which help to retain public support for the Court by highlighting the idea that the Court is different from regular politics (Gibson et al. 2014). Further, there is an existing set of ideas that come from early political socialization that help to reinforce judicial legitimacy (Gibson and Caldeira 2009).[3] These symbols and early political socialization together help to generate what has been referred to as a "reservoir of good will." Gibson and Caldeira argue that this reservoir is what allows the Court to survive the potential backlash that may come from unpopular decisions. Further, exposure to these symbols can also refill the reservoir of good will by reminding those exposed that the Court is legitimate and "different" from regular politics.

One of the most dramatic examples of this concept would be the 2000 election and the Supreme Court's decision in *Bush v. Gore*. For those too young to remember, on election night 2000 the outcome of the election hinged upon Florida. The winner of the state, which was too close to call at the time, would receive the state's 25 electoral votes, pushing them above the 270 electoral vote requirement and securing the election for either George W. Bush or Albert Gore. However, the margin separating the two candidates in Florida was so close that it triggered a mandatory recount. During this recount, the issue emerged of how to count so-called *hanging chads*. At the time, paper ballots in Florida used a punch system where a stylus was used to poke out a small circle of paper that was slightly perforated. If one didn't punch out the circle completely, the circle of paper or "chad" would remain attached. The debate centered on what to do about a chad that was still attached by one or two perforations (aka hanging).[4] Various Florida counties were making different decisions on how to count these votes and there were concerns that the votes were not being counted fairly or equally across the state. These concerns lead to multiple lawsuits challenging the vote-counting procedures. After rulings by the State Circuit Court and the Florida Supreme Court, one of these cases made its way to the US Supreme Court.

2. The idea being that among other things, Congress and the presidency are evaluated based on what they have done. It is surprising that the Court is not evaluated in the same way.
3. Early political socialization includes things like our primary school education and the messages received from parents or guardians.
4. There were also pregnant chads where the chad was concave due to some pressure, but the perforations were not broken.

The Court, by a 5–4 margin, ruled that the state should stop its recount, and in effect awarded the state of Florida, and by extension the Presidency, to George W. Bush. This 5–4 decision, where the five Republican-appointed justices ruled for the Republican presidential candidate, was criticized by many, but as Gibson, Caldeira, and Spence (2003a) show, disapproval of the decision had little if any impact on the Court's perceived legitimacy. This raises the question again of what might shape the Court's legitimacy. If an arguably partisan decision where the Court, in effect, awarded the presidency to the candidate who lost the popular vote (Law 2019; Mann 2001) does not influence the Court's legitimacy, what does?

While there is considerable evidence that the Court has a sizeable reservoir of good will, "that reservoir is far from bottomless" (Gibson and Nelson 2014, 205). Bartels and Johnston (2013) find that when subjects place themselves on the standard five-point ideological spectrum[5] and then place the Court on the same spectrum, those with the highest level of ideological disagreement between where they placed themselves and where they placed the Supreme Court[6] view the Court as less legitimate. Furthermore, Bartels and Johnston (2012) also find that much of the public views the Court as a political institution. While this may not be surprising to some, it is nonetheless significant in terms of understanding how the public thinks about the Supreme Court. Nicholson and Hansford (2014) as well as Christenson and Glick (2014) find that among the public this perception of the Court and its decisions as political rather than legal has an impact on both the acceptance of decisions and the Court's overall legitimacy. Taken together, these results and others suggest that the way the Court is talked about, or framed, matters for how the public conceptualizes and, in turn, evaluates the Court.

Framing the Court

"Framing is the process by which respondents develop a conceptualization of an issue or reorient their thinking about an issue based on what considerations are brought to mind.... A frame—whether captured by a single word within the question or by multiple words or phrases—acts as an interpretive lens, provoking a different set of considerations depending on the

5. Very liberal, liberal, moderate (or "case by case basis" when discussing the Court), conservative, or very conservative.
6. For example, a subject who identified as very conservative and identified the Court as very conservative would have zero ideological disagreement, while someone who identified as a moderate or independent and said the Court was very conservative would have a disagreement level of two.

perspective it portrays" (Koning 2020, 17). The idea that the way the Court is discussed and what related themes are made salient, or how the Court is framed, matters is obvious.

Compared to other institutions, the Court practically invites framing of it and its decisions by other political actors. The Supreme Court is passive and opaque. While other political actors seek out questions and controversies, the Court involves itself only in issues that are brought before it, and even then it selects only a small fraction of those.[7] If Congress is debating salient legislation there is no end to the soundbites and media appearances of elected officials; they are on every screen and in every speaker, spinning the debate and the legislation. Compare that to the Supreme Court at the end of every term. Not only do the justices not appear on the nightly news to discuss the decisions,[8] but the decisions are written in a language most voters do not understand, and arguably few even within the legal community read in their entirety (Chemerinsky 2015).[9] As a result, the decisions and behavior of the Court require translation and communication to the public. Never ones to miss an opportunity, political elites use these moments to spin and frame the Court and its decisions (Morgan and Peabody 2014; Peabody and Morgan 2013). It is in this framing that we can see how the public's perceptions of the Supreme Court may be shaped.

Building on the vast framing literature,[10] several scholars have found significant framing effects around the Court. For example, Baird and Gangl (2006) find experimental evidence that when a Court decision is framed as political, rather than legal, subjects evaluate the Court and its decision more negatively. Zilis (2015) finds first that the presence of dissenting opinions leads to an increase in the media coverage framing the decision as a conflict or fight. Second, he finds experimental evidence that when the Court's decisions are framed as such, there is a negative impact on evaluations of the decision, which has the potential to harm the Court's legitimacy.[11]

The Supreme Court and Judicial Review in American

7. Of the thousands of cases that apply for certiorari, the Court only hears roughly one hundred each term, giving it an acceptance rate of around 1 percent (*About the Supreme Court*, n.d.).
8. While media appearances of Justices may be increasing (Hasen 2016), it is undeniable that Justices differ from elected officials in their conduct and statements during these appearances.
9. Famously in 2012, CNN and Fox News both misread the *National Federation of Independent Businesses v. Sebelius* decision and, incorrectly, announced that the Court had struck down the individual mandate in the Affordable Care Act (Seltzer 2012).
10. See Chong and Druckman (2007) for a thorough review of this literature.
11. Also see Nicholson and Howard (2003) who find that under some circumstances, like highlighting the consequences of a decision, the framing of a Supreme Court decision can harm the Court's legitimacy.

Democracy

While the public, overall, appears to be quite supportive of the Supreme Court, there are some who raise questions concerning the compatibility of the Court with democracy. This debate often hinges upon the Supreme Court's power of judicial review.[12] Bickel (1962) coins the term "the countermajoritarian difficulty"[13] to summarize this concern: that the unelected and largely unaccountable Supreme Court uses its power of judicial review to invalidate legislation which can potentially undermine the preferences of the majority. The counter-majoritarian difficulty has become what some call the "central obsession" of constitutional scholars (Friedman 2002). While the nuances of this debate are beyond the scope of this chapter, there are some important aspects of this debate that need to be explored so as to provide a basis for the experiment to come.

The first question is, Does the Court in fact behave in a counter-majoritarian fashion? It makes sense to see if in fact the concerns about the Court invalidating the will of "the people" has an empirical basis. Dahl's (1957) analysis showed that rather than the Supreme Court overruling the national majority or elected officials, more often than not it was frequently in line with both. In turn, this led Dahl to conclude that "the Supreme Court is inevitably part of the dominant national alliance" (1957, 293). While Dahl found that at the national level the Supreme Court did not invalidate the preferences of Congress, Casper (1976), by expanding Dahl's methodology and scope to include state and local laws being overturned by the Supreme Court, found that the Court did in fact behave in a counter-majoritarian fashion.[14] More recently, Kastellec (2017) complicated this debate. Specifically, he analyzes the legalization of marriage equality after the 2015 decision in *Obergefell v. Hodges*[15] and finds that by striking down some state-level bans, the Court was behaving in a "promajoritarian" fashion by bringing policy more in line with majority opinion which favored marriage equality. However, that same decision in other states was "counter-majoritarian" where a majority of voters in those states did not support marriage equality.[16]

12. A power given to the Supreme Court by the Supreme Court in *Marbury v. Madison* (1803).
13. Also sometimes called the countermajoritarian dilemma.
14. Important as well is that in addition to including a broader scope of cases which could even be considered countermajoritarian, Casper (1976) included the Warren Court and by extension the civil rights era, when the Court heard many cases challenging discriminatory state and local laws.
15. 576 U.S. 644.
16. Also see Hoekstra (2000) on local public opinion and Supreme Court decisions. Again, the concern about judicial review is that by overturning the decisions of a legislature the Court is acting against the will of the public and thus the Court is acting antidemocratically. This requires accepting the assumption that by overturning legislative decisions the Court is by extension overturning the public's will. For a number of reasons such as race (Butler and Broockman 2011; Minta and Sinclair-

Persily, Citrin, and Egan (2008) take a variety of policy questions and look at the longitudinal trend of Supreme Court decisions and related public opinion. While on some issues, such as school desegregation, public opinion has moved more in line with the Court's decision, on other issues like flag burning and school prayer "strong majorities continue to support a position contrary to that of the Court" (Persily et al. 2008, 12).[17] Mishler and Sheehan (1993) similarly find a long history of the Court tending to be in line with the long-term trends in public opinion, but in more recent years the Court has remained to the right of where the public has been.[18] (See also the Johnson and Strother chapter in this volume.) Thus in answering the question of whether the Court is a countermajoritarian institution, the evidence suggests that it can be at times. However, the extent that voters are troubled by this remains an open question.

What do those who are potentially "countered" by the Supreme Court's use of judicial review think about the role of the Court? While scholars may have debated and studied these issues for decades, we know surprisingly little about what regular voters think of these different debates and concerns (see Bickel 1962; Ely 1980; and even *Federalist*, no. 78). By better understanding the public's attitudes toward judicial review—a public whose preferences are potentially thwarted by the Court's use of it—we can further refine our understanding of public attitudes toward the judiciary. Also, we can improve our normative conceptions of how the Supreme Court and judicial review should, or should not, fit into our political system. If, potentially, the public is ambivalent or even welcoming of judicial review, this has the potential to alter how we view the concerns around the counter-majoritarian dilemma.

Methods

In order to investigate these questions surrounding public opinion and judicial legitimacy, I fielded a survey experiment that employs vignettes regarding the Court (May 28 through June 2, 2019)

Chapman 2012; Tate 2003), gender (Carroll 2003; Ditmar et al. 2018; Rosenthal 1998), or class (L. M. Bartels 2008; Domhoff 2006; Schattschneider 1960), we should be skeptical at best of the idea that the decisions and preferences of the elected branches represent the will of their constituents or voters more broadly.

17. Also see Franklin and Kosaki (1989) who studied the Court's decision in *Roe v. Wade* and found that on one hand the decision increased support for abortions broadly while also increasing the polarization toward "discretionary" abortions.
18. But see Bartels and Johnston (2013), who argue the Court has moved somewhat to the left.

and uses a nonprobability convenience sample.[19] As seen in table 1 below, though this sample is not nationally representative, it does compare well to national demographics and the American National Elections Survey (ANES), a nationally representative survey fielded biannually.

	Percent of sample	US Census*	ANES**
Gender	--	--	--
Male	47.4	49.2	46
Female	52.4	50.8	52
Other	.2		.2
Race	--	--	--
Non-white	39	39.3	28
White (non-Hisp.)	61	60.7	71
Age	--	--	--
18-24	11.9	9	7.6
25-34	19	14	16.6
35-49	26.5	19	23.3
50-64	27.1	19	27.3
65+	15.5	16	22.3
Party ID	--	--	--
Rep	37		40.53***
Ind.	17.2		13.5
Dem	45.8		45.4
Ideology	--	--	--
Lib	28.7		24.1
Con	35.1		32.2
In btwn.	36.3		20.94****

Table 1: Demographic characteristics of the experiment sample compared to US Census and 2016 American National Election Time Series

19. Convenience samples are not intended to be nationally representative, they are drawn from individuals recruited into a pool of subjects, rather than being drawn at random from the population at large. However, in the experimental literature, the use of a convenience sample is common and well regarded (Clifford and Jerit 2014; Mullinix et al. 2015).

* Gender and race: https://www.census.gov/quickfacts/fact/table/US/PST045218; Age: https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP_2017_PEPSYASEXN&prodType=table.Note:age percentages here do not include 0–17.

** ANES 2016 time series.

*** Collapsed version of ANES 7-point party identification question.

**** Collapsed version of ANES 7-point ideology question.

In the study of courts and judicial legitimacy, I follow in a long line of experimental work, dating back almost twenty years (B. L. Bartels 2014).[20] Specifically, the use of vignettes as part of the experimental design, as used here, is common in the judicial legitimacy literature (Baird and Gangl 2006; Christenson and Glick 2014; Zilis 2015). Vignettes as a design involve presenting subjects with one or more passages of text to read and then measuring their response after reading the text(s). Vignettes can be thought of as the "treatment"; by exposing (or treating) the subjects with different vignettes, we can compare our dependent variables based on the different treatment groups. For example, an experiment may present a vignette discussing a policy proposal, but half the subjects are randomly assigned a treatment where they are told the policy proposal is coming from a Congresswoman while the second half is randomly assigned to a treatment where the same proposal is attributed to a Congressman. After reading the passage you then measure agreement with the passage and see if, for example, there is a difference between those in the Congresswoman treatment and those in the Congressman treatment. If the only difference between the treatment vignettes is the gender of the person presenting the proposal, and we detect a difference between the groups, we can say that the gender cue influenced how subjects evaluated the passage.

	Political	**Countermajoritarian**	**Democratic process**
Democrat			
Republican			
Bipartisan			

Table 2: Experimental design

This experiment used a 3 × 3 design (see table 2), where 1,004 subjects were randomly assigned to one of nine treatments where they read a passage from either a Republican, Democratic, or bipartisan group of Senators and members of the House criticizing the judiciary in one of three different ways.

20. For example, see Mondak (1992); Gibson, Caldeira, and Spence (2003b); Gibson, Lodge, and Woodson (2014); and Bartels and Johnston (2013).

Using the language found in an analysis of congressional press releases as a guide (Morgan 2020), I crafted three different criticism types that reflect three different ways of criticizing the Court; political, countermajoritarian, or democratic process. For the "political" criticisms, the main idea here is simply that the Court is making "bad" decisions, not interpreting the Constitution correctly, and the vignette, overall, attacks the decision-making process.

Political frame:

> In a recent speech, **[a bipartisan group of Senators and members of the House of Representatives / a group of Republican Senators and members of the House of Representatives / a group of Democratic Senators and members of the House of Representatives]** discussed the role of the Supreme Court. The **[bipartisan group of Senators and members of the House of Representatives / group of Republican Senators and members of the House of Representatives / group of Democratic Senators and members of the House of Representatives]** criticized the Court saying that; "The Supreme Court continues to make the wrong decisions. This is not about ideological disagreement, instead the Court simply continues to read and apply the constitution incorrectly. Instead of making decisions based on the text of the constitution and legal precedent the Justices make decisions based on their own political preferences. We are deeply concerned about the future of our country if we continue to allow the Supreme Court to substitute the political ideology of the justices for sound legal reasoning. As a nation founded on Constitutional principles and the rule of law, we urge all Americans to question why we allow the Supreme Court to continue to undermine that."

The "countermajoritarian" criticisms focus on the idea that the Court's decisions are thwarting the will of the people and/or voters. Finally, the "democratic process" criticisms present the idea that the Court's decisions are harming access to and participation in the democratic process. This line of criticism draws upon the work of Ely (1980), but rather than viewing judicial review as justifiable when it defends democracy and democratic participation, it turns this into a criticism by attacking the Court for undermining those concepts. Additionally, while previous studies have analyzed the harm that disagreeable decisions may or may not have on support for the Court, the democratic process and countermajoritarian criticisms offer something new by shifting the focus from a disagreeable decision to attacking the Court as incompatible, or inconsistent, with democracy.

Countermajoritarian frame:

> In a recent speech, **[a bipartisan group of Senators and members of the House of Representatives / a group of Republican Senators and members of the House of Representatives / a group of Democratic Senators and members of the House of Representatives]** discussed the role of the Supreme Court. The **[bipartisan group of**

Senators and members of the House of Representatives / group of Republican Senators and members of the House of Representatives / group of Democratic Senators and members of the House of Representatives] criticized the Court saying that; "The Supreme Court continues to make decisions that are opposed to the wishes of voters. In a democracy it should not be allowed that nine unelected, and unaccountable, judges are able to make decisions that contradict the will of the people. It should be through the political process, where voters decide what is best for them, and in turn elect representatives to carry out those wishes. We, the elected representatives, and the voters should resolve these issues, and not turn that over to judges to make those decisions behind closed doors. The Supreme Court is not only making the wrong decisions, but by ignoring and invalidating the will of the people, it is undermining our democratic form of government."

Democratic process frame:

In a recent speech, **[a bipartisan group of Senators and members of the House of Representatives / a group of Republican Senators and members of the House of Representatives / a group of Democratic Senators and members of the House of Representatives]** discussed the role of the Supreme Court. The **[bipartisan group of Senators and members of the House of Representatives / group of Republican Senators and members of the House of Representatives / group of Democratic Senators and members of the House of Representatives]** criticized the Court saying that; "The Supreme Court continues to make decisions that weaken the ability of the voters to have a voice in government and politics. All voters should be troubled by a Court that allows special interests to drown out the voice of voters. In a democracy it should be the voters, not special interests, who elected officials pay attention to. The Supreme Court should be making decisions that encourage voting and participation in our political process, instead it continues to rule against these core democratic values. We should encourage all citizens to have a voice and to exercise their right to vote, but the Supreme Court appears opposed to allowing voters to exercise these most fundamental rights."[21]

To make the criticisms believable, the language of the criticisms is negative, but generic enough so that it could be reasonably be attributed to any of the sources. This means that the criticisms do not mention specific decisions or ideological positions. For example, it would be hard to believe a criticism of the *Citizens United*[22] (2010) decision or the Court being too conservative would come

21. Introductions to each passage and the text of the source cues come from experimental manipulations used by Gibson and Nelson (n.d.)
22. 558 U.S. 310.

from a Republican or that a criticism of *Obergefell* or the Court being too liberal would come from a Democrat.

After reading the passage, subjects are then given two sets of questions that serve as the dependent variables in analysis. In the first set, subjects are asked about their agreement with the statement itself, how strong they felt the argument was, a measure of hypothetical willingness to donate to a candidate or group advocating for what the passage discussed, and how credible those quoted were. These variables represent a basic reaction to the passage or, in the case of willingness to donate, a different way to conceptualize agreement with the passage. If we are to uncover evidence that the frames had an effect, we should find evidence of that here. These items also allow us to see how voters view these different messages. Since the public views the Court highly, we first need to see if they are even open to messages calling into question the very role of the Court. If voters do not reject these criticisms, we can then take this analysis one step further and see what influence they have on evaluations of judicial legitimacy.

The second set of dependent variables, listed below, consists of standard measures of judicial legitimacy developed by Gibson and Nelson (2014).[23] Subjects were asked the following questions at the beginning of the survey and then again after receiving the treatment, which allowed me to measure any potential change between the initial attitudes and those after the treatment. Finding an effect here would offer important new information to the debate over judicial legitimacy.

1. "It is inevitable that the US Supreme Court gets mixed up in politics; therefore we ought to have a stronger means of controlling the actions of the US Supreme Court."
2. "The US Supreme Court ought to be made less independent so it listens a lot more to what the people want."
3. "Judges on the US Supreme Court who consistently make decisions at odds with what a majority of the people want should be removed from their position as judges."
4. "If the US Supreme Court started making a lot of decisions that most people disagree with, it might be better to do away with the Supreme Court altogether."
5. "The right of the Supreme Court to decide certain types of controversial issues should be reduced."
6. "The US Supreme Court gets too mixed up in politics."

23. Note, these items are based on a scale originally developed by Gibson, Caldeira and Spence (2003a). Additionally, they also produce a highly reliable scale with a Cronbach Alpha of .866.

The experiment also ensured that subjects paid attention through two manipulation checks. Subjects were asked "who was quoted in the article you just read" and "True or false, the passage you just read praised the Supreme Court." Seventy-nine percent of the subjects got both manipulation checks correct. Manipulation checks allow us to ensure a subject was paying attention and properly perceived the treatment. The analysis below uses only those subjects who correctly answered at least one of the manipulation checks.

Hypotheses

I am interested in public attitudes toward the three criticism frames—countermajoritarian, democratic process, and political—and further, if they present a threat to judicial legitimacy. However, given ample evidence around the influence of partisanship on voters' attitudes, and that the partisan source cue was manipulated in the experiment, I propose the following initial hypothesis.

> **H1**: Subjects will respond to the partisanship, or source cue, of the passage rather than the type of criticism used.

Based on existing research on framing and partisanship in regard to support for the Supreme Court (Clark and Kastellec 2015), and the current level of hyperpartisanship among the American electorate (Mason 2018), I expect that subjects will respond more favorably to a criticism that is from their copartisans, regardless of the frame used. Therefore, even though analysis of congressional language found differences between how Democratic and Republican legislators discussed the Court (Morgan 2020), as with much of today's politics, I expect that partisanship will be a driving factor here.

However, even if partisanship is a significant force, we can look within the partisanship manipulations, in effect controlling for the influence of partisanship, to explore the responsiveness to the different frames. Based on the language used by legislators in press releases, Democratic legislators overwhelmingly preferred democratic process language while the Republican peers preferred countermajoritarian language (Morgan 2020). Therefore, I expect that subjects, when presented with a copartisan source—for example, a Republican getting a message from a fellow Republican—will evaluate statements that are consistent with how their party

discussed the Court more positively compared to those framed in the opposite ways. This leads me then to the following two hypotheses:

H2a: Self-identified Democratic subjects, when presented with a Democratic source cue, will agree more with a democratic process frame, compared to counter-majoritarian framing. They will also evaluate Democrats using the democratic process frame as more credible than those using a countermajoritarian frame.

H2b: Self-identified Republican subjects, when presented with a Republican source cue, will agree more with a counter-majoritarian frame, compared to a democratic process framing. They will also evaluate Republicans using the countermajoritarian frame as more credible than those using the democratic process frame.

I am also interested in how these types of criticisms affect judicial legitimacy. Scholars have grappled with the Court's democratic credentials as a theoretical issue for decades, but there has been little systematic analysis of the extent to which the public is responsive and/or concerned about these issues.[24] Therefore, I propose two hypotheses based on the experimental manipulations:

H3a: Subjects, presented with a copartisan source cue, who are exposed to either a democratic process or countermajoritarian criticism, will have a lower evaluation of the Court's legitimacy, compared to those exposed to political criticisms.

H3b: Subjects who are presented with a counterpartisan source cue and a democratic process or countermajoritarian frame, will increase their evaluations of the Court's legitimacy.

24. But see Morgan and Young (2019).

The logic here is that attacks on the democratic compatibility of the Court will harm the Court's legitimacy only when that attack comes from a copartisan. Alternatively, H3b is what I am calling the "roughing the ref hypothesis." When the more substantial criticisms come from a counterpartisan, I expect there to be a backlash in which partisans react to the other party's attack by coming to a defense of the Court's legitimacy.

Analysis

H1 claims that subjects will respond to the source cue of the criticism, rather than the frame used. Since "partisanship is a hell of a drug," the expectation is that subjects' first reaction to the statements will be contingent on the partisanship of the source cue. This does not mean that the message does not matter; rather, that I expect the criticism frame to come into play when the message comes from a copartisan source. For this analysis then I have run several two-way between-subjects analysis of variance tests (ANOVAs), which test if the difference between independent groups is statistically significant for Democrats and Republicans separately looking at the effects of the source cue and criticism frame on the four dependent variables.

For Democrats, there is a statistically significant effect for the source cue and the criticism frame when it comes to their level of agreement with the passage.[25] The Tukey HSD post hoc test showed statistically significant differences between the Republican source cue and the Democratic ($p = .001$) and bipartisan ($p = .001$) source cues (see figure 1 below), as shown in figure 1 below, where the bars for Democratic and bipartisan groups do not overlap with the Republican line. There was no statistically significant difference between the Democratic and bipartisan source cues ($p = .997$), shown in the figure below where these two bars overlap.

25. Source cue ($F(2,344) = 7.708$, $p = .001$ $n2 = .042$). Criticism frame ($F(2,344) = 3.219$, $p = .041$ $n2 = .017$).

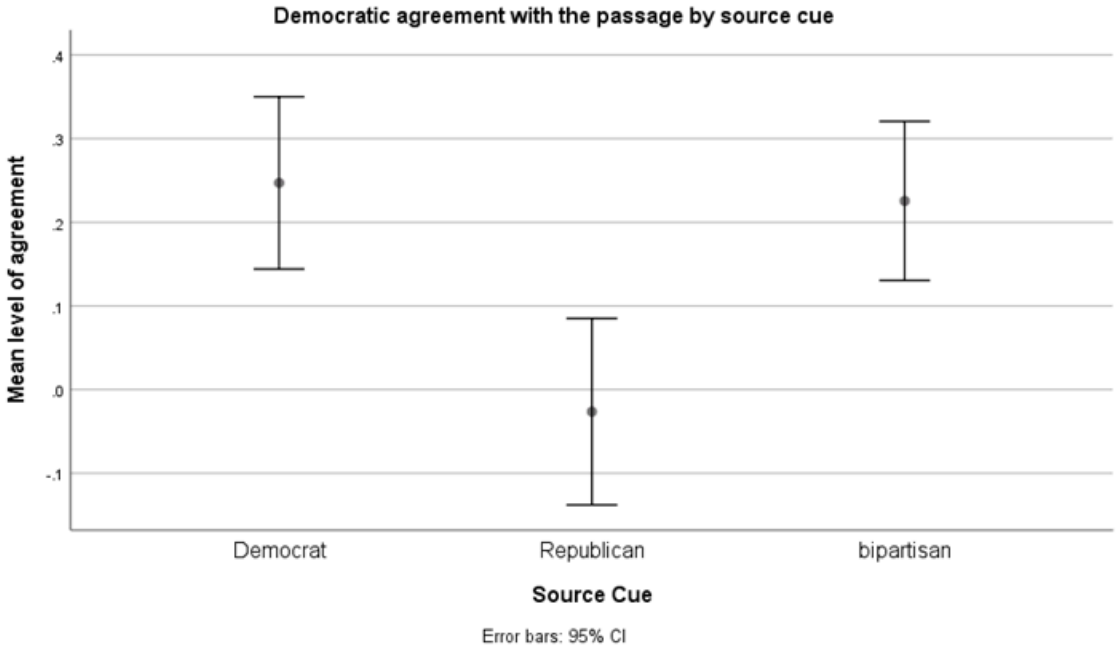

Figure 1

For the criticism frames, Democrats agreed more with the democratic process frame compared to the countermajoritarian frame by .199 (p = .02). The post hoc analysis did not show any other comparisons between the frames as statistically significant.

When we look at how likely Democrats would be to donate, we see a statistically significant difference based on the source cue,[26] but not for the criticism type. The Tukey HSD post hoc test showed that in terms of donating, the statistically significant difference, as seen in figure 2 below, was between the Democratic and Republican source cues (p = .019). The other comparisons were not statistically significant. Similarly, when it comes to evaluation of the passage's strength, there is a similar statistically significant difference based on the source cue,[27] but not for the criticism frame.

26. F(2,344) = 4.084, p = .018 n2 = .023.
27. F(2,344) = 3.141, p = .044 n2 = .018.

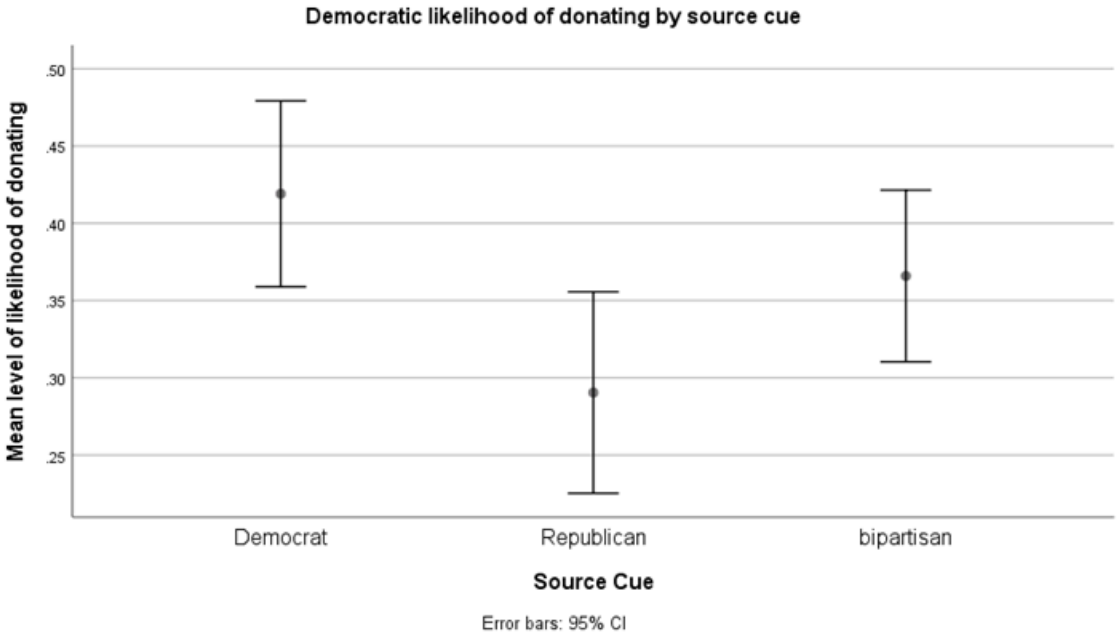

Figure 2

Finally, for the credibility afforded to those quoted in the passage, among Democrats I find another statistically significant difference based on the source cue,[28] but not for the criticism frame. The post hoc analysis showed that Republican passages had a mean evaluation .113 less than those attributed to only Democrats (p = .006), and .122 less than those attributed to both Democrats and Republicans in the bipartisan treatment (p = .002).

28. (F(2,344) = 6.712, p = .001 n2 = .037).

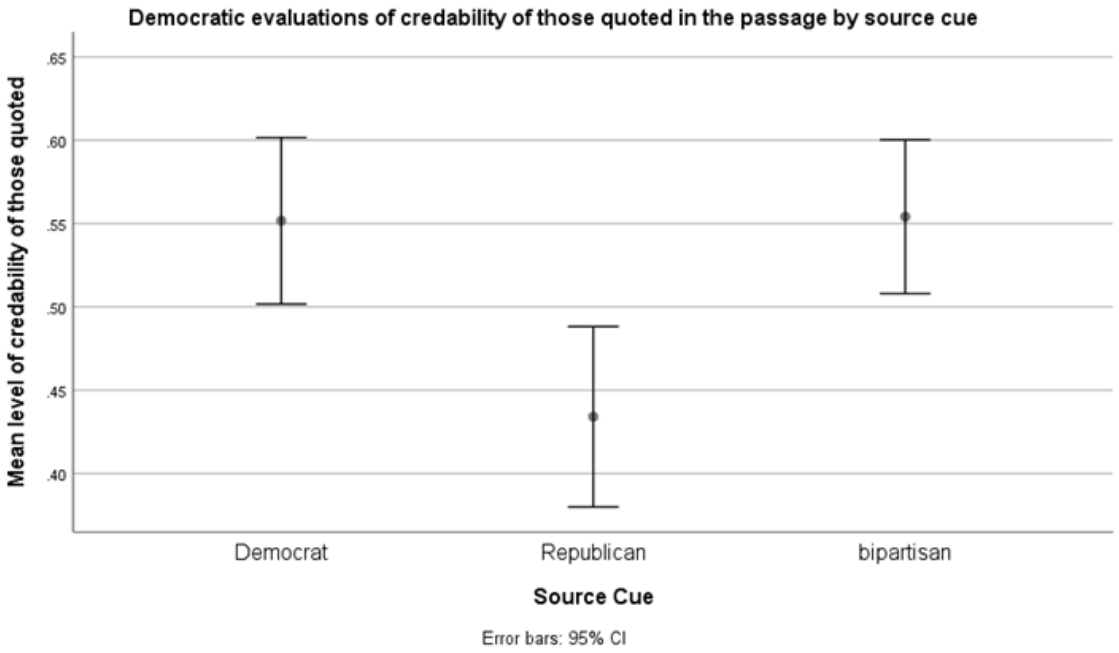

Figure 3

Moving now to Republicans, I find an even stronger effect of partisanship in terms of their level of agreement with the passage. The difference between evaluations was statistically significant based on the source cue,[29] but not for the different criticism types (p = .055). The Tukey HSD post hoc test showed that Republican subjects evaluated passages attributed to Democrats compared to those from Republicans worse by .344, or roughly 1/3rd of the scale (p < .001). The other comparisons were not statistically significant.

29. (F(2,288) = 7.744), p = .001 n2 = .049).

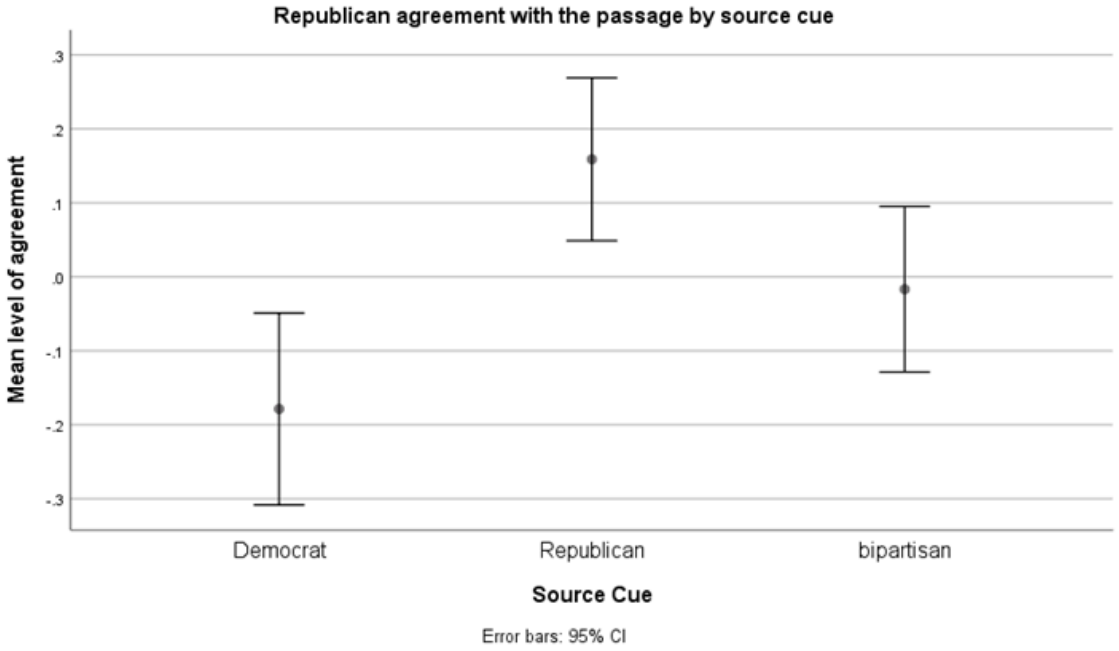

Figure 4

When we move to Republican's likelihood of donating, the model Levene's Test was statistically significant (>.05), violating the assumption of homogeneity of variance. Since this is the case, I proceed with some level of caution and will look for a significance level of < .01, rather than the normal < .05 level. Even with this higher bar, I find that there is a statistically significant effect of the source cue on Republicans' likelihood of donating[30] (see figure 5), but the differences between the criticism frames were not statistically significant. The Tukey HSD post hoc tests showed Republican subjects were more willing to donate when the criticism came from a fellow Republican compared to a Democrat ($p < .001$) or even when it came from a bipartisan group ($p = .018$).

30. ($F(2,288) = 8.32$, $p < .001$ $n2 = .053$).

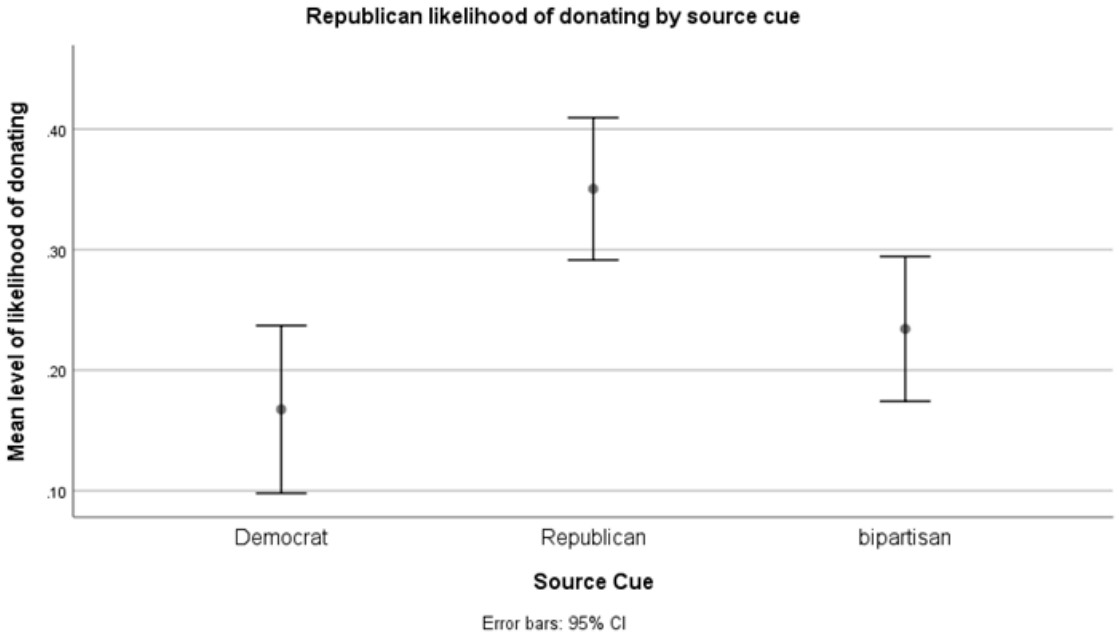

Figure 5

Turning to how strong Republicans viewed the passage to be, I find a statistically significant difference here as well, based on the source cue.[31] Republicans appear to punish those passages that do not include copartisans (see figure 6). Using the Tukey HSD post hoc test, compared to a Republican source cue, those that came from Democrats were evaluated as worse by .157 (p = .002). Also, when compared to a bipartisan source cue, Democratic statements received a lower rating by .123 (p = .019). There was not a statistically significant difference between the Republican and bipartisan statements (p = .7).

31. (F(2,288) = 5.728, p = .004 n2 = .036).

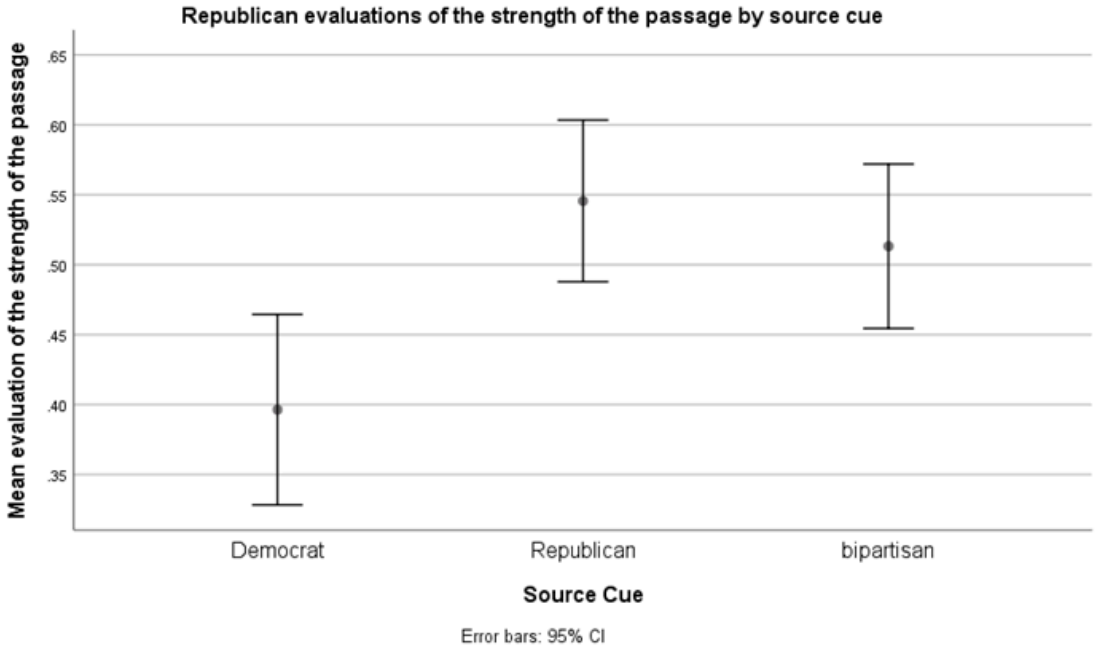

Figure 6

Finally, Republicans appear to evaluate the credibility of those quoted in the passage based on the partisanship of the messagexxxii (see figure 7), while the criticism type was not statistically significant. Similar to how they evaluated the strength of the passage, Republicans appear to punish press releases that do not include fellow Republicans, with those coming from Democrats being evaluated as worse by −0.19 compared to a Republican source cue ($p < .001$), and Democratic passages were evaluated as worse than the bipartisan treatment by −0.159 ($p = .001$), based on the Tukey HSD post hoc test. There was not a statistically significant difference between the Republican and bipartisan source cues ($p = 1.0$).

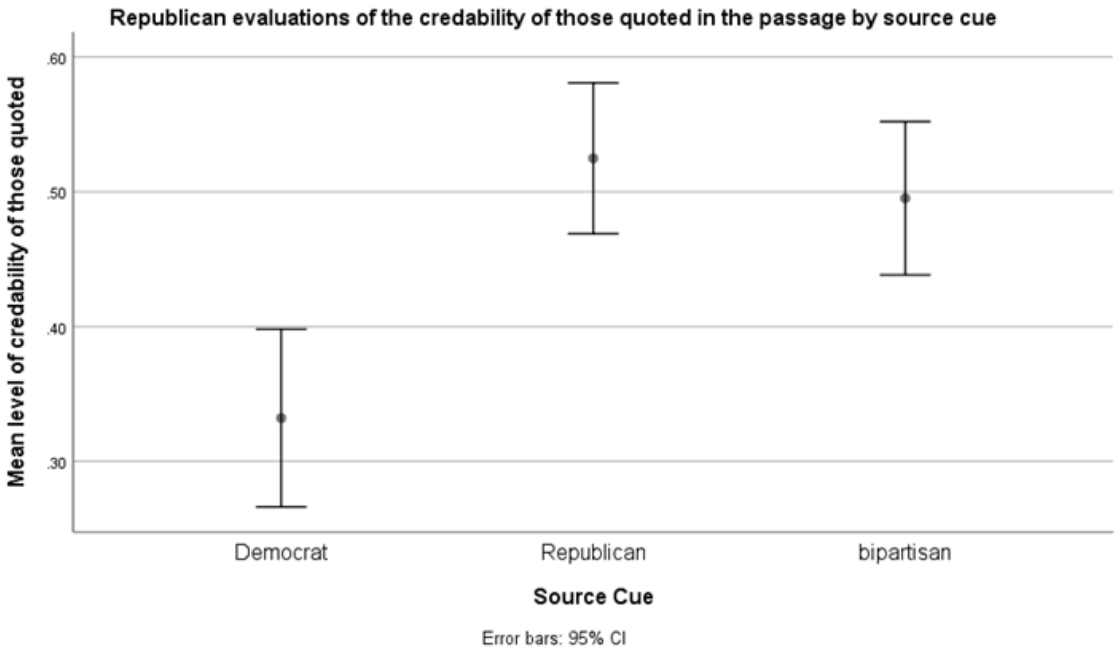

***Figure* 7**

For the first hypothesis, the evidence supports it. Both Democrats and Republicans look as if they are first and foremost concerned about the partisanship of those quoted in the passage. Across the board, I find that partisans evaluate the passage as more credible, view it as stronger, are more likely to donate, and generally agree more with passages that come from copartisans.[32] This, though, does not mean that the frames do not matter. It means rather that we need to remove the partisan influence by looking at the influence of the criticism frames within copartisan treatments.

H2a and H2b are two sides of the same coin. The idea here is that since partisanship is such a significant factor, we need to control for its influence and look at how partisans respond to a copartisan frame. This analysis proceeds using one-way ANOVA and focusing on partisans who received a copartisan frame.

Beginning with Democratic subjects who were told the criticism came from fellow Democrats, in terms of agreement with the passage I find that the differences between the criticism types were not statistically significant ($p = .057$). However, in terms of their willingness to donate, Democrats appear to respond to the criticism frame presented, as the difference between the criticism type

32. In some situations this positivity toward copartisans meant that they also viewed the bipartisan treatment more positively.

is statistically significant.[33] The Tukey HSD post hoc test shows that the statistically significant difference is between the democratic process and political frames (p = .031), with Democrats being .20 points more likely to donate when presented with a democratic process frame compared to the political frame (see figure 8). The difference between the countermajoritarian and democratic process frames was not statistical significance (p = .055). Remember, the results here are Democrats being asked about donating to fellow Democrats, and therefore the difference detected here appears to be a result of the language used, and not the partisan source cue.

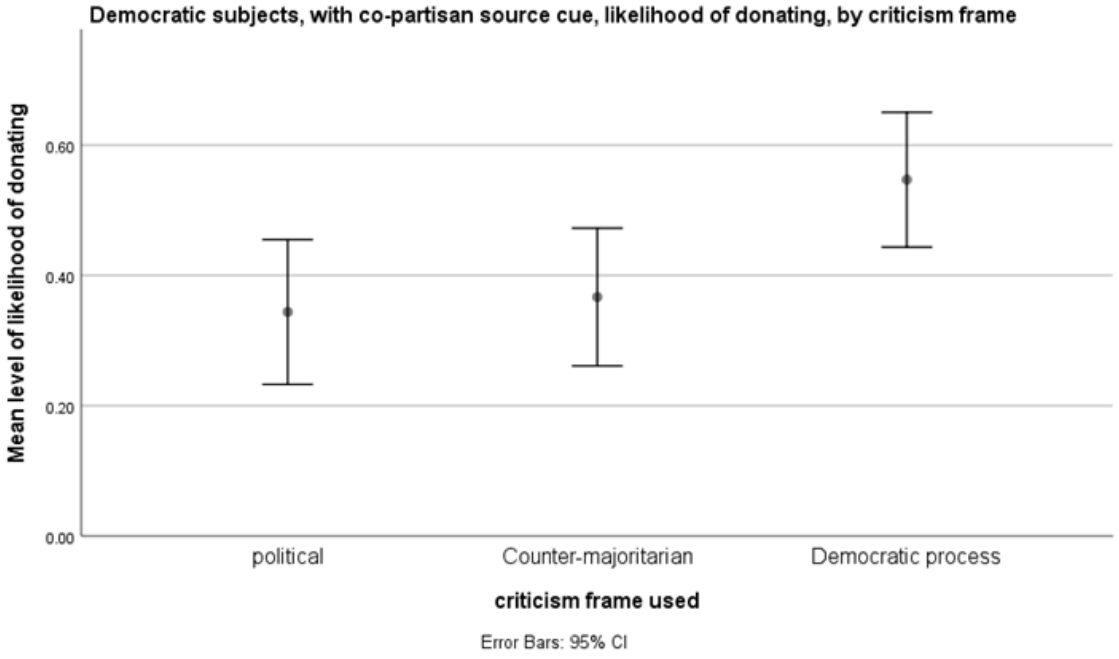

Figure 8

In terms of evaluations of the strength of the passage (p = .139) and its credibility (p = .453), I find that there is no statistically significant difference between the criticism frames for Democrats who received a copartisan source cue.

In the end, then, this analysis suggests limited evidence for H2a that Democratic subjects responded to the criticism frames presented to them. Even when we remove the influence of partisanship, there is no evidence that Democrats agreed more with the democratic process frame compared to the countermajoritarian one, and only slight evidence that they were more willing to donate when exposed to the democratic process frame compared to the political one. This offers some limited evidence in support of the hypothesis.

33. (F(2,114) = 3.851, p = .024).

For Republicans, I find even less evidence that the criticism frame influenced their attitudes toward the passage. There was no statistically significant difference between the frames in terms of agreement with the passage ($p = .575$), willingness to donate ($p = .490$), how strong the argument in the passage was ($p = .538$), nor for how credible those quoted in the passage were ($p = .918$). Therefore, for H2b, I find no evidence that Republicans responded to the criticism frames they were presented with.

H3a looks at the influence the frames may have on evaluations of the Court's legitimacy. Previous research has found that framing the Court in a way other than "legal" has the potential to affect how legitimate voters view it to be (Baird and Gangl 2006; B. L. Bartels and Johnston 2012; Nicholson and Hansford 2014). H3a takes this line of inquiry in a different direction by asking if framing the Court as harmful to democracy harms evaluations of its legitimacy. To the extent that the democratic process and countermajoritarian frames call into question the Court's legitimacy in a way that the political criticisms do not, I hypothesize that these frames will diminish the Court's legitimacy.

For this analysis I shift my approach to use a two-way repeated measures ANOVA, taking advantage of the fact that the same legitimacy questions were asked of all subjects at the beginning of the survey and after the treatments. Repeated measures ANOVA has the benefit of controlling for the effect of how legitimate voters viewed the Court at the start of the survey, prior to any of the treatments, allowing one to more effectively detect any changes in the posttreatment measures and facilitating a between-subjects analysis (between the groups of different criticism frames) and a within-subjects analysis (comparing individuals' pre- and posttreatment legitimacy scores).

For Democratic subjects who received a Democratic source cue, I find that there is no statistically significant effect of the criticism frame on evaluations of legitimacy, the within-subjects analysis ($p = .453$) was not statistically significant, nor was the between-subjects analysis ($p = .055$). Among Republicans, I also find no evidence that the criticism frames, when paired with a copartisan source cue, had any effect on evaluations of judicial legitimacy. The within-subjects analysis was not statistically significant ($p = .735$) nor was the between-subjects analysis (.671).

Thus for the hypothesis that these criticism frames would harm the Court's legitimacy, I find no supporting evidence. While some work has found that framing the Court as political rather than legal may damage the Court's legitimacy, my analysis does not suggest that highlighting the potentially antidemocratic nature of the Court has a similar effect.

H3b is a flip on the previous hypotheses. Since partisanship is a driving factor in responsiveness to the passages, I expected that when subjects were presented with a counterpartisan framing (i.e., a Democrat presented with a Republican source cue, and vice versa) they might come to the defense of the Court and rate it as more legitimate. In the analysis then I expect that when presented with

a counterpartisan frame that calls into question the compatibility of the Court and democracy, subjects will increase their evaluations of how legitimate they view the Court to be.

Using two-way repeated measures ANOVA again I test this hypothesis by looking at both the within-subjects change from the pretreatment scores to the posttreatment scores, and at the effects between subjects caused by the criticism frame they were presented. Looking at Democrats first, I find no evidence that when presented with a counterpartisan frame that they view the Court as more legitimate. Neither the within-subjects analysis (p = .999) nor the between-subjects analysis (p = .531) was statistically significant.

For the Republican subjects, there was not a statistically significant change within subjects when presented with a Democratic attack on the Court (p = .824). However, the between-subjects analysis did show a statistically significant difference between the criticism frames.[34] According to the Bonferroni post hoc test, evaluations of the Court's legitimacy after the treatment were .144 points lower in the democratic process frame compared to the countermajoritarian frame (p < .05). Additionally, as seen in figure 9 below, Republicans appear to come to the Court's defense when Democrats use countermajoritarian language. While the differences between the criticism frames and the pretreatment legitimacy scores were not statistically significant (p = .07), this does suggest that potentially there is something about receiving a counterpartisan frame and either the countermajoritarian or democratic process frame that influenced Republican's attitudes toward the Court.

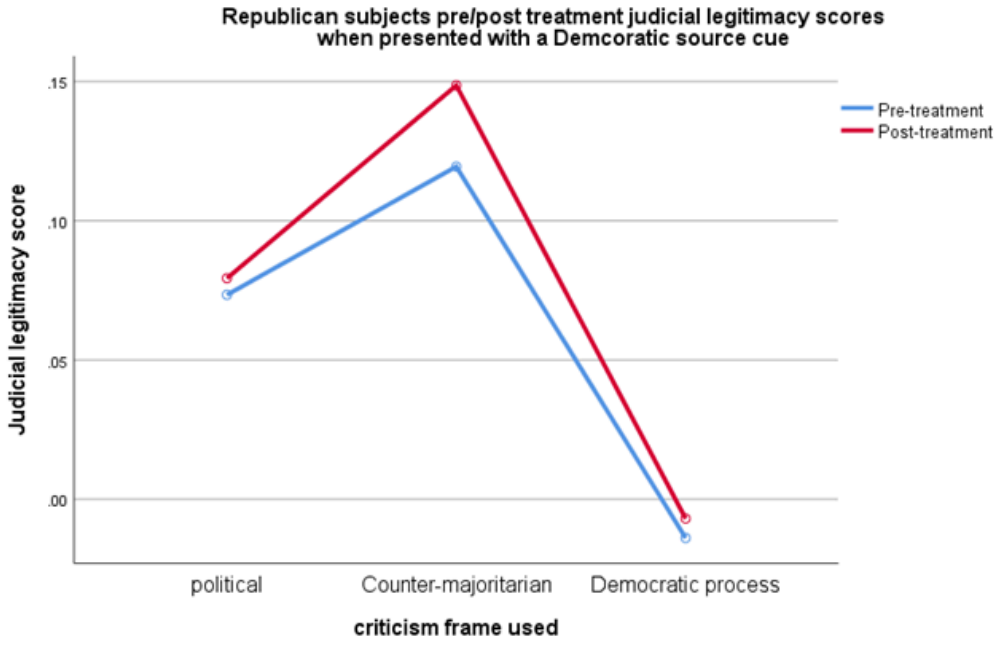

Figure 9

34. (F(2,78) = 3.344, p = .04).

This suggests Republicans are responsive to these criticisms, and when Democrats "borrow" Republican language to attack the Court, they view this differently than when Democrats attack the Court on their own terms.[35] While the criticisms did not appear to change individual evaluations of the Court, Republicans at least appear to express a distinction between the criticism frames in terms of how legitimate they view the Court to be.

Conclusion

The literature is full of examples that disagreement with specific decisions of the Court does little, if anything, to harm the Court's legitimacy. Other projects have looked at how the framing of those decisions can influence the public's support for them, and even the Court's legitimacy. This study goes in a different direction by analyzing the extent to which framing the Court as antidemocratic can influence attitudes toward' the Court's legitimacy. Briefly, my results suggest that while these criticisms do not drain the Court's reservoir of goodwill or its legitimacy, these antidemocratic frames may be a threat to the Court over the long run.

My analysis finds limited evidence that attacking the Court as antidemocratic does much to harm the Court's legitimacy. Even when presented with a copartisan source cue, there is no evidence that highlighting the ways in which the Court is incompatible with or harmful to democracy diminishes the Court's legitimacy. The most interesting finding in this area, however, is that Republican subjects appear to come to the Court's defense when presented with a Democrat attacking the Court using countermajoritarian language. However, this does not mean that these frames were not salient to subjects.

Once we account for the partisanship of those quoted in the passage, I find evidence that subjects responded to frames in a way that was consistent with the partisan divide in how legislators use those same frames. Specifically, I find that Democrats are more responsive to the democratic process framing, while Republicans prefer the countermajoritarian language. This preference appears to be strongest among Democrats, who express a greater willingness to donate when presented with the democratic process framing. Interestingly, this would imply that for Democratic elected officials, even though the Court is viewed positively by Democrats and the public at large, there is something to be gained by using the Supreme Court as a foil for their criticisms.

35. For *terms* here, what I mean is that based on the differences in how Democratic and Republican elected officials attack the Court, I associate Republicans with countermajoritarian language and Democrats with democratic process language.

For the larger discussion about the role of the Supreme Court in our democracy, I find that voters are open to these messages that the Court is, potentially, antidemocratic. Despite the Court's high levels of approval and legitimacy, it does not appear that the subjects here rejected these frames. Had subjects evaluated one criticism frame more negatively, that would suggest they disagreed with that messaging. The lack of differences in how subjects evaluated the messaging regarding the Court suggests that the subjects were open to criticisms of the Court, and further that they do not draw much of a distinction regarding how it is done. While these messages did not directly diminish the Court's legitimacy, the fact that voters did not reject them is an important finding nonetheless.

As the Court continues to involve itself in many of our most salient and controversial social and political questions, we may see these frames invoked more frequently. While a one-off criticism does not appear to diminish the Court's legitimacy, what remains to be seen is if sustained criticisms of a Court that continues to involve itself in our democratic and political process strike a nerve with voters over time, possibly opening the doors for criticisms of the Court that previously would have been politically unthinkable.

Activity

1. You have recently been hired by a political consulting firm (congratulations!). Your firm is working with a local member of Congress who is deeply upset with the US Supreme Court. She would like you to work on some messaging to attack the Court that she can use in her upcoming House race.
    a. Do you advise her to attack the Court or not? (why or why not?)
    b. How do you suggest that she attack the Court? Why do you think this would be an effective line of attack? If her district is solidly in line with her partisanship, would your advice be different than if it were a more competitive district?
    c. How would your advice differ if the Congresswoman wants to attack the Court to score political points, versus if her goal is to actually rein in or punish the Court?
    d. Never one to miss a business opportunity, your firm is also doing some consulting for her opponent. How would you suggest that they respond to the attacks on the Court (if at all)?
2. Which type of criticism (political, countermajoritarian, or democratic process) resonates more with you? Why do you find that line of attack more compelling, or alternatively, why are the others less powerful?

3. If you were to replicate this experiment, how would you change the treatments (vignettes) used?
4. What is the proper role that you see for the Supreme Court in our democracy? What types of cases do you think the Court should be involved in or not involved in? Can you come up with a nonpartisan set of guidelines for how the Court should behave?

Appendix 1: Significant Correlations between Demographics and Manipulation Checks

In the exploration of the data prior to the analysis, I uncovered a correlation between several of the demographic variables and the manipulation checks. There was a weak positive correlation between age and the combined measure of the manipulation checks ($r = .287$, $n = 991$, $p < .001$). A similarly weak and positive relationship was found between the manipulation checks and education ($r = .243$, $n = 990$, $p < .001$), political knowledge ($r = .359$, $n = 991$, $p < .001$), and self-identified White subjects ($r = .212$, $n = 991$, $p < .001$). There were equally weak and negative correlations between the manipulation checks and self-identified black respondents ($r = -0.116$, $n = 991$, $p < .001$) and Hispanics ($r = -0.099$, $n = 991$, $p < .01$).

While correlations are never ideal, the randomization was carried out successfully and, despite the small correlations reported above, these findings should not complicate the analysis or muddy the results of the experiment.

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29. Public Attitudes toward State Courts

KENNETH E. FERNANDEZ AND JASON A. HUSSER

State courts in the United States are the workhorses of the judicial system; they currently preside over 96 percent of the cases filed in the United States (National Center for State Courts 2018). In 2016, state trial courts in the United States had a caseload of over 14 million civil cases and 17 million criminal cases (National Center for State Courts 2016). Compare this to 291,851 civil cases and 77,357 criminal cases filed in US district courts that same year (United States Courts 2016). In addition, state courts have been highly active in reviewing and challenging state policies. For example, prior to federal court involvement, many state supreme courts began striking down bans on gay marriage (Kastellec 2018).

Yet state courts receive far less attention from scholars compared to courts at the federal level. Even more neglected is the study of public perceptions of state courts. Instead, researchers often focus on other branches of government, especially at the federal level. In the field of political science, there is a rich and diverse body of research on individual-level confidence in political institutions. This includes the presidency, the federal bureaucracy, Congress, and the US Supreme Court. This is driven by the concern that low levels of trust and support can be a symptom of serious problems in a democratic society, including lack of adequate political representation and even corruption. Low levels of confidence in political institutions can also produce or exacerbate problems, such as political apathy and low voter turnout or even noncompliance with the law. It is firmly believed that a healthy democracy requires a certain amount of institutional trust and support at all levels of government. However, support for national-level organizations tends to dominate scholars' attentions at the expense of state government institutions.

Very few studies examine support for state political institutions, especially state courts (Berthelot, McNeal and Baldwin 2018). This lack of attention toward state courts is unfortunate given the caseloads these courts handle every year and that most public interaction with the courts is likely to occur at this level. In their study of state supreme courts, Curry and Romano (2018, 140) argue that well-functioning democracy requires the "perception that the system works for the benefit of citizens," and this includes perceptions of the judicial system. Public opinion surveys allow researchers, citizens, judges, and other public officials to assess how courts are perceived in society. How the public views the courts is critical given that their power relies heavily on perceived legitimacy. As a former US Supreme Court justice, Felix Frankfurter stated in the Court's ruling in *Barr v. Carr*, "The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction" (1962, 268).

This chapter will examine public attitudes toward the state court system in a single state: North

Carolina. We will first discuss the importance of studying state courts. We then briefly describe the structure of state courts. Findings from a survey conducted by the Elon University Poll in 2015 of over 1,234 state residents will then be presented. Statistical analysis of these survey data will be used to examine the various factors that influence people's perceptions of state courts. We conclude by discussing the importance of public opinion research at the state level, especially in a federalist democracy.

The Importance of Studying State Courts and Public Opinion

The rule of law is considered one of the pillars on which democracy rests (O'Donnell 2004). O'Donnell describes the rule of law as the consistent and fair application of legal rules, where rules are applied without consideration of the "class, status, or relative amounts of power" of the parties involved. Furthermore, rules are applied through a "preestablished, knowable" (2004, 33) procedure that allows all stakeholders an opportunity to voice their case. The role of maintaining the rule of law often falls to the courts, particularly when an individual or group submits a grievance regarding the violation of or the unequal application of the law. For the courts to serve their function and help maintain the rule of law, they require a certain level of trust and support from the public (Caldeira and Gibson 1992). Although most of the scholarly (and media) attention focuses on the major decisions of higher courts (Olson and Huth 1998), the day-to-day decisions of the state and local courts address all dimensions of our social, economic, and political lives, from how land is used, to the power of public officials, to how the government itself is organized. Dolbeare (1976) makes the argument that state court cases have enormous capacity in determining the essence of politics, specifically "who gets what, when, and how" in state and local politics. William J. Brennan, a former US Supreme Court justice, once said that state courts were more important than federal courts because they deal with the issues that are most relevant to our daily lives (Brennan 1966). Clearly, such an institution deserves closer inspection by scholars and the public.

Because state courts affect our daily lives, citizens are very likely to have personal contact and experience with the state court system (Rottman 2015). They may be called to be a jury member, they may serve as a defendant or plaintiff, or they may be called to testify in court. In fact, some surveys have found that approximately half of citizens have had some contact with the lower courts (Olson and Huth 1998). Since this complex institution has frequent contact with the public, it is important that there is some level of accountability established for the court system. Elections can help hold courts accountable by removing judges who are deemed by voters as unacceptable; however, the removal of judges is very rare and only provides information that the judge was not retained. Therefore, we believe that public opinion (and public opinion surveys) can help provide

specific information about how citizens feel about the courts and, in some cases, why they feel the way they do.

Unfortunately, prior literature reviews have shown that state courts are often neglected by researchers examining the judicial system in the United States. Furthermore, the study of public attitudes toward state courts is especially thin (Buckler, Cullen and Unnever 2007; Wenzel, Bowler and Lanoue 2003). Benesh points out that the "systematic analysis of public confidence in America's lower courts has been missing" (2006, 697). This chapter will attempt to provide additional insights into how the public views state courts.

The Structure of State Courts

One reason there is less research on state courts is because the court system in each state is different, and each has changed over time. Starting in the early twentieth century, states began to reform their state judicial systems to consolidate the diverse and overlapping courts that appeared across the different localities (Hall 1999). By the 1970s, most states had combined all state and local courts into a unified, state-funded judicial system. In North Carolina, this unified state court system (which includes the supreme court, appeals courts, and trial courts) was created in 1965 and is called the General Court of Justice (https://www.nccourts.gov/). The General Court of Justice is funded and administered through the North Carolina Administrative Office of the Courts.

Even with these reforms and unifications, no two state court systems are alike. However, these systems do have many commonalities (Berkson 1980). They typically have a three-level structure that includes appellate courts, trial courts of general jurisdiction, and trial courts of limited jurisdiction.

State Supreme Court and Appellate Courts

All states have at least one state court of final resort, usually called the supreme court.[1] Most of these state supreme courts have five or seven justices, with all the justices participating in each case. These state supreme courts hear appeals of major questions arising from the lower

1. In Maine and Massachusetts, the court of last resort is referred to as the supreme judicial court, and in Maryland it is called the court of appeals.

courts. For example, in North Carolina there are seven supreme court justices who disposed of 136 cases during the 2017–18 session. There is no further appeal from decisions made by these courts regarding state law or state constitutional matters unless the issue also relates to a federal law or involves a right protected by the US Constitution. All but nine states also have an intermediate appellate court, often called the court of appeals, which hears appeals from the state trial courts (Cole and Smith 1998). For example, in the North Carolina Court of Appeals, there are fifteen judges divided into five panels of three judges to hear cases being appealed from lower courts in the state. In the 2017–18 session, the North Carolina Court of Appeals disposed of over 2,178 cases.

State Trial Courts

State trial courts are often divided into courts of general jurisdiction and limited jurisdiction. State trial courts of general jurisdiction are typically located in the county seat but are funded by the state. These courts hear both criminal (primarily felony crimes) as well as substantial civil cases. Courts of general jurisdictions go by different names depending on the state; in North Carolina, they are called superior courts. According to Berlin (2013), there are around three thousand trial courts of general jurisdictions in the United States, and each judge in these trial courts hears around 1,800 cases per year. In North Carolina, there are 107 superior court judges organized in eight divisions and forty-eight districts across the state. These judges hear all felony cases and civil cases involving amounts over $10,000. In the 2017–18 session, North Carolina superior courts disposed of 291,654 cases.

State trial courts of limited jurisdiction (also known as inferior courts or lower trial courts) hear smaller civil cases and less-serious criminal cases as well as preliminary matters in more serious cases. There are approximately 13,500 courts of limited jurisdiction in the United States (Cole and Smith 1998). In North Carolina, trial courts of limited jurisdiction are known as district courts. There are 272 district court judges in North Carolina organized into forty-one districts. These district court judges hear misdemeanor cases, preside over probable cause hearings, and hear guilty or no-contest pleas in some felony criminal cases. These lower courts also preside over civil cases involving $10,000 or less, and like most lower courts in the fifty states, they deal with domestic relations cases (e.g., divorce), juvenile cases, and commitments to mental health facilities (Silbey 1981).

Judicial Selection in the States

Unlike most judges serving in the federal court system, who receive lifetime appointments, judges

in most states face some type of election. The fifty different states use a variety of methods to select and retain judges. Partisan elections for state judges, where candidates' political party affiliations appear on the ballot, were popular in the 1800s, but in the twentieth century, many states, including North Carolina, changed to nonpartisan elections of judges (Glick 2004). Today, only eight states still elect most of their judges through partisan elections, while seven other states select some judges using partisan elections. Thirteen states use nonpartisan elections, while eight more use nonpartisan elections to elect some judges. Several states use a merit system to select judges. In a merit system, a regional or statewide panel of appointed lawyers and nonlawyers makes judicial nominations. Some states combine both a merit system and a retention election, allowing citizens to decide whether to keep an appointed judge in office. Two states, California and New Jersey, allow the governor to appoint higher-level court judges, and two other states, Virginia and South Carolina, allow the state legislature to appoint judges. Only Rhode Island appoints state judges for lifetime tenure. Massachusetts and New Hampshire appoint judges to tenured appointments that last until the age of seventy, which is the mandatory retirement age.

The selection of judges in North Carolina has been particularly interesting because of the number of procedural changes in recent years. Prior to 2002, North Carolina used partisan elections to select all judges in the state. In 2002, the state legislature passed a law that required all statewide judicial electoral races to be nonpartisan. This was designed to address the increasing level of fundraising, campaigning, and partisanship in state judicial elections (Troutman 2007). However, in 2016 and 2017, the North Carolina state legislature passed laws to return to partisan elections. Now in North Carolina, district court, superior court, appellant court, and state supreme court judges are selected through a partisan election.

Elections give the public a voice in how state courts operate by allowing voters to select judges and other court officials. Still, the public is sometimes wary of the value of these elections, suspicious that campaign contributions may cause conflicts of interest for court officials campaigning for reelection (Cann and Yates 2008; Gibson 2008). Some studies have found that electing judges can enhance the public's trust in courts, while other studies have shown elections create skepticism among the public of judges and the courts (Gibson 2008; Rottman 2015). Public opinion surveys are useful in helping policy makers understand which selection methods promote trust in the courts and enhance the courts' legitimacy. Furthermore, Curry and Romano (2018) maintain that elected judges, for good or bad, are more likely to take into consideration the public's opinions when ruling on salient issues.

A Public Opinion Survey of North Carolina

As noted, there are few studies that examine public opinion of state courts; however, there are even fewer studies examining public attitudes toward the courts within a single state (Overby, Brown, Bruce, Smith and Winkle 2004). There are advantages to studying a single state. Since states differ in how they select judges, we can imagine that state variation in institutional mechanisms could influence how much the public trusts the courts (Wenzel, Bowler and Lanoue 2003). In a national survey, it is sometimes difficult to understand why an African American male respondent in California has a different opinion about his state courts than an African American male in North Carolina. It could be because one state has a higher crime rate or elects its judges and the other does not. Examining a single state allows researchers to study individuals within a single court system. All respondents in North Carolina are represented by the same judicial system and are governed by the same state laws and policies. Nicholson-Crotty and Meier (2002) argue that it is sometimes better to examine a single state than to collect data from all fifty. Many scholars of state courts believe that single-state studies can provide important insights into the judicial system (Dougherty, Lindquist and Bradbury 2006; Yates 2009).

There are also limitations to studying a single state. For example, it limits one's ability to generalize the statistical findings to larger populations or other states (Olson and Huth 1998). For our purposes, however, we believe that collecting a healthy sample of residents in a single state helps ensure adequate coverage of certain subgroups, such as African Americans and rural county residents.

It should be noted that North Carolina is neither typical nor necessarily unique. With a population over ten million, North Carolina is the tenth most populous state in the nation. More importantly, North Carolina is a southern state, and the South has a unique history and culture, especially regarding trust in political institutions. Christensen found that "North Carolina remains culturally conservative, more like Alabama than California" (2008, 313). However, some scholars have suggested that North Carolina is different from the rest of the southern states and is more similar to the rest of the country (Vercellotti 2008).

Public Opinion and the Courts: The Elon University Poll

The Elon University Poll conducted a live-caller, dual-frame (landline and cell phone) survey of 1,330 adult residents of North Carolina between October 29 and November 2, 2015. Of these respondents, 1,234 answered all the questions used for weighting (age, gender, race, type of phone

use).[2] The survey reported here has a margin of error of ±2.79 percentage points. The survey included various questions about state courts and other political issues. The list of the questions analyzed in this chapter and a link to the full survey report appears in the appendix.

The few studies that have examined public attitudes toward state courts have used different question wording to determine trust and support for state courts. For example, Olson and Huth (1998) ask respondents, "Do you believe the courts in Utah are doing a good job?" However, Benesh (2006) uses a survey item that asks respondents, "What is your level of confidence in the courts in your community?" Studies have shown how even slight wording differences in survey items can cause respondents to answer questions differently (Husser and Fernandez 2016).

Scholars have suggested that the above measures are imperfect because they are incapable of distinguishing between specific and diffuse public support. Researchers thus recommend using multiple survey items to capture different dimensions of public opinion toward the courts. Caldeira defines specific support as a "set of attitudes toward an object based upon the fulfillment of demands for particular policies or actions" (1991, 322) and therefore possibly more likely to change depending on the circumstances. On the other hand, diffuse support is described as more generalized and potentially more persistent. Caldeira and Gibson (1992) suggest that diffuse support may be based on a recognition of the basic legitimacy of the courts and their function in society. That support may persist even when a respondent is unhappy with a specific decision made by the courts (Gibson, Caldeira, and Spence 2003).

In this study, we ask about diffuse support and specific support for North Carolina state courts. To measure diffuse support, we ask respondents about the level of confidence they have in state courts (see table 1). For comparison, we also ask about confidence in five other political institutions: the federal government, the media, the US Supreme Court, local public schools, and local police or sheriffs. Respondents were specifically asked, "First, I'd like to know how much confidence you have in the following public institutions using the scale of very confident, somewhat confident, not very confident, or not at all confident. In general, how would you rate your confidence in the following?" The names of the political institutions were rotated randomly to avoid bias.

2. The purpose of most survey research is to obtain a sample that is representative of the true population. However, adjustments may be needed because of sampling error or response bias (e.g., younger residents are less likely to answer political polls). To correct for biases, the sample is often weighted so that it matches known demographic information about the population (often obtained from the US Census).

Institution	*% Somewhat or Very Confident*
Local Police/Sheriff	81.0
NC State Courts	65.9
Local Public Schools	65.8
US Supreme Court	65.0
Federal Government	37.2
The Media	35.6

Table 1. Confidence in Political Institutions

The public in North Carolina is generally quite confident in the local police or sheriff. Eighty-one percent of those surveyed said they were somewhat or very confident in this local institution. No other institution had such a high level of confidence. These findings are consistent with Walker's (1977) study of North Carolina. Walker found that the public had very different levels of confidence regarding political institutions and that the public tended to have the highest support for law enforcement.

Nearly 66 percent of respondents stated they were somewhat or very confident in the North Carolina state courts. This was followed closely by local public schools, with 65.8 percent, followed by the US Supreme Court, with 65 percent. Confidence in the federal government and the media was the lowest among the six institutions, with 37 percent and 36 percent, respectively.

The survey also asks respondents a question on the fairness of the courts: "How often do people receive fair outcomes when they deal with the courts? Always, usually, sometimes, seldom, or never?" (see table 2). This question is more specific than just asking respondents about how confident they are in the courts; it requires them to evaluate court performance and behavior. Overall confidence may tap into "diffuse support" for the courts, whereas fairness may tap into "specific support" by stressing the institution's performance and quality of service (Olson and Huth 1998; Tyler 1988). In addition, the survey asked respondents how they felt the state courts treated certain groups, including African Americans, whites, Hispanics, and people who are low income (see table 3).

	%
Always	3.1
Usually	36.9
Sometimes	41.6
Seldom	8.5
Never	2.2
Don't Know	7.6
Refused	0.1
N=	100%

Table 2. Fairness of the Courts

	NC courts free from political influence	***Judges influenced by political parties***	***Judges influenced by elections***
Strongly	2.8%	4.2%	23.6%
Agree	14.3%	51.7%	51.8%
Disagree	44.7%	16.3%	16.2%
Strongly Disagree	31.0%	2.5%	1.8%
Don't Know	7.1%	5.1%	6.2%
Refuse	0.1%	0.2%	0.5%

Table 3. Political Influences on the Courts and Judges

A large proportion of respondents, nearly 42 percent, felt that people only sometimes receive a fair outcome in state courts (see table 2). Forty percent of respondents felt that people always (3.1 percent) or usually (36.9 percent) receive a fair outcome. Only about 2 percent of respondents said that people never get a fair outcome. However, when asked how the courts treat various groups, very different opinions emerged (see table 3). Approximately 76 percent of respondents believe that people without legal representation are treated worse by the courts. Low-income people were also seen as likely to receive unfair treatment (64 percent). Over half of those surveyed (53 percent) said non-English-speaking individuals were generally treated worse by courts. Forty-six percent of respondents believe African Americans are treated worse. Very few respondents believe that whites (4.1 percent) or wealthy individuals (1.6 percent) are treated worse by the courts. In fact, most respondents (51 percent) said the wealthy receive “far” better treatment in the courts.

Group	*% Saying Group is Treated (Somewhat or Far) Worse*
People without a Lawyer	76.2%
Low-income People	63.8
Non-English Speaking People	53.4
African Americans	46.2
Hispanics	45.6
Middle Class/Working Class People	16.9
White People	4.1
Wealthy People	1.6

Table 4. Group Treatment by the Courts

Respondents were also asked about how politics influence judges' decisions in North Carolina. They were asked if they agree or disagree that courts were free from political influence, that judges were influenced by political parties, and that judges were influenced by running for reelection (see table 4). Just over 75 percent of respondents disagreed or strongly disagreed that courts were free from political influence. Seventy-five percent also agreed (somewhat or strongly) that judges are influenced by political parties. Similarly, just over 75 percent agreed that judges are influenced by having to run for reelection.

It may be surprising that a survey can find that most residents not only have confidence in state courts but also believe the courts treat certain groups unequally and that judges are influenced by political forces. Prior research has also found similar contradictions in public attitudes toward the courts (Dougherty, Lindquist and Bradbury 2006; Silbey 1981). One reason for this is the complexity of public opinion. As noted earlier, the public can have diffuse support for the courts, where citizens are aware of the important role that courts play in our political systems. The public can also have more specific opinions about certain actions, policies, and even candidates. A citizen may not like a particular governor or a president, but she may have faith in the executive branch to function appropriately. Similarly, the public may be very aware that courts do not always produce fair outcomes but at the same time are relieved that the courts and the legal system are there to deal with local and state problems and disputes and respect the difficult job that judges do.

The above tables and results present a simple univariate analysis of the public attitudes toward state courts in North Carolina. Univariate analyses are useful for presenting a broad picture of public opinion; however, further analysis is required to better understand public opinion. In the next section, we will present findings from several ordered logistic regression models to explore more carefully how and why respondents have different attitudes toward the courts.

Regression Analysis: Examining Public Attitudes toward State Courts

In this section, we will use some of the survey questions discussed above as dependent variables in a series of regression models. These measures are all ordinal measures, meaning they measure attitudes using an ordered ranking, such as a four-point scale ranging from strongly agree to strongly disagree or a five-point scale ranging from far better to far worse. Because these measures are ordinal, an ordered logistic regression is used. In the following regression models, these measures (dependent variables) are regressed on a set of independent variables, which are discussed below. These independent variables are used to explain the variation in public attitudes toward state courts.

When deciding which independent variables may explain public attitudes, researchers often turn to different theories and models developed by prior scholars. A review of prior studies on public opinion of political institutions points to the following variables as important in understanding opinions toward state courts: respondent's race, political party and ideology, age, gender, education level, prior experience with the courts, and knowledge of the courts. In addition, to these commonly used independent variables, this study will include a variable that also indicates if a respondent lives in a rural county.

Race of the Respondent: Race is one of the most studied variables when examining attitudes toward the legal system. Minority groups often have different experiences and perceptions of the role of courts and how courts apply the law across individuals from different ethnic and racial backgrounds. Much of the literature in the field of criminal justice has adopted a conflict perspective on the role of the criminal justice system in society. This perspective argues that laws, law enforcement, and the courts have been used to control subordinate/minority groups who are perceived to be a threat (Fernandez and Bowman 2004). Thus many studies have found that minorities are more distrustful of and less confident in the courts and law enforcement agencies (Berthelot, et al. 2018; Overby, et al. 2005). Here, we predict that African Americans, all things being equal, will have less positive attitudes toward state courts than whites.

Knowledge of the Court: One might expect that more knowledge about the courts would make it easier for citizens to evaluate the judicial system and its performance. However, Harris (1993) notes that many citizens probably obtain their knowledge of the courts through the media—mostly likely from television news and even crime dramas (Johnston and Bartels 2010; Rottman 2015; Selya 1996). As the media and TV shows tend to focus on more controversial behavior, more knowledge of the courts may actually result in less trust in the legal system (Daniels 1973; Olson and Huth 1998).

In this study, we measure knowledge through a survey item that asks respondents, "How much would you say you know about the courts in North Carolina? A lot, some, a little, or nothing at all?" A dichotomous independent variable was created where respondents who self-reported that they had a lot or some knowledge of the courts are coded as 1, and those respondents who reported that they had little or no knowledge were coded as 0. There are problems in relying on self-reported levels of knowledge. Some respondents may be embarrassed to admit they know little about a subject matter; however, the survey found that over 40 percent of those surveyed said they had little to no knowledge about state courts.

Experience with the Courts: Several studies test the independent effects of personal experience in the court system. It is difficult to predict how experience with the court may influence one's attitude. The court system works in a complex way, and participants may leave the courtroom feeling far from satisfied (Walker, Richardson, Denyer and Williams 1972). Some studies have found that prior experience with the courts is strongly associated with perceptions of the court (Kritzer and Voelker 1998). In fact, Walker (1977, 11–12) found that prior interaction with the court was a stronger predictor of support than income, age, or even race. Others have found that prior experiences with courts had little or no correlation with an individual's support for the courts (Buckler, Cullen and Unnever 2007). Other studies have found that certain types of interactions can influence one's attitude toward the courts positively or negatively. Boyum (1992) found that jury duty in California was associated with increased levels of support for the courts. Benesh and Howell (2001) and Wenzel, Bowler, and Lanoue (2003) found that defendants were less supportive of the courts. In this study, we use two dichotomous variables, one that measured respondent's jury service and one that measured respondent's status as a party to a case.

Education Level: Education is included in almost all studies of public attitudes toward state courts because it is likely associated with a variety of other important underlying characteristics, including social status and knowledge of the court system. More educated residents will likely have more information about the legal system and the performance of courts. More educated respondents are also more likely to be concerned about inequalities in the political system (McCall and Kenworthy 2009). Education is measured using a dummy variable that indicates whether a respondent has a college or graduate or professional degree (coded as 1) or not (coded as 0).

Party Identification and Ideology: Although it may seem intuitive that ideology and partisanship are related to attitudes toward the courts, several studies found no correlation between court support and ideology or partisanship. Caldeira and Gibson (1992) argue that since most measures of support for the courts measure diffuse support, and diffuse support is so widespread across different individuals, ideology should not be related to such measures. Perhaps this is the reason most studies examining public opinion on state courts do not include an ideology measure in their analysis. Instead, most studies use party identification. Scholars may believe that partisanship is more important to understanding public opinion of the courts because the selection of judges

has become such a partisan issue among politicians and elected officials (Bonica and Sen 2017). Research has suggested that Democrats have a more favorable opinion of the US Supreme Court than Republicans, and this may hold true for state courts as well (Cann and Yates 2008).

It should be noted that party identification is often correlated with ideology, but in the South, there are still conservative Democrats who have not switched over to the Republican Party. These Democrats are often called Dixiecrats. Because of this, we include two dichotomous variables that indicate whether a respondent is a self-identified Democrat or a Republican, and we include a scale to measure self-reported ideology that ranges from 1 (extremely liberal) to 7 (extremely conservative).

Sex: On average, survey research has shown that men and women differ on a wide range of political attitudes. Kelleher and Wolak (2007) found that women were typically more confident in state courts then men; however, Cann and Yates (2008) found that women had less support for courts than men. One might theorize that Cann and Yates's finding that women were less supportive of courts than men could be caused by women's greater concern with crime and their belief that courts have in the past been too lenient on criminals (Myers 1996). In our study, we include a dichotomous independent variable where women are coded as 1 and men are coded as 0.

Age: Younger citizens tend to be more skeptical of government institutions than older citizens (Kelleher and Wolak 2007). There are a variety of reasons younger people have different attitudes than older individuals. First, younger respondents have had less time to complete their education, suggesting they may have less knowledge of court systems and their performance. Furthermore, younger respondents are less likely to have had experience with the courts. In addition, younger respondents tend to be more concerned with social justice issues (Overby, et al. 2004). We include age as an independent variable in each of the regression models.

Rural County: We include a county-level variable that indicates whether a respondent in our survey lives in a rural county.[3] Huckfeldt argued that "political opinions and behavior of individuals

3. When including a county-level measure (rather than an individual-level measure, such as race or education), the assumption is that respondents within a county are more similar to one another than they are to individuals in a different county. For example, in this study we believe that rural county residents are more like each other than they are to people living in urban or suburban counties. In statistical terms, this means that there are correlations between observations within counties (clusters), and this can create estimation problems when conducting a regression analysis. This can be corrected by making adjustments when estimating the standard errors of the regression coefficients. Many statistical software packages allow for estimating cluster-robust standard errors

cannot be understood separately from the environment within which they occur" (1987, 1). Glick (2004) suggests that courts in urban areas tend to deal with more serious and controversial cases than courts in rural areas. In addition, rural courts have fewer judges, and there may be a better chance that the public is aware of who judicial candidates are in rural areas. McKenzie, Rugeley, Bailey, and McKee (2017) also found that rural residents tended to know more about local courts and judges. For these reasons, we predict that respondents living in rural areas will tend to view the state court system more favorably.

Statistical Findings: What Variables Explain Public Attitudes toward State Courts?

Table 5 shows the results of two ordered logistic regressions. Model 1 uses the dependent variable that measures a respondent's "confidence" in the North Carolina courts. The explanatory variables race, knowledge of the courts, experience as a jury member, education, party identification, sex, age, and living in a rural county were not associated with confidence at a statistically significant level. One of the most interesting findings was that race was not associated with confidence in the courts. This was somewhat surprising given that so many studies have found a correlation between race and public opinion toward the courts at both the federal and state levels. However, some scholars have noted that blacks and whites generally have a basic level of diffuse support for the courts' legitimacy and that differences only emerge when asking more specific court-performance questions (Overby, et al. 2004).

to adjust for clustering. All of the regression models in the next section are estimated using this technique.

Independent Variables	*Dependent Variable - Model 1 - Confidence in State Courts - Not at all Confident to Very Confident*	*Dependent Variable - Model 2 - Fair Outcome in Court - Never to Always*
Age	0.001 (0.004)	0.006+ (0.004)
White	0.461 (0.416)	0.965*** (-0.279)
Black	-0.046 (0.364)	0.123 (0.312)
Female	-0.120 (0.115)	-0.279*** (0.107)
Ideology (7 point scale)	0.115*** (0.044)	0.089* (0.044)
Democrat	0.060 (0.158)	0.222+ (0.131)
Republican	-0.097 (0.119)	0.132 (0.141)
College	0.166 (0.154)	0.450*** (0.146)
Jury Experience	-0.010 (0.171)	0.046 (0.117)
Defendant or Plaintiff	-0.650*** (0.156)	-0.492*** (0.145)
Knowledge of Courts	0.131 (0.114)	-0.019 (0.136)
Rural County	-0.054 (0.151)	-0.167 (0.152)
N (# of respondents)	1011	1133
# Countries	89	91
Pseudo R^2	0.021	0.041

Table 5. Ordered Logistic Regression

+p<0.10, *p<0.05, **p<0.01, ***p<0.001

Only two independent variables in model 1 were associated with confidence in state courts. A respondent's ideology was positively associated with the dependent variable. That means that respondents with higher scores in our seven-point scale (more conservative) tended to have more confidence in the courts in North Carolina. This is an interesting finding, since prior studies have found that conservatives tend to be less trusting of the government and especially of the US Supreme Court (Cook and Gronke 2005). Yet conservatives in our sample were more confident in state courts than liberals.

No other study we reviewed found such a finding, for the most part because studies did not typically include ideology as an independent variable when examining public attitudes toward state courts. Our study shows that for North Carolina, ideology is an important variable in understanding support for state courts. Curry and Romano (2018) suggest that ideology and ideological cues help create a connection between the courts and the public and help increase accountability.

Our regression models also include variables measuring prior experience with the courts. Like other studies, such as Benesh and Howell (2001) and Wenzel, Bowler, and Lanoue (2003), our study found that individuals who have experience as a defendant or a plaintiff tended to have less confidence in the courts. Unlike Boyum (1992), who found that jury duty in California was linked to increased levels of support for the courts, we found no relationship between jury duty and confidence in the courts in North Carolina.

Model 2 uses the same independent variables to explain variation in perceptions of fairness in the North Carolina court system. Respondents were asked, "How often do people receive fair outcomes when they deal with the courts? Always, usually, sometimes, seldom, or never?" This dependent variable is not as commonly used by scholars as the "confidence" question. This "fairness" variable measures more specific support for courts. The results for model 2 are different from model 1 and show that whites are more likely to believe the courts usually treat people fairly. Race was not an important factor in explaining general confidence in courts in model 1, but race does matter when looking at a more specific question about court performance. This supports findings from prior research in Mississippi by Overby et al. (2004), which found that race mattered for specific support but not for diffuse support for courts. Conservatives also tended to believe courts produced fair outcomes. Similarly, more-educated respondents were also more likely to believe the courts were fair. Women were more likely to believe that state courts seldom treat people fair; so were people who had been a defendant or a plaintiff in a courtroom.

It is important to know that women, African Americans, and residents with prior experience with the courts were more likely to believe the courts were not always fair. When different groups of residents have different levels of trust in the courts, it calls into question whether courts are serving all interests and individuals in society. Even if these differences in trust are unfounded, such beliefs may diminish the legitimacy of the courts.

Independent Variable	***Dependent Variables - Far Worse (1) to Far Better (5) - Model 3 - Low Income***	***Dependent Variables - Far Worse (1) to Far Better (5) - Model 4 - African Americans***	***Dependent Variables - Far Worse (1) to Far Better (5) - Model 5 - Whites***	***Dependent Variables - Far Worse (1) to Far Better (5) - Model 6 - Hispanics***
Age	0.002 (0.003)	0.002 (0.003)	-0.001 (0.003)	0.009* (0.004)
White	0.426 (0.303)	0.209 (0.315)	-0.650* (0.295)	-0.057 (0.329)
Black	-0.690+ (0.390)	-0.744* (0.338)	0.739** (0.279)	-0.331 (0.375)
Female	-0.065 (0.122)	-0.137 (0.124)	-0.154 (0.116)	-0.299* (0.146)
Ideology (7 point scale)	0.224*** (0.038)	0.294*** (0.037)	0.290*** (0.037)	0.237*** (0.039)
Democrat	-0.072 (0.168)	-0.111 (0.155)	0.188 (0.153)	0.006 (0.133)
Republican	0.082 (0.136)	0.207 (0.133)	0.003 (0.160)	0.204 (0.136)
College	-0.263** (0.092)	-0.613*** (0.113)	0.211+ (0.119)	0.425*** (0.121)
Jury experience	-0.065 (0.114)	-0.216 (0.161)	-0.177+ (0.102)	-0.015 (0.112)
Defendant or Plaintiff	-0.421** (0.144)	-0.216 (0.161)	-0.267* (0.116)	-0.138 (0.118)
Knowledge of Courts	0.135 (0.108)	-0.031 (0.116)	-0.165 (0.144)	0.027 (0.133)
Live in Rural County	0.589*** (0.155)	0.423** (0.140)	-0.473*** (0.133)	0.609*** (0.158)
N (# of respondents)	1051	1043	1049	980
# of countries	91	91	90	87
Pseudo R^2	0.06	0.077	0.09	0.05

Table 6. Ordered Logistic Regression - Court Treatment of Groups

+p<0.10, *p<0.05, **p<0.01, ***p<0.001

Table 6 presents the results of a set of ordered logistic regression models that use dependent variables that measure the beliefs about how state courts treat specific groups. These dependent variables are based on a survey item that asks respondents to evaluate if a particular group receives far better, somewhat better, the same, somewhat worse, or far worse treatment in the

state courts. The most consistent finding was how ideology was related to perceptions of court treatment of different groups. Conservatives were more likely to believe the courts treat low-income people, African Americans, and Hispanics better and were more likely to believe that whites were treated worse. This is not necessarily a surprising finding, but it is an important finding because very few studies on state courts use ideology as an independent variable.

Living in a rural county was also consistently associated with the four dependent variables. Like conservative respondents, respondents living in rural counties were more likely to believe the courts treat low-income people, African Americans, and Hispanics better and treat whites worse. This means that even when controlling for a respondent's race, ideology, partisan identification, and other characteristics (independent variables), we found that individuals living in a rural county tend to evaluate North Carolina courts very differently. These regional and geographic differences are highly relevant in state politics and the state court system. Elected officials, including judges, are elected within certain districts. Differences between rural and urban counties might produce district elections that select very different judges and may produce different outcomes (Fernandez and Bowman 2004). Furthermore, when district lines are redrawn every ten years, officials may attempt to engage in gerrymandering to influence electoral outcomes.

Race was found to be associated with beliefs about group treatment. As we predicted, African American respondents were more likely to believe whites were treated better and that blacks were treated worse. The education level of a respondent was also associated with different perceptions of court treatment of groups. College-educated respondents were more likely to say that low-income people, African Americans, and Hispanics are treated worse by courts. This is perhaps because college-educated individuals are more likely to have learned about racial disparities in the criminal justice system.

People with experience as a defendant in court were also more likely to believe courts treat low-income defendants worse but were also more likely to believe whites were treated worse as well. Not all studies have found that prior experience with the courts matters. For example, Berthelot, McNeal, and Baldwin (2018) found that experience with the courts did not have a statistically significant relationship with attitudes toward state courts. Our study highlights how it is important to differentiate between types of experience, since jury duty is very different from being a defendant or a plaintiff in court.

In table 6, age and sex (being identified as female) were only found to be associated with beliefs about court treatment of Hispanics (see model 6). Older respondents tended to believe Hispanics were treated better, compared to younger respondents. Women tended to feel the opposite, believing that Hispanics are treated worse by the courts in North Carolina. Although modest in size, the Hispanic population in southern states is seeing some of the fastest growth (Fernandez and Dempsey 2017). Race relationships in the South have generally focused on white-and-black

dynamics. Future research in southern state politics will need to examine public attitudes toward the growing Hispanic population (Peralta and Larkin 2011).

As noted earlier, most surveys ask questions that provide respondents with an ordered set of choices for a response: strongly agree, agree, and so on. This type of ordinal measure requires special regression models for analysis, but the coefficients produced by ordered logistic regression are not easily interpreted outside of looking at statistical significance and the sign, which indicate whether the independent variable is positively or negatively related to the dependent variable. To better understand the relationship between the independent variables and the dependent variable (public attitudes toward the state courts), researchers often compute the probabilities of observing a specific value of the dependent variables (e.g., strongly disagree) given a set of values for the independent variables.

For example, using the logistic regression coefficients in model 4 in table 6, we can calculate the probability that a person says courts treat blacks far worse given that the respondent is a male who considers himself neither black nor white but some other race, is fifty-three years of age (the average in the sample), has not graduated college, is moderate in ideology (value 4), is neither a Democrat nor a Republican (e.g., Independent), has never served on a jury or been a plaintiff or defendant in court, and lives in a suburban or urban county. The probability of answering "far worse" for the hypothetical respondent is 0.13, or 13 percent. This is presented in table 7 under the "Overall Probability." We can then change one of the values of an independent variable (e.g., being black) and recalculate the probabilities of giving the same answer (blacks are treated far worse). Table 7 presents these calculated probabilities along with predicted probabilities when making the hypothetical respondent above white, then a rural resident, then a college-educated individual, and then extremely conservative. These probabilities tell us that being black increases the probability of answering "far worse" by about 0.10, and graduating college increases the probability by 0.08, and moving from a moderate ideology to an extremely conservative ideology decreases the probability by about −0.07.

Variable	***Change in Value***	***Far Worse***	***Somewhat Worse***	***The Same***	***Somewhat Better***	***Far Better***
Overall Probabilities	-	0.130	0.344	0.391	0.117	0.019

Table 7a. Change in Probabilities Given a Change in Value for a Specific Independent Variable

Black	0 to 1	.102	.074	-.110	-.057	.010
White	0 to 1	-.025	-.028	.030	.019	.004
Rural	0 to 1	-.040	-.061	.043	.048	.010
College	0 to 1	-.071	-.128	060	.113	.026

Table 7b. Marginal Effects on the Probabilities of Beliefs about Court Treatment of Blacks (using Coefficients in Model 4 in Table 6)

In addition, we can plot the change in the predicted probabilities for all the values in the ideology measure ranging from 1 (extremely liberal) to 7 (extremely conservative) to visualize how this important variable is related to public attitudes toward the courts. Figure 1 shows how ideology influences the probability of answering that African Americans are treated worse by the state courts. The figure presents results for both college-educated and non-college-educated respondents. Ideology is clearly related to beliefs of how state courts treat blacks. Liberal respondents are more likely to say blacks are treated worse. Furthermore, we can see how a college education also influences attitudes; however, the differences between college-educated and non-college-educated respondents are less visible once a respondent is extremely conservative. Extremely conservative respondents tend to have similar perceptions of how blacks are treated whether they have a college degree or not.

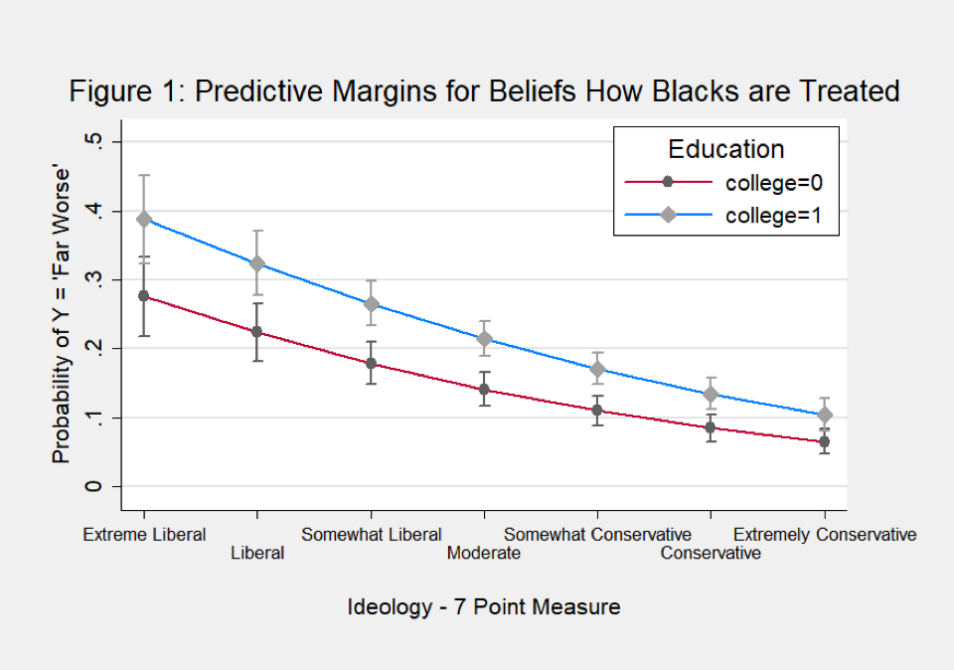

Figure 1. Predictive Margins for Beliefs How Blacks are Treated

Discussion

According to Olson and Huth (1998), public opinion regarding state courts has been of low interest to most pollsters. That is unfortunate given the influence courts have on the lives of citizens.

Public opinion research is valued because surveys help promote democracy and accountability by providing "systematic information on the preferences of the citizenry" (Asher 2012, 26).

The earliest survey that asked about state courts was conducted in the 1970s and found that the public was not very satisfied with the courts (Rottman 2015). Similarly, many legal experts in the 1960s saw state courts as slow and inefficient and saw many state court judges as unqualified (Hall 1999). But starting in the 1970s, state and local courts became consolidated, better funded, and better managed. Hall argues that most state courts have been transformed into "highly professionalized institutions" (1999, 114).

This study finds that the public is not unsatisfied with the state courts in North Carolina and that the public sees state courts in a more positive light than the media, the federal government in general, the US Supreme Court, and even local public schools. These findings do not seem to support arguments that "a crisis of public confidence in the American judicial system is at hand" (Selya 1996, 909). Having said that, the findings do show that the public believes the courts do not always treat people fairly. Although most respondents, regardless of background, have a general level of confidence in state courts, respondents are also keenly aware that not all groups are treated fairly by the courts. The contradiction in having confidence in political institutions but also understanding that these political institutions are influenced by politics and other external forces is perhaps a reflection of the pragmatic approach many citizens have to our democratic system. There is broad support for our political institutions even though we know they are imperfect.

These contradictions and the complexity of public attitudes toward the legal system can only be fleshed out when several different types of questions are used to measure the public's perceptions of political institutions. Many studies have found that voters tend not to have much confidence in Congress, but they typically have favorable opinions of their representatives in Congress. Dougherty, Lindquist, and Bradbury (2006) found that different independent variables were associated with different measures of support for courts in Georgia. A measure that simply asks respondents about confidence in the courts might only measure the public's overall respect and deference to the legal system. General questions of confidence do not capture the real differences in opinions that some groups have about the actions and behaviors of state courts. For example, Overby et al. (2004) found that blacks and whites in Mississippi had similar assessments of state courts when asked about diffuse support for the courts.

However, the similarities between blacks and whites disappear when specific questions are asked about how courts actually work and perform. In our survey, white and black respondents were very similar when it comes to confidence in state courts in North Carolina but were very different when asked about fair treatment by the courts. Therefore, it is not surprising that we found very different results when we examined attitudes toward confidence in the courts, fairness of the courts, and how courts treat different groups. Specific question wording in a survey item captures how respondents evaluate state courts in different ways. Understanding how different groups

view the fairness of the legal system is critical in helping keep the courts accountable to all its citizens and ensuring that court rulings are seen as legitimate by all groups.

No single study can capture all the factors that influence a person's opinion about a court system. In our study, we found that ideology was one of the most consistent predictors of attitudes toward the court. This is not surprising given that political science often defines *ideology* as a set of core beliefs and principles about how politics and government should work (Knight 2006). It is surprising how few studies include ideology in the statistical models used to examine opinions on state courts. Our review of prior studies also found that few studies examine how a person's environment may influence his or her beliefs about courts. We found that individuals living in rural counties have different perceptions of the courts. Even when controlling for ideology, rural residents are more likely to believe that people of low income, blacks, and Hispanics are treated better in the courts and whites are treated worse. This finding highlights the importance of where people live in understanding public opinion. As Lyndon Johnson once said, "Tell me where a man comes from, how long he went to school, and where he worships on Sundays, and I'll tell you his political opinions" (Morone and Kersh 2019, 206). Other environmental variables can be included in future research, including county crime rates, median income of a county, or the percent of a county population that is African American or Latino.

As noted, there is plenty of room for more research on state courts. The prominence and influence of state courts is expanding. Individuals living in the United States are governed and protected by a system of dual constitutionalism. Their rights are protected by both the US Constitution and the constitution of the state in which they reside. Recent decades have seen a new judicial federalism where state courts are increasingly using state laws and state constitutions to determine the degree to which individual rights and liberties are protected—and even to secure rights not articulated by the US Constitution (Tarr 1996).

Furthermore, state courts have seen important changes in their organization and how judges are selected. Just in North Carolina in the past ten years, the selection of judges has changed from partisan, to nonpartisan, and then back to partisan elections. What kind of effect has this had on public perceptions of the state courts? Around the country, more women and minorities have been elected or appointed to judicial positions in state courts. How has this diversity in the court system influenced public perceptions?

How the public perceives the courts is an important field of study given the growing caseload state courts manage. As Kelleher and Wolak argue, "trust and confidence in government is consequential. People are more likely to comply with laws when they have confidence in government" (2007, 707). Public confidence is perhaps even more important for the courts because they often lack enforcement powers. As Alexander Hamilton wrote in Federalist 78 in reference to the federal judiciary, the courts have "no influence over either the sword or the purse. . . . It may truly be said to have neither FORCE nor WILL, but merely judgment." This applies to state courts

as well, who often rely on their perceived legitimacy in hopes that other branches of government and the public abide by their rulings.

Appendix: Survey Question Wording

Introductory statement. Now I would like to ask you some questions about the North Carolina court system. This system includes the state supreme court, court of appeals, superior courts, and district courts.

Confidence in institutions. First, I'd like to know how much confidence you have in the following public institutions using the scale of very confident, somewhat confident, not very confident, or not at all confident. In general, how would you rate your confidence in the following (institutions rotated randomly): your local public schools, your local police or sheriff, the media, the US Supreme Court, the federal government in Washington, the North Carolina state courts?

Fairness of courts. How often do people receive fair outcomes when they deal with the courts? Always, usually, sometimes, seldom, or never?

Knowledge of courts. How much would you say you know about the courts in North Carolina? A lot, some, a little, or nothing at all?

Experience with courts. I'd like to ask you some questions about your personal experiences with the North Carolina state court system (jury question is first; defendant/plaintiff and testify rotated randomly): Have you ever served on a jury? Have you ever been a defendant or a plaintiff in a court case? Have you ever testified as a witness in a court proceeding?

Treatment of different groups. I would like to read you a short list of groups of people. For each, please tell me if you think the group receives far better, somewhat better, the same, somewhat worse, or far worse treatment in the state courts (groups rotated randomly): low-income people, middle-class/working-class people, wealthy people, people who have no lawyer representing them, non-English-speaking people, white people, African Americans, Hispanics.

Political influence on courts. Do you strongly agree, agree, disagree, or strongly disagree with the following statements (statements rotated randomly): North Carolina courts are free from political influences, judges' decisions are influenced by political parties, and judges' decisions are influenced by the fact they must run for election.

Demographic Questions

- **Race.** For statistical purposes only, could you please tell me your race or ethnic background?
- **Party ID.** Generally speaking, do you usually think of yourself as a Democrat, Republican, Independent, or something else?
- **Ideology.** When it comes to politics, do you usually think of yourself as liberal, moderate, conservative, or haven't you thought much about this?
- **Education.** How much school have you completed?
- **Age.** Do you mind if I ask how old you are (continuous variable recoded for presentation)?
- **Gender.** Was the respondent male or female (determined by the interviewer)?

The full list of survey items and their results and cross tabulations can be found at https://www.elon.edu/u/elon-poll/wp-content/uploads/sites/819/2019/02/111915_ElonPoll_CourtsReport.pdf

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Class Activities

Activity 1

Research how the judges for the state supreme court in your state are selected. Describe how these judges are selected. Are they elected through a nonpartisan election, are they appointed by the governor, or are they selected through another method? How long is a state supreme court judge's term (e.g., four years)? Are there limits on the number of terms they can serve?

Regardless of how your state selects judges, which method do you think is best in choosing judges for state courts? Should the executive (e.g., the governor of a state) appoint state judges? Should an appointed panel of lawyers and nonlawyers make judicial recommendations? Should voters choose who is best to serve as a state judge? If a state elects its judges, should those elections be partisan (a candidate's political party affiliations listed on the ballot) or should they be nonpartisan (no party affiliations listed on the ballot)? Explain your answer.

Activity 2

Using the internet, find a recent survey that asked respondents about their feelings or opinions about courts. Provide the following information:

1. What is the name of the organization that conducted or sponsored the survey?
2. When was the survey conducted (provide specific date range surveys were collected)?
3. What geographic area did the survey cover (e.g., the entire United States, a single state such as California)?
4. What was the sample size of the survey (how many people did they reach)?

5. What was one of the questions they asked about courts?
6. What do you think was the most interesting finding from the survey?

30. Does the US Supreme Court Respond to Public Opinion?

BEN JOHNSON AND LOGAN STROTHER

Does the Supreme Court respond to public opinion when it decides cases? This question has been the subject of much debate since the nation's founding, and it is still important today. A nonresponsive Court that imposes its policy preferences on the nation raises concerns about the "countermajoritarian difficulty"—why should an unelected institution get to make binding decisions in a democracy (Bickel 1962)? On the other hand, a responsive Court may not sufficiently protect minority rights in the face of shifting majorities. This is one of the traditional defenses of judicial independence—the inverse of "responsiveness": a court that is beholden to the public or the legislature cannot be reasonably expected to neutrally enforce the rule of law (Breyer 1995). Alexander Hamilton put it this way in *Federalist*, no. 78:

> The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex-post-facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.
>
> (*Federalist*, no. 78)

This question of judicial responsiveness is especially important as the Supreme Court plays an increasingly prominent policy-making role in an era of intense partisan polarization (Lee 2015; Keck 2014).

The normative importance of this question aside, whether the Supreme Court responds to public opinion is an empirical question. Getting the answer to this empirical question right tells us which normative problem we face. For a long time, scholars have presented consistent empirical evidence that the Court does, in fact, track the public. In contrast, as we show below, these earlier studies consistently reported such a finding because they did not carefully inspect their data and drew erroneous conclusions based on a time-bound finding. There is actually no good empirical evidence that the Supreme Court systematically responds to the will of the people.

While our analysis here certainly cannot (nor does it try to) *prove* that justices *never* care about the public's preferences, we find no evidence to support the alternative proposition, that the Court consistently responds to public opinion.

Why Would the Supreme Court Respond to the Public?

Because the Framers viewed judicial independence as crucial to the rule of law, they wrote several structural protections for judicial independence into the Constitution. Supreme Court justices are appointed rather than elected, and they enjoy lifetime tenure (with the historically rare exception of removal via impeachment). Congress can alter the Court's jurisdiction, effectively preventing it from deciding certain cases, but it cannot force the Court to decide cases in any particular way.

By all appearances, justices take this structural separation from the public quite seriously. When giving speeches and interviews, justices routinely argue that a fundamental purpose of the Supreme Court is to have a neutral decision-maker that can stand above the fray of partisan politics (Glennon and Strother 2019; Strother and Glennon 2021). Take Justice Jackson's famous line from his opinion in *West Virginia Board of Education v. Barnette*: "The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities" (*West Virginia Board of Education v. Barnette* 1943, 638). Much more recently, Justice Sotomayor voiced a similar view, but in even stronger terms, in an interview on *The Daily Show*. When asked by John Stewart whether she or the Supreme Court considers public opinion when deciding cases, Sotomayor answered, "No, I don't think there's a judge on my Court and a judge that I've met, actually, who responds to public opinion."[1] These sentiments are supported by the fact that public opinion is rarely mentioned in Supreme Court opinions (Marshall 1989).

Despite these strong institutional protections for judicial independence, many studies in political science have argued that the Supreme Court is in fact influenced by public opinion (Mishler and Sheehan 1993; Flemming and Wood 1997; McGuire and Stimson 2004; Giles, Blackstone, and Vining 2008; Epstein and Martin 2010; Casillas, Enns, and Wohlfarth 2011; Hall 2014; Bryan and Kromphardt 2016; Hall 2018; Black, Owens, Wedeking, and Wohlfarth 2020). Given the discussion above about judicial independence and structural separation, this consistent finding in the literature is striking. How can this be?

1. Sonia Sotomayor, interview by John Stewart, *The Daily Show*, January 21, 2013, https://www.cc.com/video/a1f1ob/the-daily-show-with-jon-stewart-exclusive-sonia-sotomayor-extended-interview-pt-3.

Scholars have offered three main theories to try to explain this apparent relationship between public preference and Court outputs. First is the Dahlian, or "Regime," theory of judicial responsiveness, which holds that each new Supreme Court justice is a creature of the dominant governing coalition that appointed her, because justices are nominated, vetted, and confirmed by the coalition in power (Dahl 1957). On this view, the fact that justices are nominated and confirmed by elected officeholders is sufficient to moor the judiciary to the public will.

The second theory is commonly known as "drift," which holds that justices' preferences change over time. The basic idea here is that as time passes fashions evolve and people change, and because justices are people, they may well move along with the general public (Giles, Blackstone, and Vining 2008). Note that both of these theories concern *indirect* responsiveness, where the relationship between public preferences and the Court's outputs are incidental, as opposed to intentional.

The third theory, in contrast, concerns *direct* responsiveness, wherein the justices are thought to be consciously considering and responding to the will of the people. This theory is known as "strategic institutional maintenance," and it holds that justices respond to the public to protect the Court's institutional power and legitimacy (Casillas, Enns, and Wohlfarth 2011; Hall 2014). The basic idea is that if the Court bucks the public too often or too much, the public will lose confidence in the Court. This would weaken the Court's ability to act effectively in the American political system, as the Court relies on its public legitimacy for the efficacy of its decisions (Hall 2014; Strother 2019). That is, outside actors are less apt to comply with decisions handed down by an unpopular Court (Hall 2011).

Even among those who contend that the Court directly responds to the public, however, there is much disagreement as to how and why it does so (Epstein and Martin 2010; Johnson and Strother 2021). The relationship has typically been found to be small (e.g., Stimson et al. 1995), except when it is large (McGuire and Stimson 2004); contemporaneous (Collins and Cooper 2016), except when it requires a significant time-lag (Mishler and Sheehan 1993); that it exists in all issue areas (Bryan and Kromphardt 2016), unless it exists only a few (Link 2015). There is considerable agreement that case salience is a key mediating variable, but wide disagreement over how salience conditions the relationship between public opinion and Court outputs. For example, Casillas, Enns, and Wohlfarth (2011) find that the Court is responsive to the public in nonsalient cases, but not in salient cases, while Hall (2014) and Bryan and Kromphardt (2016) find that the Court is responsive to the public in salient cases but not the nonsalient ones. To further complicate matters, Collins and Cooper (2016) argue that the Court responds to the public in both very high and very low salience cases, but not to cases in the midrange of salience. These things, of course, cannot all be true.

Our goal here is to clear up these assorted disagreements and confusions in the literature. To do so, we go back to the fundamentals of empirical best practice. We look closely at the data and walk

step by step through the analytic process. In doing so, we aim to cut through the noise and do justice to this fundamentally important question in American politics.

Research Approach

The wide array of divergent empirical findings in the direct responsiveness literature is especially puzzling given that studies rely on the same data and measures to capture key concepts. This state of affairs indicates that the contrasting findings are most likely attributable to modeling choices; that is, to different functional forms and different sets of control variables. And to be sure, the cutting edge in the literature is typified by complex models with many right-hand-side variables and, frequently, interaction terms. Put more simply, most of the models in this literature are extremely complex—but the complexity is not always well justified, and the possible problems these complexities can create are not often carefully checked. Sophisticated though they may be, these models point us in different directions rather than illuminate a clear path forward.

We believe if the Supreme Court responds to public opinion, then evidence of that relationship should appear in the simplest of models—in the cross-tabs, so to speak. That is, if there is a real relationship between public opinion and Supreme Court outputs, it should be evident before we begin to add variables to the right-hand side of the equation (Achen 2005; Achen 2002; Lenz and Sahn 2020). For these reasons, we will seek evidence of this crucially important theoretical relationship in parsimonious models, beginning with minimal specifications, and working outward from there. This approach will allow us to cut through the noise—that is, the array of divergent findings in the existing literature—and build a solid base for empirical generalization.

Many researchers wrongly assume that adding additional covariates to a statistical model of observational data poses no harm. In reality, however, adding covariates can introduce a variety of biases, including amplification bias, posttreatment bias, and collider bias, among other ills (Montgomery, Nyhan, and Torres 2018; Lenz and Sahn 2020).[2] To address these potential problems, and to advance the cause of transparent science, Lenz and Sahn (2020) argue that researchers should present the minimal specification of their models.[3] And in cases where

2. These assorted biases can cause you to draw faulty inferences from your analyses.
3. Minimal specifications have to be balanced against concerns of omitted variable bias—that is, bias that comes from correlation between the dependent variable, one or more independent variables, and the error term. Such bias arises in practice when a model when a determinant of the DV is omitted from the model. To address this, we discuss what we call the minimal theoretically justified

statistical significance relies on the inclusion of covariates, researchers should very clearly justify each covariate's inclusion and assess the robustness of the relationship against an array of model specifications.

To summarize, best practices in empirical examination of observational data require us (1) to begin with and to report minimally specified models—that is, models only capturing the core necessary variables of interest—(2) to use only theoretically sound variables; and (3) to examine and validate any findings in all relevant subsets of the data. Scholars of judicial politics should take these fundamental points of empirical practice seriously. For this reason, we take a step back from the cutting edge of research on this topic—that is, from the tendency to assume that the presumed relationship between public opinion and the Supreme Court requires "sophisticated" models with many (many) covariates to be observed—and instead return to basics: Are there meaningful correlations between public mood and the Supreme Court's outputs? And by the same token, we will add covariates piecemeal, and only when doing so is clearly justified on theoretical grounds, and we will assess the robustness of our findings across a range of measures.

To be clear, the following analyses cannot possibly prove (or disprove) a causal relationship between public opinion and judicial outputs. This is because we have only observational data, and there is no institutional variation or differential "treatment" to exploit that would allow us to do sound causal inference. Instead, we are addressing a more conservative question—but one that actually fits the data: do Supreme Court outputs correlate with public mood? This is a more conservative question in the sense that many relationships (even important ones) are not causal. Therefore, if we find strong evidence of a correlation between public opinion and Supreme Court decisions, that would establish a meaningful correlation, though not necessarily a causal relationship. If, on the other hand, we do not find good evidence of a correlation, then it is much harder, if not impossible, to sustain a theory of a causal relationship between public preferences and judicial decisions. Answering this question—and doing so well—is important, then, because doing so will provide a solid foundation for further work on this important topic.

Analysis

We address this question using the same data and basic approaches that we find throughout the literature. Like all studies in this literature, we draw on the Supreme Court Database to specify the dependent variable—case outcomes—with liberal outcomes coded as one (1) and

model in the sections below. See Clarke (2005) for discussion on dealing with omitted variable bias in empirical practice.

conservative outcomes as zero (0).[4] To capture our key independent variable, public opinion, we use Stimson's (1999) "public mood" measure (hereafter, "mood"). The mood measure aims to capture what Stimson calls "policy mood," which is an estimate of the aggregate liberalism of the American public's policy preferences derived from mass responses to thousands of survey questions. We begin with only these two variables to specify minimal models, as discussed above. Other theoretically justified variables will be considered and added below; we discuss these as we get to them.

Before we go any further, we discuss two possible empirical strategies. Researchers should make informed judgments about the data-generating process(es) underlying their data. In this case, we have to think about the nature of our two key variables: Supreme Court decisions and public mood. A key question we have to answer is whether we think our observations of these variables are independent over time. In other words, is every term (or case) at the Supreme Court largely independent of the term(s) before it? Is public opinion this month closely related to public opinion last month? And so on. If we think the observations on these variables are closely related to past observations of the same variable (we call this *autocorrelation*), then we need to adopt a "time-series" research strategy. On the other hand, if we think our observations are largely independent of one another, we would opt for a "cross-sectional" research design. In this body of research, scholars have been pretty divided as to the best approach, with numerous cross-sectional (e.g., Epstein and Martin 2010; Hall 2014) and time-series (e.g., Casillas, Enns, and Wohlfarth 2011; Collins and Cooper 2016) studies. Since our goals are to (1) show there is no good evidence that the Court follows public mood, and (2) to explain how earlier studies mistakenly found such a relationship, we'll demonstrate both approaches in the following sections.

Cross-Sectional Approach

We start with the cross-sectional approach. Doing so raises another question, though—what is the appropriate unit of analysis? That is, what are the units we should be studying? In this research application, the units could be individual justices' votes in cases, Supreme Court decisions, or even the term-level aggregate liberalism (i.e., the proportion of the cases in a given term decided in the liberal direction). And again, studies abound at all of these units of analysis. For that reason, we will demonstrate the application of the best practices at both the term level and the decision level.

We will move stepwise through the analysis, following best practices. If we find evidence of a

4. Note that this means when we aggregate to the term level, as we do in some of the analyses below, that higher values will correspond to more liberal terms, and low values to more conservative terms.

relationship we will rigorously interrogate it by seeing whether it exists in all subsets of the data (to establish that it is not an artifact), and then by seeing whether it persists when we begin to add control variables to the right-hand side of the model. If the relationship persists in all the subsets and in the presence of theoretically justified control variables, only then will we say that the relationship is "robust"—and therefore that it should be believed to be true.

We begin our analysis (as all data analysis should begin) by visually inspecting our data. In figure 1, we scatter the proportion of the Court's decisions in a given term that was decided in the liberal direction ("Court Liberalism") against public liberalism ("Mood"), with both variables on the same scale. This simple exercise tells us something important: public mood varies extraordinarily little (from a low of 0.528 to a high of 0.722) over our entire period of study, 1952–2018, while the liberal bent in the Court's outputs varies quite a bit (low of 0.348, high of 0.801).

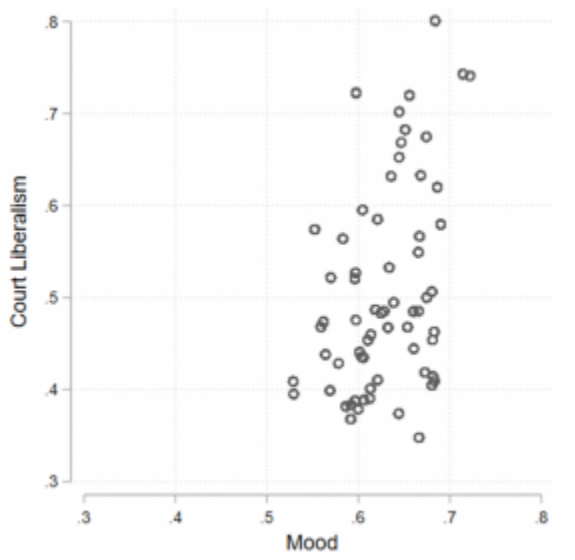

Figure 1. *Scatter plot of court liberalism versus public liberalism (mood), by term*

To begin the analysis in earnest, we present the cross-tabs, so to speak, of the term-level correlation that motivated this entire line of research. The subplot at the top left of figure 2 plots the share of cases decided in the liberal direction (as coded in the Supreme Court database) each term against the general liberal mood for that year for the period from 1952 through 2018. This panel shows the strong relationship between public mood and Court output that drives previous studies. Indeed, in a linear probability model, a one percentage point increase in public liberalism correlates with an equal increase in the percentage of cases decided in the liberal direction, with a p-value of 0.001.

Finding a "significant" correlation in the data does not end the inquiry, however. We next seek

to validate this empirical observation by examining the relationship within subsets of the data, as suggested by Achen (2002). The findings are presented in the remainder of figure 2. These plots present the term-level correlations within each Chief Justice era. If there is a relationship between the Court—as an institution—and public opinion, there should be a consistent relationship across Chief eras. However, the Chief-era plots give the lie to this expectation. The Warren Court shows a positive (but marginally insignificant, p = 0.073) relationship, the Rehnquist Court exhibits a weakly positive (and marginally significant, p = 0.041) effect, the Burger Court is essentially flat (p = 0.516), and Roberts shows a significant *negative* correlation (p = 0.034) between public mood and case outcomes, which is entirely antithetical to the strategic institutional maintenance perspective.

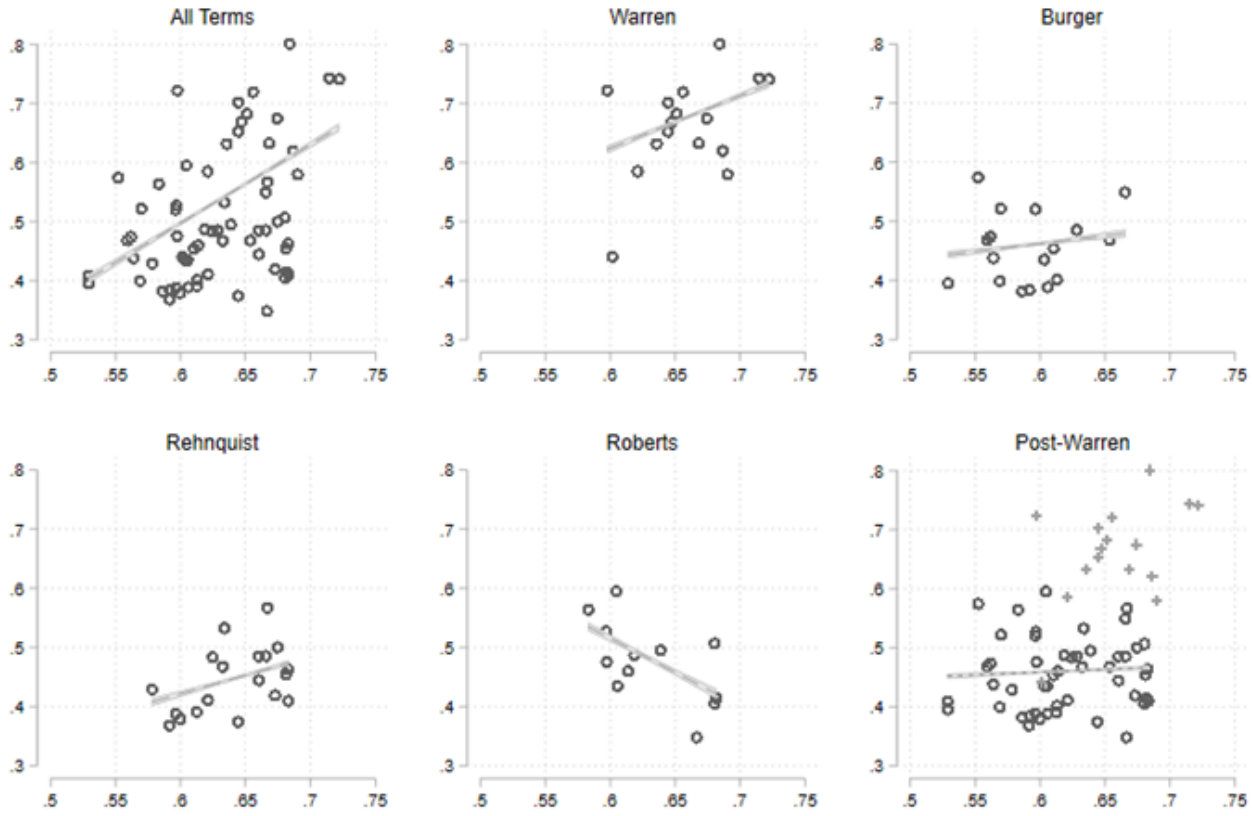

Figure 2. *Assessing the correlations between term-level outputs and mood*

Finally, because our Chief Era analyses suggest the clearest relationship during the Warren Court years, we next aggregate all the post–Warren eras (i.e., 1968–2018) in order to see whether there has been any meaningful correlation between public preferences and Court outputs over the last fifty years. The subplot at the bottom right of figure 2 clearly shows that the appearance of a meaningful relationship between mass public opinion and Court output is a function of the Warren Court: the best fit line for the post-Warren period is essentially flat (p = 0.67). This suggests that

the relationship suggested by the "All Terms" panel is not robust. It also suggests a good test for models built on institutional maintenance theory: do their results stand up in the post-Warren era?

Several scholars have pointed out that term-level analyses are by their nature quite coarse, and necessarily ignore a myriad of potentially relevant case-level factors (e.g., Epstein and Martin 2010). Thus we turn now to a case-level (but still cross-sectional) analysis.

We estimate a series of linear probability models where the outcome is the direction of the Court's decision (1 is liberal, 0 is conservative). The key independent variable is, as above, mood. Here we also add some case-specific information: salience. *Salience* is a latent quality of interest that concerns both how "important" a case is, and how much attention it receives, in some combination. Recall from above that most proponents of strategic institutional maintenance theory argue that salience is a key variable—even if they disagree about the nature of the relationship. The idea is that the salience of a case conditions how justices will act, how likely they are to care what the public thinks with regards to that case. To capture salience, we use data from Clark, Lax, and Rice (2011), which measures media coverage of cases in three newspapers before the decision is rendered (see Strother 2019; Johnson and Strother 2021).

We estimate a series of models in order to ease the interpretation of the key relationship of interest. Here, each model takes the basic form:

$$\text{decisionDirection} \sim \beta 1\text{Mood} + \beta 2\text{MidSalience} + \beta 3\text{LowSalience} + \beta 4\text{Mood} \times \text{MidSalience} + \beta 5\text{Mood} \times \text{LowSalience} + \alpha + \varepsilon$$

In each model, we are interested in the coefficient β1. In the example model just above, β1 is the total effect of mood in high salience cases.[5] To capture the total effect for midsalience cases, we replace MidSalience with HighSalience in the model; for low-salience cases, we swap out LowSalience for HighSalience. We estimate these models for the full dataset, and then as above, for each Chief Justice era, and then for the post-Warren period.

Figure 3 depicts the findings graphically (we only show the key variable of interest, mood, for the sake of presentation). These figures are coefficient plots, which plot the point estimate (the shape) and the 95 percent confidence interval (the bars) for each model. If the error bars do not cross zero (the thick vertical line) then we would say the relationship is "statistically significant" at the conventional $p < 0.05$ level. If the error bars do include the vertical zero-line,

5. The α is a constant (or "intercept") term and ε is the error term.

however, then we would say the relationship cannot be distinguished from zero (or that it is not statistically significant). The subplot at the top left again is consistent with the typical finding in the literature, of salience in high and low salience cases showing up as highly statistically significant. However, when we check in the subsets of the data, we see tremendous heterogeneity. The model for the Warren Court era shows across-the-board correlations, with the strongest relationship appearing in midsalience cases. In the Burger era, we find no evidence of correlation in high or low salience cases, but a significant negative correlation appears in cases of midsalience. The Rehnquist Court looks much more like what the strategic institutional maintenance theorists would suggest, though the relationship is only modestly significant. The Roberts Era again bucks the trend, with significant negative correlations in high and midsalience cases, and a negative though marginally insignificant correlation in low salience cases. There is no theory of Supreme Court responsiveness that would purport to predict this odd array of findings. Institutional Maintenance Theory, specifically, would predict a consistent pattern in every era over time. The data do not support this expectation. Finally, we again estimate the model considering the full post-Warren period (presented in the subplot at bottom right) and find tight nulls in all three levels of salience.[6]

6. In Johnson and Strother (2021) we show that this (non)pattern holds when we control for Supreme Court ideology, and when we focus on the subset of the Court's decisions reversing lower Court decisions. Adding ideology to the model described above (i.e., inserting the term $\beta 6 Ideology$) brings us to what might be thought of as the "theoretical" minimal model, because it is the minimally specified model that accounts for all theoretically relevant variables—since virtually all judicial politics scholars agree that justice ideology shapes Supreme Court decision-making. In Johnson and Strother (2021) we show that all the analyses we describe here hold true when we account for this theoretically important variable.

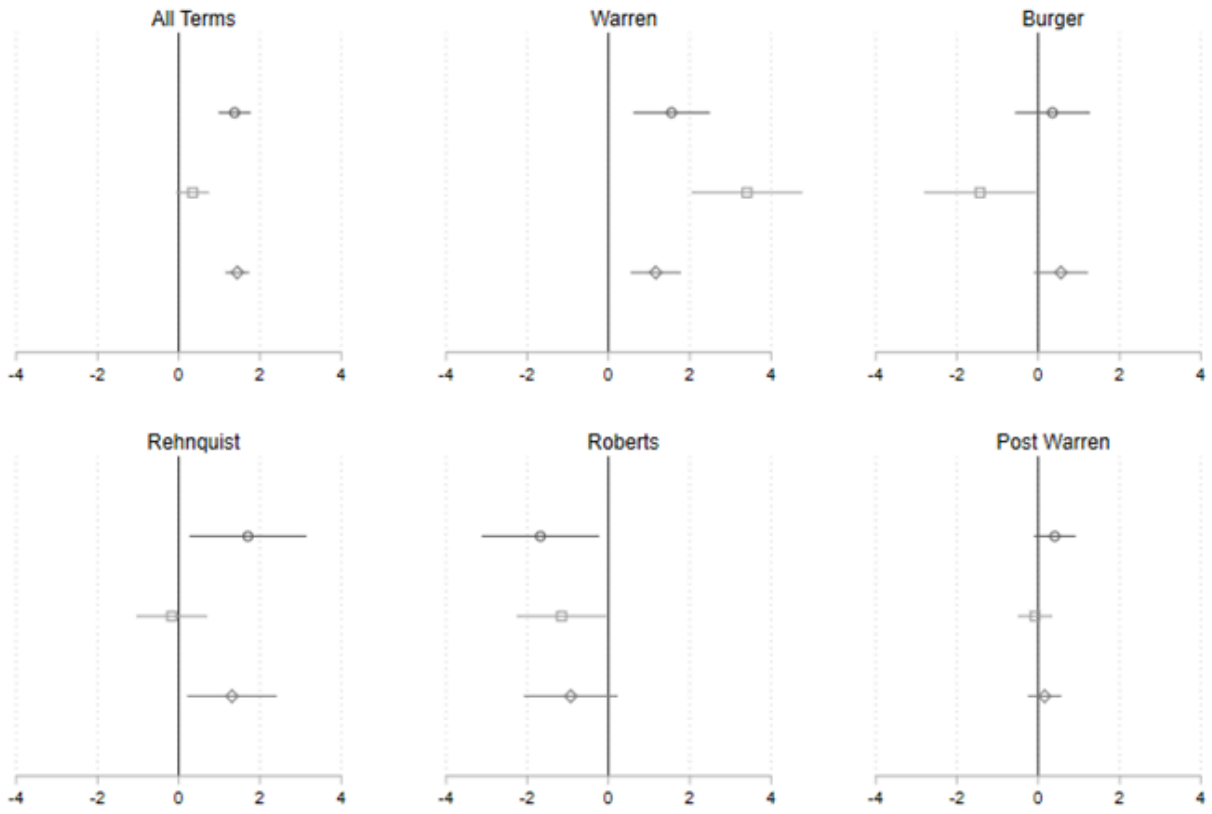

Figure 3. *Case-level analysis of the relationship between Supreme Court decisions and public mood*
Note: *Point estimates with 95% confidence intervals. In all subplots, the circle (○) at top denotes Mood in high salience cases, the square (□) at center denotes Mood in medium salience cases, and the diamond (◊) at bottom denotes Mood in low salience cases.*

In summary, we find no evidence to support the claim that the Supreme Court is responsive to public opinion in these cross-sectional analyses. Contrary to many existing studies, we find no significant correlation between public mood and the Court's term-level outputs (i.e., the proportion of decisions in a given term rendered in the liberal direction) or at the level of individual decisions. This finding remains when we consider the potential mediating variable, salience. It seems likely that prior studies have reached errant conclusions because they did not consider how the correlations they observed might be time bound. That is, those findings are almost certainly driven by the Warren Court and not reflective of a larger pattern in the data. Or to put it a little differently, there is no evidence that the "relationship" identified in the literature, and shown here in our "All Terms" analyses, is robust and meaningful.

Time-Series Approach

Of course, it is possible that this cross-sectional approach is not the best one to identify the relationship of interest. Many studies in this literature have taken a time-series approach (e.g., Mishler and Sheehan 1993; Casillas, Enns, and Wohlfarth 2011; Collins and Cooper 2016). Time-series approaches allow us to consider time trends in the relationship, the possibility that the Court responds after a lag (as opposed to contemporaneously), and the like. For these reasons, the next portion of our analysis takes time seriously. First, as above, we simply plot the data and visually inspect it. Figure 4 plots both public mood and Supreme Court liberalism against time. Again, we see that there is far more variation in Court outputs than in public liberalism—but the eyeball test suggests that the two may move somewhat in concert. And note the especially tight apparent correlation during the Warren Court (1954–68).

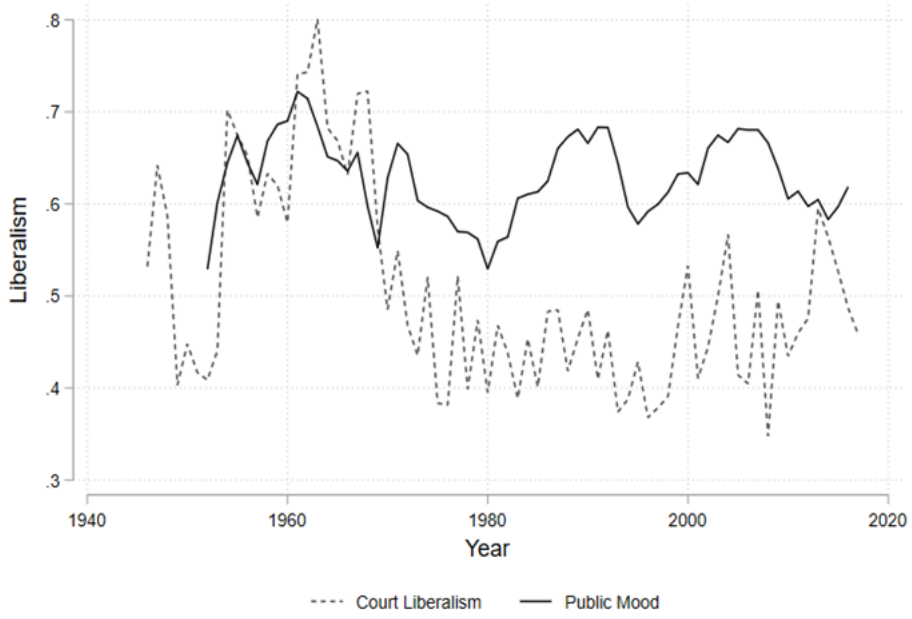

Figure 4. *Time-series plot of court liberalism versus public liberalism (mood), by term*

From here, we move on to more exacting tests than the eye can perform. We estimate a series of general error correction models, where the outcome is term-level Court liberalism, and the key independent variables capture public mood—both contemporaneous and lagged. Additionally, we control for Supreme Court ideology, as justices' tendency to vote ideologically is among the most well-established in all of judicial politics (Segal and Spaeth 2002). In doing so, we are estimating what you can think of as the minimum theoretically justified model. We specify Supreme Court ideology in these models using the Segal-Cover score of the median justice on the Court for a

given term (Segal Cover 1989). Finally, the model includes the "error correction rate" (the lag of the dependent variable) on the right-hand side of the equation. The outputs of these models are presented graphically in figure 5. We first estimate the model for all the Court terms in our dataset. As the figure shows, when considering the full time range, we find that "lagged" (i.e., last year's) public mood correlates significantly with Court liberalism. Building on our analyses above, though, we next consider whether this correlation holds when we exclude the Warren Court. The model for the post-Warren years provides no evidence of a correlation between mood and Court outputs. As such, these time-series analyses are consistent with the cross-sectional analysis presented above; there is nothing to see after the Warren era. We have found no solid evidence that the Court responds to public opinion.

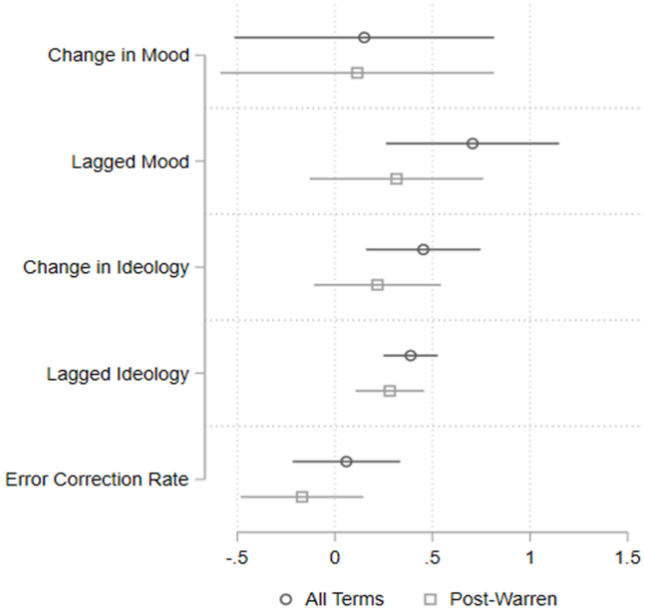

Figure 5. *Time-series analysis of court liberalism*
Note: *Point estimates with 95% confidence intervals.*

Conclusion

The Constitution creates strong protections for judicial independence. By design, tenure during good behavior, salary protection, and the appointments process all insulate the judiciary from public pressure. Given the structural protections guarding the Supreme Court, it would be surprising if the Court did, in fact, follow the public. An important question in judicial politics scholarship, then, is whether these constitutional protections are "working." The answer to this

question points us to which normative question we face: can the Court be democratically legitimate? If the Court follows the public, can it effectively protect minorities?

Many scholars contend that constitutional protections for judicial independence have not insulated the Court from the public. That is, they reject a strong account of judicial independence and contend that despite the Court's structural protections, the justices hew to the public will to protect their institutional legitimacy. These theories have been supported by a large number of studies reporting significant correlations between the liberal tendencies of the public and Supreme Court decisions. The regularity of these findings has established something of a consensus that public opinion directly influences Court's work. If these scholars are right, the concern that the Court may not be able to protect the rights of unpopular minorities against majoritarian abuse is legitimated.

By going back to the basics—looking carefully at the data, checking in the subsets, assessing robustness, and so on—we show here that there is actually very little evidence that the Supreme Court, as an institution, responds to public preferences. That is, our empirical results show that there is no solid empirical basis for the common claim that the Court follows public opinion—at least over the last fifty years.[7]

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7. In other work, we show that this is true across three units of analysis, a variety of measures of public preferences and case salience, and among the subset of cases in which the Court reversed lower court decisions. Replications of prior studies further reinforce these conclusions. See Johnson and Strother (2021).

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Class Activity: What's Wrong with the Warren Court?

In the chapter, we argued that there is no good evidence that the Supreme Court, as an institution, responds to public opinion and that prior studies have erroneously concluded the opposite because of a correlation driven by the Warren Court (recall especially figure 2 and the associated discussion).

But this raises a new question: Was the Warren Court responsive to public opinion? It is possible, for one reason or another—perhaps the fact that Earl Warren himself was a prominent politician before joining the Court—that the Warren Court was an outlier that did, in fact, care about the will of the people.

Alternatively, it is possible that the Warren Court was simply a very liberal Court that happened to be serving when the public was also very liberal. That is, that the liberalism of the Court and public are correlated, but not causally related.

Note that this is an important empirical question. For this activity, your job is to try to answer that question: Was the Warren Court responsive to the public?

To answer the questions below, you first need to download R and RStudio. R is a powerful open-source program for statistics and data analysis. RStudio is free software that provides a nice-

looking console for working in R. For information on installing R and RStudio in Windows or in Mac OS X see one of the following links:

- https://www.andrewheiss.com/blog/2012/04/17/install-r-rstudio-r-commander-windows-osx/
- https://owi.usgs.gov/R/training-curriculum/installr/
- https://cran.r-project.org/doc/manuals/r-release/R-admin.html

Once you have R and RStudio installed on your computer, download and open the .R file ("Warren_PublicOpinion.R") and the data file ("Warren_PublicOpinion.csv") below. Note that you will need to save the .R file and the data file in the same folder on your computer. Next, set the working directory of your RStudio session to the folder where you saved the .R file and data file. To do so, open RStudio, click "session" on the menu near the top of the screen, scroll down to "set working directory," and click "choose directory" (i.e., Session > Set Working Directory > Choose Directory).
Once the working directory is set, you can click and highlight sections of the code in the scripting window and click the "run" button in the top left section of the window. There are notes in the code that will guide you through the exercise.

Questions

1. Do you think the Warren Court was responsive to public opinion? Why or why not?
2. Do you observe a constant relationship between opinion and outputs during the Warren years?
3. You identified an "outlier" year in the data. What do you think caused that one year to be so different from all the other observations in the Warren era?

PART V

MEDIA

Studying media coverage of courts and their decisions is a natural pursuit for students of the judiciary. Courts are passive institutions and judges generally do not hold press conferences, send out constituent mail or tweet. What most people know about courts and their work, then, is often filtered through the lens of the media. Understanding the judiciary and its role in our society, then, requires us also to understand how and why the media covers the courts. To this end, our volume has two contributions—one that examines how the media covers the judiciary and the potential fallout of that coverage and one that examines what the media chooses to cover, and how those choices may impede steps taken by the judiciary to become more open to media coverage. First, Professor Douglas R. Rice examines whether coverage of the U.S. Supreme Court has changed over time. Using an original dataset that includes newspaper coverage spanning over fifty years, Professor Rice employs machine learning and textual analysis to his research question. Specifically, Professor Rice focuses on the coverage of conflict on the high court and finds that reporting of conflict has increased. Moreover, the increase in this type of coverage is echoed in the declining public approval of the Court, escalating scholarly concerns regarding the declining legitimacy of the U.S. Supreme Court. Second, Professors Joseph P. Bolton and Christopher D. Kromphardt examine media requests for televising hearings of the Court of Appeals for the Ninth Circuit from 1991 through 2005. Assessing the requests of local and national media, allow Bolton and Kromphardt to investigate what drives coverage of oral arguments versus coverage of court decisions. The analysis finds significant differences between local and national interest and some divergence in factors that spur a request for coverage versus factors that yield coverage of a court decision.

Rice, Douglas. "The Language of Newspaper Coverage of the US Supreme Court."

Bolton, Joseph P. and Christopher D. Kromphardt. "Black Robes in the Limelight: News Values and Requests to Televise Oral Arguments in the Ninth Circuit Court of Appeals, 1991-2005."

31. The Language of Newspaper Coverage of the US Supreme Court

DOUGLAS RICE

A previous version of this paper was presented at the 2018 Conference of the Midwest Political Science Association, Chicago, IL, April 5th-8th, 2018.

In describing the work of media coverage of the Supreme Court, celebrated newspaper reporter Linda Greenhouse writes that the "overwhelming impression that journalism about the Court—including my own—probably conveyed to the casual reader was of an institution locked in mortal combat, where sheer numbers rather than the force of argument or legal reasoning determined the result" (1996, 1551–52). Greenhouse, notably, is considered one of the most level-headed journalists covering the Court, most likely to present cases without the added dramatics of other reporters (Davis 1994; Solberg and Waltenburg 2014). In the context of a changing media environment and debate over the norms of coverage of the Supreme Court, Greenhouse's perspective suggests a Court that is increasingly discussed by the media in terms of dramatic divisions.

What does this dramatization of the Court's business mean for the public's approval of the institution? In this study, I seek to understand how and whether changes in conflict reporting relate to (or reflect) the public's perception of the Court. Understanding this relationship is especially important in light of recent declines in the public's approval of the US Supreme Court, declines that have sparked hot takes from pundits, a series of alarmist posts from Gallup and other polling organizations, and recent academic inquiries (e.g., Sinozich 2017) all examining the causes and implications for the role of the Supreme Court in American politics. Studying coverage at all stages of the cases—rather than simply coverage of the decisions—and doing so across multiple newspapers over an extended period of the Court's modern history, I provide evidence of changes in the extent to which major national newspapers cover conflict between justices as well as conflict between the Court and other political institutions.

The results suggest that reporting on the Court has increasingly focused on conflict between the justices. Moreover, changes in the emphasis on this conflict closely mirror changes in the Court's public approval, at least as captured by one prominent measure. These results fit with a body of accumulated experimental evidence suggesting that exposure to division on the Court influences perceptions of the Court in terms of both policy acceptance or compliance and institutional legitimacy. In light of growing polarization on the Supreme Court, particularly following the confirmation battles and controversy surrounding Merrick Garland, Neil Gorsuch, and Brett

Kavanaugh, the results offer evidence that the Court's reservoir of goodwill may be at risk of drying up.

The Court as a Story

Media coverage is notorious for its sensationalism; as the saying goes, "If it bleeds, it leads." Media select and craft stories in order to attract audiences, as would be expected in an industry that relies on readership and advertising dollars (e.g., Davis 1994; Zilis 2015). The Court's institutional characteristics, however, make it a difficult subject for the sort of dramatic storytelling likely to garner audiences. Access to the Court is limited, deliberations regularly occur out of sight, and decisions are released as lengthy opinions cloaked with legal justifications. Legal language is generally dense and understated, and the Court itself is cloaked in symbols suggesting an exclusive and particularly high-minded form of discussion and debate (Davis 1994, 2011).

Nevertheless, newspaper coverage of the Supreme Court is tasked with attracting audiences, which is achieved by "generating drama and emphasizing conflict" (Zilis 2015, 29). Disagreements between justices, between litigants, and between the Court and other political actors are emphasized. Some cases lend themselves to such framing—for instance, the Obamacare decision—but the majority do not. Epstein and Segal (2000) find that only 15 percent of decisions receive front-page coverage in the New York Times the day after the decision. Similarly, Clark, Lax, and Rice (2015) demonstrate that coverage of cases across three major national newspapers exhibits strong positive skew, with most cases receiving no or very little coverage and a small number receiving extensive coverage throughout the life of the case on the Court's docket.

The upshot is that many of the Court's decisions are only minimally newsworthy in terms of what newspaper editors want, and those that are newsworthy present a distorted picture of the Court's business (Solberg and Waltenburg 2014). Because so few cases receive media attention, most rulings never influence the public's opinion of the Court, as the public is blissfully unaware of what the Court is doing (Marshall 1989; Franklin and Kosaki 1995; Zilis 2015). But where the media's attention does turn to the Court's activity, conflict and drama are more likely to be present (Zilis 2015), and—given the task of the reporter—the conflict and drama are likely to be highlighted and emphasized.

The Court has seemed acutely aware of this potential, seeking to control its image, reliant as it is on its legitimacy. As one of the seminal works on the topic notes, as of the early 1990s, "the justices have been stunningly successful in focusing the press' attention on those aspects of the Court most beneficial to the achievement of the justices' objectives, both those in support of the institution and those that support them as individuals" (Davis 1994, 114).

Yet there is reason to believe the Court's ability to manage its public profile may have broken down. The changing media environment has yielded a far different emphasis in coverage across all areas of American life, and the Court has not been immune to that trend. Increasingly, journalists treat the Court as a political institution and the justices as political actors (Davis 2011; Solberg and Waltenburg 2014). Indeed, reporters covering the Court are aware of the changing environment. As Davis notes, there is an ongoing dispute among journalists covering the Court about the proper manner in which to discuss the institution and the decision-making process of the justices (Davis 2011). Should reporters treat the Court as a political institution with political actors in the broader political debate, or should the justices be treated as altruistic actors seeking resolutions in the law?

The question becomes particularly important when one considers whether media coverage affects public responses to the Court. Stated more simply, the question is whether coverage—particularly coverage focused on conflict—matters. This question is rooted in a rich and developing literature that has struggled to traverse the divide between the external validity of experimental results and understanding media coverage at scale. In one vein, work has looked to document the ability of the Court to encourage support for public policies in both observational (Marshall 1989; Mondak 1994) and experimental (Zilis 2015) work. Importantly, experimental work has also demonstrated the importance of the media in translating the Court's decisions for the public in terms of generating acceptance (Clawson and Waltenburg 2003).

Still, acceptance of individual decisions is only a small part of—and indeed, may be shaped by (Zilis 2015)—a more fundamental characteristic of the Court: its institutional legitimacy. The debate over the proper manner to discuss the Court traces directly to concerns about treating the Court in a way that reduces its legitimacy. On this question, recent experimental and survey research suggest that responses to individual Court decisions or the perceived ideology of the Court may influence perceptions of the legitimacy of the institution under some conditions (Johnston and Bartels 2010; Bartels and Johnston 2013; Zilis 2015). Lost in these studies, however, is how changes in the broad environment of news coverage relate to or affect the long-term changes in public approval. That is, to remain tractable, scholars have regularly relied on a relatively small fraction of media coverage for relatively short periods of time, have examined coverage only of a limited number of cases, or have examined only survey or experimental work.

Thus I build from this work and address two questions. First, I examine whether—and if so, how—coverage of the Court has changed over time in terms of the conflictual content of newspaper coverage. If media reports have dramatized action in the Court as "mortal combat" and experimental work suggests that dramatization might matter for public approval of decisions and the institution, it is imperative to understand how that dramatization in coverage has changed over time. Second, how does the reporting of conflict relate to public approval of the institution over time? While experimental work suggests that exposure to conflict in the Court may decrease support for the institution, it is unclear how externally valid the observed relationships are. By

examining a broad swath of media coverage in the media environment where dramatization is the most modest, therefore, I gain leverage on differences in the broad exposure to discussions of conflict on the Court and thus its connection to public approval of the institution.

Types of Conflict

I focus on two types of conflict present in newspaper coverage of Supreme Court cases: justice conflict, or the reporting of conflict between the justices, and political conflict, or the reporting of the Court's role in political conflicts, particularly as it pertains to conflict with Congress or the president. While recognizing that the magnitude of conflict is variable across cases and disagreements, in this study I define conflict as any indication of disagreement among justices or between the Court and other institutions. In the following two sections, I describe and address how these types of conflict relate to the public approval of the institution.

Justice Conflict

One of many stories to come out of the Court's decision in *Brown v. Board of Education* (1954) detailed the process of uniting a dividing Court in the name of public perception. When the case was first argued in 1952, the justices stood deeply divided (Klarman 2004). Then the chief justice at the time, Vinson, suddenly passed away, leading to his replacement with Earl Warren. As Klarman illustrates in striking detail, Warren set about bringing the Court to a unanimous decision in order to secure the judgment against backlash. In this landmark case, we can see the belief—held by the justices themselves—that conflict among justices detracts from support for the decisions of the Supreme Court and potentially from support for the institution itself.

Indeed, research provides some evidence this is the case. In experimental investigations, reporting unanimity was found to increase support for the Court's decisions (Zink, Spriggs, and Scott 2009). Likewise, Zilis (2015) argues and finds evidence to suggest that the media covers dissensual—that is, divided—cases more unfavorably than consensual decisions. In presenting conflicting views, justices potentially decrease support for the decision and their institution.

In all, justices seem aware—and evidence suggests—that explicit division might carry institutional costs. Of course, it remains necessary that the public be aware of the division of opinion. To this end, media reporting on the Court has expanded discussions of the political ideologies and motivations of the justices, explicitly focusing on their differences. As an example, consider coverage of *D.C. v. Heller* (2008) in the Washington Post. The second sentence of the article states,

"The Court's landmark 5 to 4 decision split along ideological grounds," while the author later states even more dramatically, "Stevens and especially Scalia often made their points in caustic and dismissive language. Throughout his opinion, Scalia used terms such as 'frivolous' and 'absurdity' to describe his opponents' legal reasoning. Stevens made his unhappiness known by reading parts of his dissent from the bench, and he pointedly recalled for his conservative colleagues Justice Felix Frankfurter, whom he called a 'true judicial conservative.'"

This language is no aberration. One recent study finds that articles covering the Court's decisions generally devote very little space for the justifications, whether legal or political, offered by the justices for their decisions (Solberg and Waltenburg 2014). Yet the space devoted to ideological justifications has increased markedly from 1975 to 2009. This type of coverage emphasizes the ideological positioning of justices relative to the Court's divisions (e.g., Roberts abandoning the conservatives in *NFIB v. Sebelius*) while dramatizing divisions on the Court—for instance, a "blistering" dissenting opinion (Solberg and Waltenburg 2014, 4). The focus on ideological divisions manifests in the tone of coverage, as conflicting coalitions that are ideologically homogenous receive particularly negative coverage (Zilis 2015). The potential effect is magnified by polarized responses to the Court's dissensual decisions; as Nicholson and Hansford (2014) find, providing the partisan affiliation of the majority increases the acceptance of a Court decision among similarly affiliated survey respondents while decreasing the acceptance among those of the opposite part of the Court majority.

Taken together, there is good reason to suspect—from historical accounts of the Court's decision-making, experimental research of exposure to dissensual frames, and our own understanding of newspaper coverage—that reporting of conflict between justices on the Court would decrease the public's approval of the Court. Thus I focus here on the role of the media in shaping public perceptions of the Court.

Political Conflict

Beyond conflict between justices, it is also well accepted that the Court is increasingly an epicenter of American politics. As such, it reflects the polarization of the political system. Whether through juridification—the utilization of the judiciary for political ends (e.g., Silverstein 2009; Keck 2014)—or through the ideological fracturing of the Court, the Court today reflects the conflict occurring in American politics. Interest groups and others now regularly turn to courts to block policies they do not like and to encourage policies they do like. As Congress and the president become unwilling or unable to act amid a polarized political climate, the courts become an appealing avenue to pursue political change (e.g., Whittington 2007; Silverstein 2009). But by

addressing the most important and contentious policies in American politics, the Court becomes more valuable as a political ally, and thus the Court is drawn into the polarized fights of the day.

Consider recent nomination battles. In 2015, controversy arose from the Republican Senate's refusal to consider then president Barack Obama's nomination of Merrick Garland to the Court. After Donald Trump was elected president, he subsequently nominated Neil Gorsuch to the still-open seat and thereafter widely publicized the nomination as evidence of the effectiveness of his presidency for the Republican cause. When Anthony Kennedy later stepped down from the Court, controversy erupted over President Trump's nominee, Brett Kavanaugh. First, Republicans refused to release hundreds of thousands of documents relating to Kavanaugh's activities during his time working for former Republican president George W. Bush, claiming that the documents were protected due to the sensitive and confidential nature of the discussions. Second, Kavanaugh's hearing erupted when allegations of sexual misconduct surfaced; after a secondary hearing to discuss the allegations—in which US Senator Lindsey Graham memorably appealed to colleagues and members of the public—the nominee barely won confirmation with a vote of fifty to forty-eight.

With this sort of political battle playing out over the justices and the Court, the question is whether political conflicts might decrease the Court's legitimacy. On this, prior evidence is mixed (Zilis 2015). While on some particularly hot-button issues the Court may alienate some citizens (Grosskopf and Mondak 1998), in general the Court can "damage its legitimacy only by issuing a series of high-profile and unpopular decisions in succession" (Zilis 2015, 13). Yet the Court is increasingly drawn into political arguments in a way that is central to American politics. As groups turn to the Court to resolve many of the day's most important and divisive policy questions, the Court takes on yet more power. Indeed, as groups seek to use the Court in this way, reporters rely on those very groups to craft their news stories. Newspapers—and their coverage of conflicts in the Court—thus increase the value of shifting political conflicts into courts as rival groups seek to structure reporting. For instance, consider one recent article in the Washington Post discussing a recent lower-court decision to uphold restrictions on access to abortion. The article includes quotes from representatives of the American Civil Liberty Union's Reproductive Freedom Project as well as the Center for Reproductive Rights. But as groups pursue political change through courts, they task the Court with resolving hot-button issues that carry institutional costs. Thus the Court's involvement in political conflict—and any potential costs—may reach a threshold point at which it begins to deplete the public's support for the institution.

Data

Taken together, these two types of conflict offer mechanisms by which the Court might lose the

trust of the American public. To understand changes in coverage of these dimensions of conflict in Court reporting over time, I use coverage of Supreme Court cases across an extended period of time in three major national newspapers: the New York Times, the Washington Post, and the Los Angeles Times (Clark, Lax, and Rice 2015). The data offer two important advantages for the purpose of understanding changes in media coverage. First, by tracking coverage at all stages of the case and throughout the newspaper, the collection presents a comprehensive picture of media coverage of the Supreme Court. Second, and perhaps even more importantly, by including multiple newspapers across an extended period of time, the data cover the behavior of individual journalists, which is especially valuable given that some reporters prefer to take political and justice-centered approaches to reporting (i.e., Lyle Denniston, formerly of the Wall Street Journal and Boston Globe) while others take more law-centered approaches (i.e., Linda Greenhouse of the New York Times; Davis 1994; Solberg and Waltenburg 2014).

Understanding coverage across multiple newspapers at multiple stages of the case over an extended period of time presents a difficult setting for any human-coded content analysis. Further, the classification is especially difficult because I care about proportional change in coverage—that is, not whether conflict is present in the article but the extent to which conflict (and different types of conflict) are discussed. Therefore, testing for changes in coverage requires a granular measure of article content across this extended period of time.

To achieve this, I rely on methods for the computational analysis of text. In essence, I treat the texts of news articles—specifically, the individual sentences—as data, then develop statistical models that predict whether the sentence is discussing one of the types of conflict mentioned above. To begin, I split each article into sentence-level data using a computer program called Stanford CoreNLP, which has a wide variety of tools for analyzing and understanding texts (Manning et al. 2014). The result is a corpus—or collection of texts—that features 371,232 sentences. Clearly, classifying each of those sentences by hand is beyond the scope of a manual- or human-coding project. Instead, I rely on approaches from research on machine learning. Specifically, I utilize a supervised learning approach; these approaches operate by having a human construct a small, hand-coded data set, then "training" a statistical model that best predicts the codes assigned by the human. One can then employ the trained model to predict all the remaining classifications for the uncoded data.

For this project, I took a random sample of 5,000 sentences and hand-coded them into one of three categories: conflict among justices, conflict in politics, or neither. In the first case, I classify as conflict among justices any sentence in which a division of opinion among the judges is mentioned or implied. For instance, in a 1986 Washington Post article on *Moran v. Burbine*, the author reports, "O'Connor said the dissent's misreading of Miranda is itself breathtaking in its scope." In the second case, I classify instances where conflict in the political system is reported. As an example, in a 1998 article in the Los Angeles Times discussing *Clinton v. City of New York*,

the author states, “It’s leading critics were staunch defenders of the prerogatives of the legislative branch and they exulted over Thursday’s court ruling.” Ultimately, 400 of the 5,000 statements are classified as justice conflicts (8 percent), while 305 of the 5,000 statements are classified as political conflicts (6.1 percent).

The goal of a supervised learning approach is then to take this small, hand-coded set of 5,000 sentences and—through statistical modeling —automate the coding of the more than 360,000 remaining sentences. To do so, I use the words of the sentences as variables and use the statistical model to find the words or phrases that best predict the assigned classifications (conflict among justices, conflict in politics, or neither). As an example, consider phrases like “Congress reacted” or “An evenly divided Court,” which might suggest political and justice conflict, respectively.

I then apply the statistical model—and the relationships it learns between the words used in a sentence and the assigned classification—to the more than 360,000 remaining sentences. For each sentence, the model provides a probability that the sentence belongs to each of the different classifications. For instance, given a sentence like “The 5-to-4 decision, with a majority opinion by Justice Sandra Day O’Connor, found the Court bitterly divided over the appropriate role for Federal law in the classroom,” the model might assign a probability of 0.97 to conflict between justices, 0.02 to conflict in politics, and 0.01 to no conflict. Using these probabilities, I code the proportion of an article devoted to justice conflict, or to political conflict, or to no conflict. To do so, I add up the conflict-type probabilities assigned to each sentence in an article and divide by the total number of sentences in the article.

Description

My interest is particularly in how the presence of conflict is changing over time. To that end, in figure 1, I plot the yearly average of justice conflict (left panel) and political conflict (right panel) for 1953 through 2010. For each plot, I include local polynomial regression fits (blue line) and associated 95 percent confidence intervals (gray shaded regions). The underlying idea of these lines is to allow for easier interpretation of data that have a lot of variation. The approach does so by calculating the average within some range of points, which is then plotted over the individual observations. Thus one can see both the individual observations (gray dots) as well as the general trends in the data. Turning to those trends, for justice conflict, there is a sharp increase in the reporting of conflict from the 1950s through the early 1970s. In the early 1970s—the early years of the Burger Court—newspaper coverage of the Court reached the highest individual values of reporting on justice conflict. Moving into the 1980s, however, reporting of conflict on the Court temporarily decreased before a spike in 1986—which happens to coincide with the famously

irascible Justice Antonin Scalia joining the Court—that continues for a few years before marginally rescinding, with a gradual increase ever since.

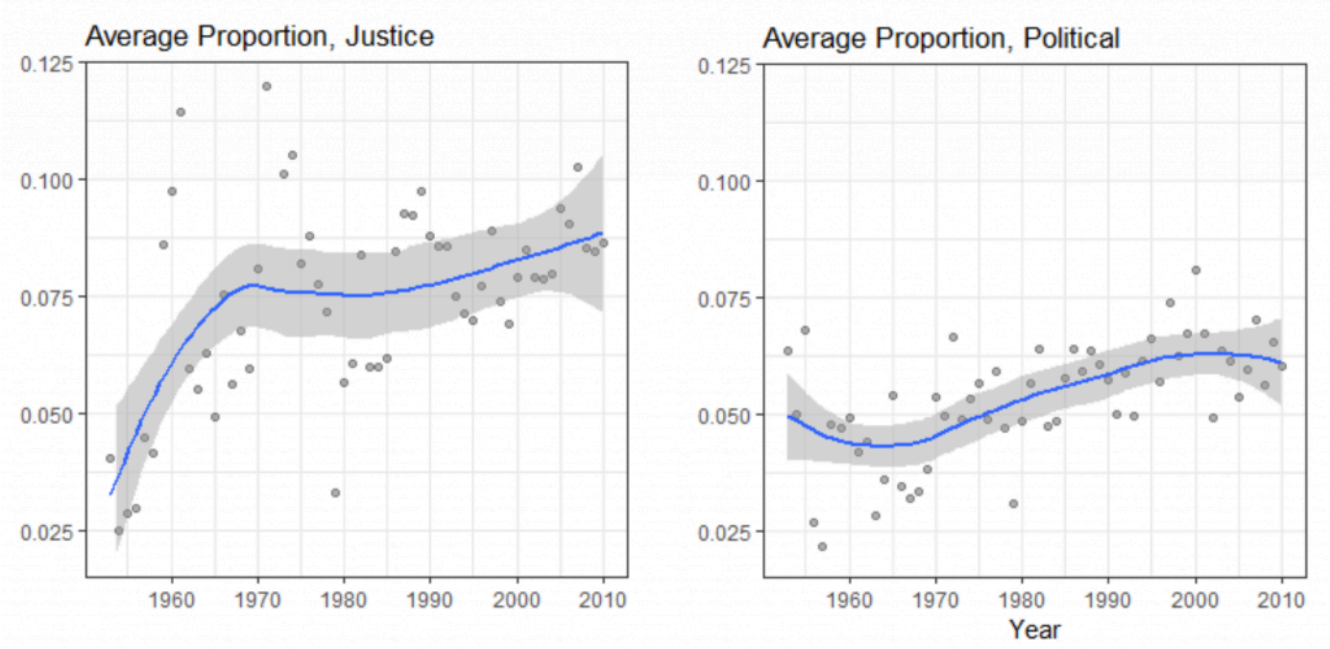

Figure 1. Conflict Reporting, 1953-2010. These plots provide the average proportion of opinions (y-axis) devoted to discussing conflict among justices (left panel) and in the political system (right panel) from 1953 to 2010. Lines are local polynomial regression fits with associated 95% confidence intervals.

While justice conflict experiences a substantial increase early in the time frame under study followed by a gentle increase throughout most of the rest of the series, political conflict exhibits a gradual increase across most of the time series, only plateauing in the 2000s. As might be expected, two of the highest years of political conflict include 1997, which featured executive privilege in *Clinton v. Jones*, and 2000, which featured one of the Court's most politically charged cases ever in *Bush v. Gore*.

Before proceeding, I turn to assessing whether the newspaper-based measures of conflict offer information above and beyond the information that might be available through other measures of the concepts of interest. If newspaper coverage simply reflects underlying levels of justice conflict (as reflected in justice voting divisions) or political conflict (as reflected in court curbing by Congress), then there is little reason to focus on newspaper coverage.

To see whether this is the case, in figure 2 I again plot the change in justice conflict (top panel) but compare changes in the justice conflict measure to changes in the average (mean) number of dissenting votes in all cases before the Court. I emphasize all, as the cases that receive attention from the media—particularly decision attention—are normally more controversial and thus conflictual (see, e.g., Davis 1994; Epstein and Segal 2000). The disparity is borne out by

the comparison here. Neither series moves in concert with the other except for brief periods, most notably during the 2000s. As the comparison suggests, the correlation is weak, with ρ = 0.11, though higher values are obtained if the analyses are restricted to more recent terms. The focus of the newspapers, then, is not simply a reflection of changes in the voting divisions of the Court. Instead, newspaper reporting of conflict between justices seems to follow its own, unique trajectory that is only very weakly related to actual divisions on the Court.

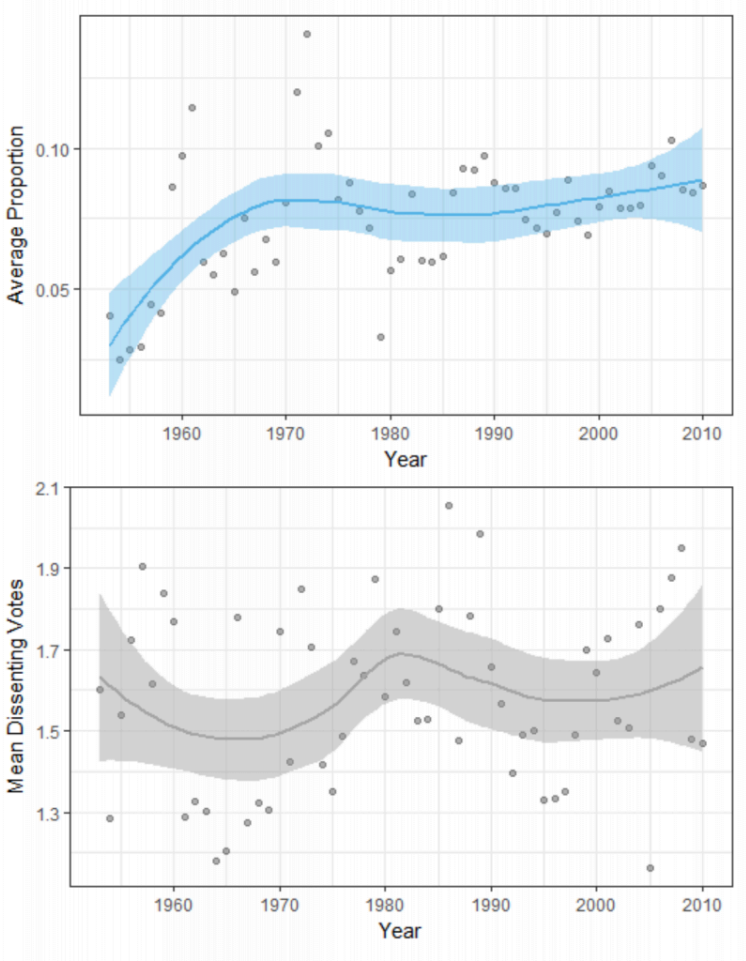

Figure 2. Conflict Reporting and Average Number of Dissenting Votes, 1953-2010. In the bottom panel, I plot the average (mean) number of dissenting votes for a term (y-axis) over time (x-axis). In the top panel, I plot the average proportion of justice conflict statements in an article (y-axis) over time (x-axis). Lines are local polynomial regression fits with associated 95% confidence intervals.

I turn next to the relationship between political conflict and a related concept, the introduction of Court-curbing bills from Clark (2009). Court-curbing is defined by Clark as all bills introduced that aim at limiting the Court as an institution or bills that aim to limit particular opinions. In his work, Clark finds that the introduction of Court-curbing legislation does curtail the willingness of the justices to engage in political conflict. Here, the relationship between political conflict and Court curbing is stronger, as I find moderate but negative correlation between Court-curbing bills

and the reporting of political conflict in articles covering US Supreme Court cases ($\rho = -0.30$). Still, though the two variables are correlated, the figure makes clear that newspaper reporting captures something unique about political conflict in which the Court is involved that goes above and beyond other observable measures of political conflict.

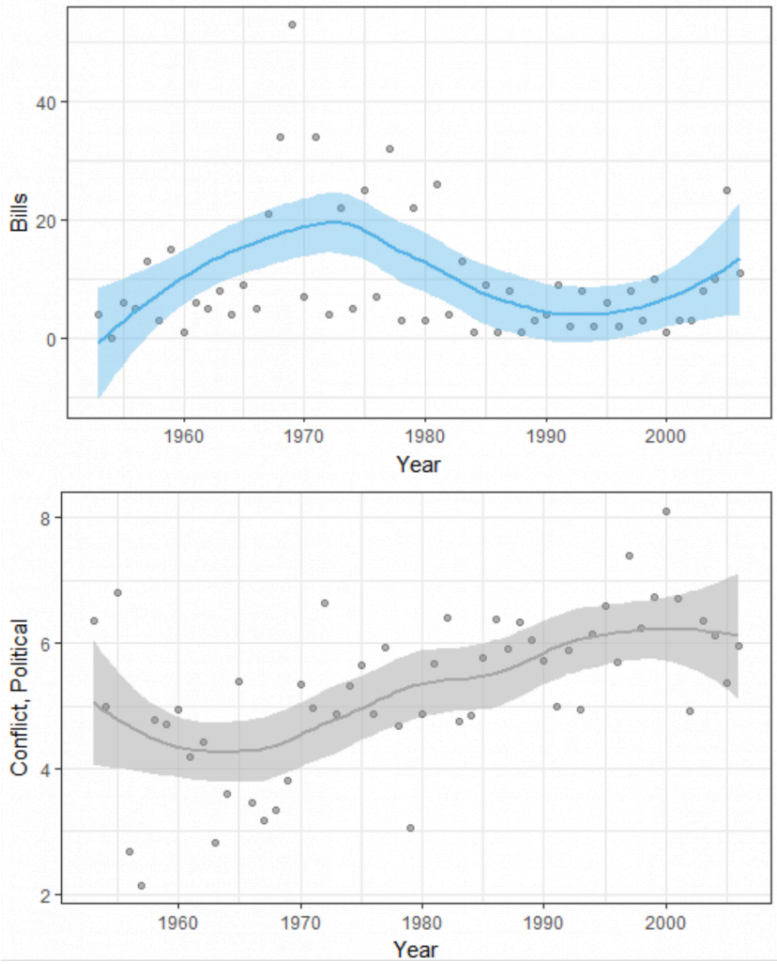

Figure 3. Conflict Reporting and Average Number of Court-Curbing Bills, 1953-2010. In the top panel, I plot the number of court-curbing bills introduced in a term (y-axis) over time (x-axis). In the bottom panel, I plot the average proportion of political conflict statements in an article (y-axis) over time (x-axis). Lines are local polynomial regression fits with associated 95% confidence intervals.

In all, we see evidence that the measures connect in interesting ways with theoretically relevant concepts that are frequently invoked in studies of public opinion and the Court's legitimacy. Yet in both cases, the measures of conflict correlate only weakly (in the case of justice conflict) or moderately (in the case of political conflict) from their conceptual cousins. The presentation of the Court provided by newspapers differs in potentially important ways from the actual events and conflicts occurring at the Court. The media coverage, therefore, is not simply an inevitable part of the reporter dutifully covering events at the Court; rather, it reflects a unique perspective of those events. Returning to the research question, we have now seen how newspaper coverage

of the Court has changed over time. Therefore, I turn next to analyzing whether these observed changes in newspaper coverage of justice and political conflict influence public approval of the Court.

Analysis

To understand the influence of newspaper coverage on public approval, one must have a measure of public approval. Unfortunately, as Clark (2009) notes, "Public opinion data about the Court are notoriously sparse" (979). In an experimental setup, one might garner some evidence of approval from a battery of questions all tapping into elements of institutional support and perceptions of institutional legitimacy (see, e.g., Gibson, Caldeira, and Spence 2003; Gibson et al. 2011; Bartels and Johnston 2013; Nelson and Gibson 2014). In nationally representative surveys covering a lengthy history of the Court's approval, however, such batteries are absent.

Given the absence, I instead rely on Gallup's institutional measure of support for the Supreme Court. Specifically, Gallup has asked the following question since 1973, worded consistently across years since 1983: "Now I am going to read you a list of institutions in American society. Please tell me how much confidence you, yourself, have in each one—a great deal, quite a lot, some, or very little?" I focus on responses to this question for the Supreme Court and aggregate the "great deal" and "quite a lot" responses as my measure of public approval.

In the upper-left panel of figure 4, I plot the change in public approval of the Court over time as measured by Gallup. The results are striking. Following an increase in the late 1980s, approval decreased throughout the early and mid-1990s, increased in the years just before and just after 2000, and then dropped off a cliff around 2005. Indeed, this drop in prestige has been the subject of both popular and academic commentary (Sinozich 2017).

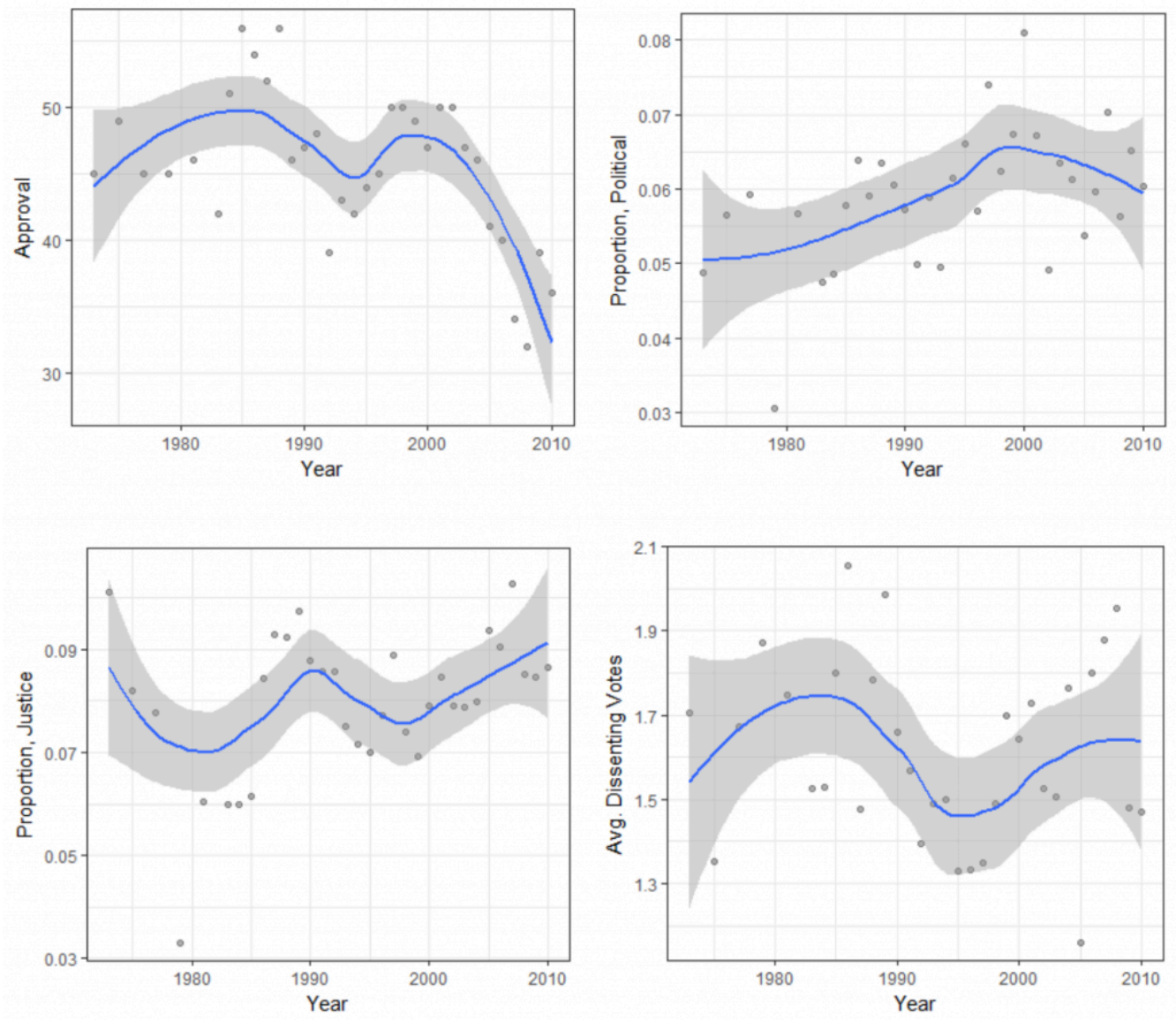

Figure 4: Public Approval and Measures of Conflict, 1984-2010. Lines are local polynomial regression fits with associated 95% confidence intervals.

How does approval match our measures of conflict? In the upper-right panel, I plot the measure of political conflict over the same time series. Here, the reporting of political conflict has marginally decreased, on average, as public approval has decreased. On the other hand, both justice conflict (lower-left panel) and average dissenting behavior (lower-right panel) have exhibited increases in conflict in recent years. Of these two, however, justice conflict sticks out as a near mirror image of public approval—that is, as reporting of conflict between the justices increases, public approval decreases. If justice conflict does coincide with drops in institutional approval, as the figure suggests, it fits well with the experimental research suggesting that public exposure to

individual statements of disagreement may dampen institutional support (e.g., Zink, Spriggs, and Scott 2009).

Of course, the figure is purely suggestive of the correlations between the measures. To test the relationships between the measures of conflict and the Court's public approval, I rely on a regression model, which predicts changes in public approval (the dependent variable) using the measures of political conflict and justice conflict (my primary independent variables of interest) as well as a series of control variables.

I measure the effects of three independent variables, each of which appear in figure 4. Because of the short time series, I estimate a full model that includes each of the independent variables and also reduced models that include only the individual independent variable as a predictor in an error correction model (ECM) framework. The results appear in table 1.

Variable	***Full Model***	***Votes Model***	***Politics Model***	***Justices Model***
(Intercept)	23.01 (15.32)	14.32 (9.08)	6.16 (11.02	25.69 (10.10)
Change in Dissenting Votes	-0.28 (3.99)	-1.28 (3.82)	-	-
Change in Political Conflict	0.14 (1.31)	-	0.20 (1.16)	-
Change in Justices Conflict	-1.66 (1.23)	-	-	-1.67 (1.00)
Dissenting Votes $_{t-1}$	0.64 (5.21)	-4.37 (4.77)	-	-
Political Conflict $_{t-1}$	0.60 (1.54)	-	0.32 (1.51)	-
Justices Conflict $_{t-1}$	-2.01 (1.05)	-	-	-2.01 (0.86)
Approval $_{t-1}$	-0.21 (0.15)	-0.17 (0.14)	-0.19 (0.14)	-0.21 (0.13)

Table 1: Regression Model of Public Approval of the U.S. Supreme Court, 1984-2010

Note: N=26. The dependent variable in these analyses is public approval of the U.S. Supreme Court

In order to isolate the effect of media coverage on public approval of the Court, I pay close attention to time in setting up the model. The particular concern here is that contemporaneous public approval may also influence the independent variables. As an example, consider if the Court's public approval declined markedly to historical lows; we might expect Congress or the president to enter into conflict with the Court more frequently in that situation. To address this, the models do not include the contemporaneous values of conflict. Instead, I include the value of each independent variable for the prior year, or the "lagged" values of the independent variables. Likewise, I include the change in each of the independent variables from the prior to the present year. In both cases, the goal is to ensure that the change in the independent variable actually occurred prior to the dependent variable. If the independent variable did not, of course, it could not cause any changes in public approval.

Across models, the only variable to attain standard levels of statistical significance is the lagged value of justice conflict. This particular modeling setup also allows one to analyze both the short-run effect and the long-run effect of an independent variable on a dependent variable. I start with the short-run effect. This can be interpreted as what would happen this year if the reporting of justice conflict increased last year. Here, we find that public approval of the Supreme Court would decrease by 0.35, a very modest effect. This is perhaps encouraging for those concerned with the potential decrease in Supreme Court legitimacy as a function of reporting, as an increase in a single year in the reporting of justice conflict would not substantially detract from the Court's legitimacy in the immediate present. The Court, in other words, can withstand some negative reporting.

Yet perhaps more importantly, we can also look at the long-term effects, which give us an idea of how more reporting of justice conflict last year might influence public approval not just in the present year but in the many years to come. Here, the long-run effect is −9.64 and decays over five years. This indicates that increases in reporting of justice conflict lead to a substantial decrease of public approval spread over a number of subsequent years Given the relative inertia of public approval of the Court (Gibson, Caldeira, and Spence 2003; Nelson and Gibson 2014), this slow decay is sensible. However, for citizens interested in ensuring the continued legitimacy and approval of the Supreme Court, the results of this analysis are also quite alarming in light of changes in the coverage of the court. The Court might withstand instances of one or a couple of years of more negative reporting of conflict of justices, with the results suggesting that the effect is spread out over future years. However, if the Court received consistent coverage of justice conflict, the damage to the Court's legitimacy is likely to be profound, as it accumulates over time.

Discussion and Future Directions

As Brett Kavanaugh was sworn in following a contentious and emotional confirmation process, media coverage turned toward how such a process might affect the relationships among the justices. One article, for instance, noted the alleged sexual misconduct, "as well as Kavanaugh's angry denials and fierce criticism of Senate Democrats, widened the U.S. political divide just weeks before congressional elections and raised concerns about the court's reputation in U.S. society." Responding to such concerns, Justice Elena Kagan—in recent remarks reported later in the same article—stated, "I think especially in this time when the rest of the political environment is so divided, every single of [the justices] has an obligation to think about what it is that provides the court with its legitimacy." These excerpts nicely illustrate the very tension this chapter highlights: while media coverage benefits from an emphasis on tension and conflict, the justices recognize and try—or at least say they try—to mitigate the appearance and expression of that conflict in

order to maintain institutional legitimacy and approval. This chapter attempts to address which of the sides is prevailing in this persistent tension.

On this, a few points are clear. First, there has been an increase in media—at least in terms of prominent national newspapers of record—reporting of conflict between the justices. This increase does not match the rate of division within the Court, which is unsurprising given the selection of disputes for coverage (Zilis 2015). Importantly, however, I find evidence to suggest that whereas voting divisions on the Court do not relate to the Court's approval among the public, the reporting of divisions does. Considered in light of the increase in media reporting of conflict and volatile recent Supreme Court confirmations, the research thus raises important questions: How might justices reach decisions and communicate those decisions to the public in an environment where expressions of conflict might be overly emphasized by the news media? How might reporters balance their important democratic role of educating the public—particularly in regards to a Supreme Court that is increasingly central in American politics—while also recognizing the potential detriment to the Court's institutional legitimacy?

While the findings reported here are troubling to those interested in maintaining a strong and independent Court, much could be done in future research to clarify this effect and the concomitant danger to the Court's legitimacy. One major conceptual hurdle lies in identifying whether the reporting directly influences public approval (as some of the experimental research suggests) or whether both the increases in the reporting of justice conflict and the decreases in public approval are instead reflective of the underlying polarization of American politics. If the justices are able to exert control over the appearance of conflict, some hope remains. However, if the Court's ability to manage its image is compromised by the polarized political environment, the Court's legitimacy might inevitably fall no matter the effort of the justices—a dire scenario for proponents of a strong and independent judiciary.

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Class Activity

Covering Conflict at the Supreme Court

The US Supreme Court is regularly asked to resolve some of society's biggest public policy problems, yet the justices also regularly seek to craft an image of the Court as above the partisan political process. For this assignment, you are to find a newspaper article covering a policy problem the US Supreme Court is expected to address before the end of its present or upcoming term. Using the course website, sign up for one of the cases presently pending before the Supreme Court. Then find an article in a major newspaper (e.g., *New York Times*, *Washington Post*) or major online media outlet (e.g., Vox.com) discussing the case. Write a three- to four-page response paper detailing the public policy issue, the case, and the following aspects of coverage:

1. What legal arguments (e.g., precedent, constitutionality) does the article discuss?
2. What political arguments (e.g., ideology, political parties) does the article discuss?
3. How many sentences are in the article?
4. How many sentences discuss conflict between the justices? What, if any, is an example?
5. How many sentences discuss conflict between the Court and other institutions? What, if any, is an example?

Your paper will be due at the beginning of class. Be prepared to discuss your article in class. For instance, if these results hold, should the media change? Whose job is it to maintain the legitimacy of the Court?

32. Black Robes in the Limelight

News Values and Requests to Televise Oral Arguments in the Ninth Circuit Court of Appeals, 1991–2005

JOSEPH P. BOLTON AND CHRISTOPHER D. KROMPHARDT

To state it lightly, federal courts are scarcely proactive with their own public relations.[1] The federal judiciary is not represented by a press agent, nor do courts issue press releases or alert the public when important cases are to be decided. In light of this vacuum, the media have played a fundamental role in determining the transparency of the judicial process. To determine which cases are newsworthy enough to bring to the public's attention, journalists must rely on important cues. In this regard, case characteristics that align with particular "news values," or established factors that attract journalists to cover a story, are salient. News values are "markers of newsworthiness" (i.e., they help predict what audiences will find important and/or interesting), or "characteristics used by media gatekeepers in decisions about what news to disseminate." For example, the news values of "impact," "proximity," "timeliness," "prominence," "conflict," "currency," and "the bizarre or unusual" are influential markers of a case's newsworthiness (Sill, Metzgar, and Rouse 2013, 60).

What motivations the media has when covering courts are a matter of great political and institutional significance. As courts lack the ability to enforce their rulings, their authority ultimately depends on the perception of their institutional legitimacy among the public and other political actors. To foster public confidence, judges often emphasize the neutral and restrained character of the courts (Walker, Epstein, and Dixon 1988; Wahlbeck, Spriggs II, and Maltzman 1999; Brennan 1986; Ginsburg 2004). Appellate judges report being concerned with portraying collegial relations, and they believe neutrality to be crucial for legitimacy and compliance (Cohen 2002). For our immediate purposes, Ninth Circuit Court of Appeals Judge Diarmuid F. O'Scannlain has emphasized the importance of televising for "improving confidence in the judiciary" by showing that his court is nonpartisan and legally principled (O'Scannlain 2007, 329). This testimonial from an active federal judge underscores both the potential and desire for televising to enhance public support and legitimacy. Yet to this end, courts must rely on the media as an essential conduit between their actions and the public.

1. Thank you to Matt Morrow for his research assistance. Authors contributed equally to the preparation of this manuscript.

In light of these political and institutional implications, we are interested in discovering what motivates journalists to request televising in the federal judiciary. Available data from media requests to televise made to the Ninth Circuit Court of Appeals—one of only two federal courts of appeals where televising is permitted by the Judicial Conference of the United States (O'Scannlain 2007; Osterreicher 2011)—demonstrate how the news media operate as gatekeepers, revealing what journalists think is most important for their audience to see, not just hear or read about.[2] Our data include televising requests from a variety of broadcast media outlets at both the regional and national scales. Broadcast journalists from local stations (e.g., KBOI-TV in Boise, Idaho, and KRON-TV in San Francisco) and national outlets (e.g., C-SPAN and Court TV) have pursued televised coverage of Ninth Circuit cases. This information provides rare evidence about what the media considers newsworthy before a case has been decided. Despite the political and institutional implications for how aware the general public is of the judicial process, studies of media coverage of the federal courts find reporting to be deficient in information and legal substance (Haltom 1998; Haider-Markel, Allen, and Johansen 2006; Davis and Strickler 2000; Clawson and Waltenburg 2003; Slotnick and Segal 1998). By analyzing these media requests, we learn what activates journalists' desire for greater transparency in the judicial process and provide critical context for understanding what the media thinks the general public should know.

We rely on news values to guide our inquiry even though news values that are appropriate when covering other political institutions might be ill-suited for courts. In the typical case filed in a federal court of appeals, media outlets would deem little to be newsworthy. Indeed, details of most of the thousands of cases appealed in federal court each year would be of little interest to anyone besides the litigants involved. And even when a case comes along bearing a promise of broad interest, journalists covering the federal courts of appeals in most circumstances would have no chance to request and obtain video footage of its oral argument. Perhaps surprisingly, however, in our analysis of media requests to televise Ninth Circuit cases, we find that what is considered newsworthy is not necessarily synonymous with being a high-profile case. For instance, C-SPAN made requests for *Bins v. Exxon* (concerning administrative accountability under the 1974 Employee Retirement Income Security Act and *Keshishian v. Gonzales* (reviewing the adverse credibility finding of an immigration judge). The media's requests reveal a desire for transparency in both the "rather mundane content" of the Ninth's docket as well as high-profile cases, such as SVREP v. Shelley (concerning the California recall of Governor Gray Davis; O'Scannlain 2007, 326, 327). So just what do journalists look for when deciding whether to make televising requests to

2. Our data also provide the opportunity to explore strategic case promotion by Ninth Circuit judges. In another study, we show that a higher likelihood of dissent relating to ideological panel composition positively predicts the denial of a request to televise (Kromphardt and Bolton, unpublished manuscript).

the Ninth Circuit? A review of the relevant literature on media and judicial politics helps us derive some important expectations.

The news value of conflict may lead journalists to seek media coverage in cases where dissent is likely (Sill, Metzgar, and Rouse 2013; Vining and Wilhelm 2010). As dissent rates vary on the federal courts of appeals by panel type, we consider how different panel configurations (i.e., three circuit court judges, a visiting district court judge, and en banc panels) may impact media requests. The media may also look to certain case participants as a cue for signaling greater newsworthiness (e.g., the chief judge; Vining and Marcin 2014; Johnson and Krafka 1994). Additionally, a case's issue area (e.g., constitutional, criminal) is a central determinant of media coverage after a case has been decided (Slotnick and Segal 1998; Yanus 2009; Sill, Metzgar, and Rouse 2013). Thus we consider the impact of case issue types on televising requests. Finally, the type of broadcast media outlet (local or national) may relate to the decision to request greater transparency (Hoekstra 2003; Haider-Markel, Allen, and Johansen 2006). We address how media outlet type may be another important factor influencing broadcast media televising requests on the Ninth.

Literature Review

Empirical studies of the factors that make a case newsworthy to journalists are in relatively short supply (and most concentrate on the Supreme Court). Further, few studies explicitly address what the media consider newsworthy ex ante (i.e., prior to the case hearing and decision). Nonetheless, we seek to glean expectations about media motivations for greater transparency in the Ninth Circuit Court of Appeals, where media requests to televise are required three days before the scheduled proceeding.

What prompts journalists to seek out a particularly vivid form of transparency like televising? The Federal Judicial Center (FJC) conducted a report on a 1991–93 pilot program that permitted media coverage of civil proceedings in six federal district courts and two federal courts of appeals (Johnson and Krafka 1994). The FJC interviewed media representatives from nine local news stations, two extended-coverage networks, two legal newspapers, and one national organization for radio and television news directors (Johnson and Krafka 1994). Media representatives reported concern for "whether the subject matter of the case had universal relevance or broad applicability," how "newsworthy" a case is, if the case is relevant to local interests, and if the case involved "high profile" litigants (29). Local news representatives also expressed that televising improves news coverage by producing "a more realistic depiction of the proceedings" and helping viewers "see the expressions and emotions of the courtroom participants." Seeing the facial expressions and body language of judges and parties tells "a much better story" (30).

This report establishes that journalists seek transparency that only televising can provide. With good reason, journalists and judges alike express high hopes for televising. Studies on media coverage of lower courts (Haltom 1998) and the Supreme Court have found reporting to be deficient in information and legal substance (Haider-Markel, Allen, and Johansen 2006; Haltom 1998; Davis and Strickler 2000; Clawson and Waltenburg 2003; Slotnick and Segal 1998). Judges have expressed optimism that cameras in the courtroom may help educate the public on the work of appellate judges, increase the accuracy of media reporting, and depoliticize the perception of the federal judiciary (O'Scannlain 2007). Televising may also encourage the media to emphasize the full process of adjudication as opposed to mere holdings (O'Scannlain 2007, 328–329). As judges express concern for legitimacy and public confidence in the judiciary, televising may potentially enhance transparency, the quality of coverage, and public awareness of the judicial process.

Journalists' desire for televising is bound to be driven by their sense of a story's newsworthiness, which is in turn driven by news values. When news values can be found in specific features of a case, journalists may view it to be more newsworthy and thus seek greater transparency in its adjudication. Several case features directly relate to news values, including issue area, whether the case involves a question of constitutionality, and the possibility of conflict.

Studies on media and the judiciary coalesce around the notion that a case's issue area is a central determinant of media coverage (Slotnick and Segal 1998; O'Callaghan and Dukes 1992; Gates and Vermeer 1992; Yanus 2009; Sill, Metzgar, and Rouse 2013). Sill, Metzgar, and Rouse (2013) posit that issue areas serve as cues for greater newsworthiness by aligning with established news values. Developing on Straubhaar, LaRose, and Davenport (2009), the authors theorize that the news values of impact, proximity, timeliness, prominence, conflict, currency, and novelty, or the bizarre or unusual, are influential markers of a case's newsworthiness (60). Journalists are expected to cover areas that are of the greatest interest to the public (Knobloch, Sundar, and Hastall 2005) and cases containing issues that are already reflected in the media's agenda (currency; Sill, Metzgar, and Rouse 2013; Straubhaar, LaRose, and Davenport 2009).

Analyzing all orally argued Supreme Court cases with written opinions from 1946 to 2001, Sill, Metzgar, and Rouse (2013) find that cases pertaining to the First Amendment, civil rights, criminal rights, and privacy are more likely to get front-page coverage in the New York Times (73). Slotnick and Segal (1998) find that a case's issue area is also a central determinant of televised media coverage during the 1989 Supreme Court term and that First Amendment, civil rights, and criminal cases are all more likely to receive televised coverage. It is expected that cases involving individual rights are attractive to the media because of their correspondence to the news values of prominence, impact, and novelty (Straubhaar, LaRose, and Davenport 2009; Sill, Metzgar, and Rouse 2013; Solberg and Waltenburg 2014).

There is also evidence that journalists may look to the court's behavior regarding constitutional questions. Examining media coverage of twenty state supreme courts, Yanus (2009) finds that

constitutional cases are 28 percent more likely to receive media coverage than statutory cases, which she attributes in part to constitutional decisions' greater durability (191). Declarations of unconstitutionality by both state supreme courts and the US Supreme Court were found to increase the likelihood of significant newspaper coverage (Vining and Wilhelm 2010; Sill, Metzgar, and Rouse 2013).

Finally, the news media's inclination toward covering conflict may lead journalists to seek transparency in cases where dissent is likely. Dissent, and in particular the number of dissenting justices, increases media coverage of Supreme Court rulings (Sill, Metzgar, and Rouse 2013). Likewise, dissent on state courts of last resort increases the probability of front-page media attention (Vining and Wilhelm 2010). At the federal courts of appeals, dissent varies by panel type: the dissent rate in all en banc cases between 2005 and 2010 was 77 percent compared to the overall courts of appeals dissent rate of less than 3 percent (Epstein, Landes, and Posner 2013). Altogether, this evidence leads us to predict that news values prompt journalists to look to issue areas, whether a case involves a constitutional question, and whether dissent is likely when deciding whether to request televising in the judicial process. Constitutional questions and dissent are attention-grabbers, which align with news values (i.e., impact, conflict) and serve to cue greater newsworthiness. Thus we should expect greater transparency via televising for these cases.

The media may also look to case participants as a cue when considering a case's newsworthiness. Looking at coverage of the US Supreme Court in television news broadcasts and online news sources, Vining and Marcin (2014) find that "decisions authored by the chief justice have 3.74 greater odds of coverage in television news and 4.55 greater odds of being reported on elite news web sites," which they attribute to the chief justice's prominence and visibility (107). Conversely, Sill, Metzgar, and Rouse (2013) find that media coverage of Supreme Court cases is not dependent on the nature of case participants—with one notable exception being the solicitor general. While Vining and Marcin (2014) examine television news broadcasts and online sources; Sill, Metzgar, and Rouse (2013) only assess print media (i.e., front-page coverage in the New York Times). Thus this differential in media type may likely contribute toward these authors' conflicting findings. Given that the chief justice's prominence and visibility have been shown to increase televised media attention, this evidence leads us to expect that participation by the chief judge—who also serves as a figurehead of his or her court, has administrative responsibilities, and is involved in all en banc cases—may prompt journalists to pursue televising in the judicial process.

Lastly, the type of media outlet may relate to the decision to request greater transparency. Studies show that media outlets are particularly attuned to covering cases affecting their own geographical area (Hoekstra 2003; Haider-Markel, Allen, and Johansen 2006; Johnson and Krafka 1994). However, this emphasis on local issues may be offset by the more limited resources available

to smaller media outlets. Nevertheless, we predict that local broadcast media outlets may be more likely to seek greater transparency in the judicial process.

Data and Method

The Ninth Circuit's "Guidelines for Photographing, Recording, and Broadcasting in the Courtroom" stipulate that media requests "to broadcast, televise, record electronically, or take photographs at a particular session" must be made to the clerk of the court (United States Court of Appeals for the Ninth Circuit). Our data come from the list of media requests submitted as an appendix to Ninth Circuit Judge Diarmuid O'Scannlain's testimony before the Senate Judiciary Committee in 2005. O'Scannlain's sample runs from 1991, when the Judicial Conference of the United States first began a pilot program in which select federal courts were permitted to televise (Osterreicher 2011, 239), up until his 2005 congressional testimony. His appendix lists the following: case name, case number, the date of oral argument, the name of the requesting media outlet, the type of coverage requested, whether the request was granted, and the names of the panel judges. We supplement this information with original data collection, identifying whether the media outlet was a regional or national organization, and issue codings from LexisNexis.

We narrow our sample in a few key ways. First, we analyze only those cases in which a request to televise was made. While this decision rule excludes a small number of cases with media interest in, say, taking still photographs, it sharpens the analytical focus on media interest in the most vivid form of transparency. Second, we consider only the subset of cases where the media outlet did not later withdraw their request and where oral arguments were not later canceled.

There were tens of thousands of cases decided by the Ninth Circuit from 1991 to 2005, and our sample of orally argued cases with a televising request from Judge O'Scannlain's data consists of 144 cases. As our analysis reveals, these cases are hardly random. Therefore, it would be inappropriate to draw general inferences about all Ninth Circuit cases from this sample through a statistical technique like multiple regression. Our analytical approach is to trace descriptive patterns in those cases where a media request was made and oral arguments were held. As far as we know, ours is the first social-scientific attempt to understand the media's motivation to pursue this unique form of transparency (i.e., televising cases in the federal judiciary; although see O'Scannlain 2007).

Analysis

What similarities recur across the set of media requests to televise? A good place to begin our analysis is by looking at different panel configurations. We see in figure 1 that the typical case panel consisting of three circuit court judges (CCC) is well represented, with 101 requests. As one should expect, given their unusual occurrence among all cases decided by the Ninth Circuit, panels with a visiting district court judge (DCC) and eleven-judge en banc panels (EB) are less common among media requests. It is evident that the news media does not rely on only one type of panel when seeking transparency.

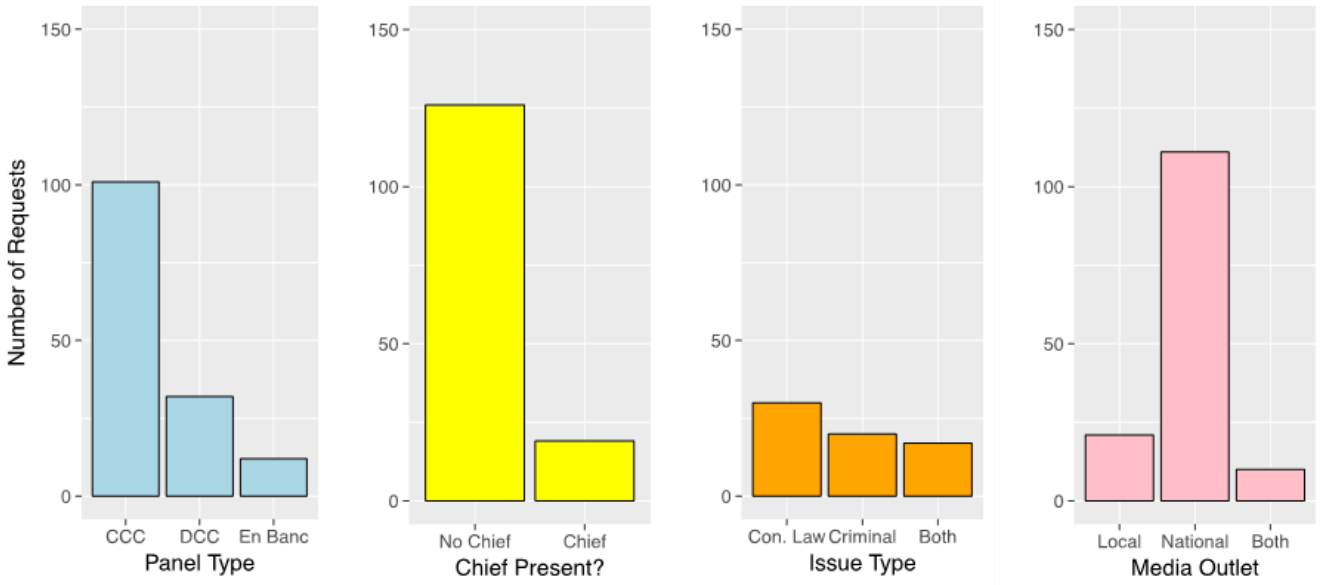

Figure 1. Descriptive patterns of media requests to televise oral arguments in the Ninth Circuit Court of Appeals, 1991–2005. N = 144.

Interestingly, the rate of district judges' participation in cases in our sample (21.5 percent) exceeds by a wide margin the rate of these visiting judges' participation of 11.04 percent in a random sample of all Ninth Circuit cases drawn from 1925 to 1996 (Benesh 2006, 308–309), although the rate of district judge participation we find matches more closely the rate of about a quarter of sittings during the 1970s (Wasby 1980, 371–372).[3] District judge participation at the circuit court of appeals

3. A possible explanation for DCC panels' overrepresentation is fluctuation in judges taking senior status and retiring, prompting a greater need for district judges to help (Wasby 1980, 372).

level is done in the interest of efficiency, so it is unclear if there is a reason for media interest to be higher in cases with DCC panels.

Turning now to EB panels, we anticipate that the media might be more interested in televising these cases thanks to the news value of conflict. Conflict arises in the judicial process when a judge issues a dissent, and dissent is far more likely in EB cases (77 percent) compared to the overall dissent rate of 3 percent in all cases heard in the circuit courts of appeals from 2005 to 2010 (Epstein, Landes, and Posner 2013). EB cases occur infrequently, at the rate of fifteen to twenty-five cases per year, or "less than one quarter of 1 percent of all cases decided by the courts of appeals" (Epstein, Landes, and Posner 2013, 270; "Ninth Circuit En Banc Procedure Summary"). Figure 1 shows that media outlets made televising requests for twelve EB cases, or 8.3 percent of all televising requests. While 8.3 percent is higher than "less than one quarter of 1 percent of all cases decided by the courts of appeals," it is still lower than we might expect given the news media's taste for conflict.

We suspect that the news media may face crosscutting pressures from a televising perspective. While news outlets might be intrigued by the high likelihood of dissent and the rare occurrence of an EB case, it is also true that many cases that are reviewed by EB panels involve highly technical and legally narrow issues (Giles, Walker, and Zorn 2006; George 1999).[4] While EB panels provide judges with the opportunity to promote themselves as technocratic arbiters of the law, these cases may not be enticing from the media's perspective because they are less amenable to attention-grabbing headlines and easily digestible soundbites. This result reflects an important divide between journalists' news values and judges' preferences for judicial promotion. The data show that judges grant requests to televise EB cases at a higher rate than other panels: 9 of 12 EB requests were granted (75 percent), while only 19 out of 31 (61.3 percent) DCC cases and 72 out of 101 (71.3 percent) CCC cases were granted. While judges are more accommodating of EB televising requests, the media may be less attracted to the typical EB case. It is intriguing that what judges view as desirable for media coverage may not hold true for journalists, and thus judicial goals for televising may not be reached.

We now turn to the question of whether media outlets are particularly interested in televising

4. George's hybrid theory argues that three factors—reversal of a lower court, dissent, and a liberal ruling—largely account for which panel decisions are reviewed en banc (1999, 220). As such, George's model successfully explains why consequential and high-profile cases such as O'Connor v. Consolidated Coin Caterers Corp. (involving substantial intercircuit conflict) and the well-known case regarding whether the Virginia Military Institute could refuse to admit women (United States v. Virginia), cases of great interest to journalists, were not granted en banc review, while minor contract cases and civil suits were. These less-dramatic cases contained panel dissent and reversed the lower court's rulings, while O'Connor and the VMI case did not (George 1999, 273).

panels with the chief judge presiding. Two men and one woman served as chief judge from 1991 to 2005—John Clifford Wallace, Procter Hug Jr., and Mary Schroeder. The data show that these three judges sat on nineteen cases where requests were made during their service as chief. The chief judge is required to sit on all EB hearings (of which twelve had media televising requests), so the media only made requests in seven additional cases featuring the chief. The chief justice of the United States can seemingly stimulate greater media coverage of his or her court (Vining and Marcin 2014); chief judges, on the other hand, apparently are less of a draw.

As we argued above, our review of the literature indicates that certain issues are likely to be deemed more newsworthy by the media. We predict that cases with newsworthy issues will be more likely to yield requests for greater transparency. Utilizing keywords from LexisNexis to explore how two such issues—cases involving constitutional law or criminal law—are represented in the sample, we find that both issue types are common in cases targeted by the media for greater transparency. Figure 1 shows that questions of constitutional law figured into forty-seven cases with requests, while criminal law cases are not far behind with thirty-seven requests.[5]

The final attribute we analyze is the geographic identity of the news media outlet. The judges on the Ninth Circuit made the decision, following a pilot program, to seek permission to keep televising. But how often do the media outlets of the Ninth Circuit present these judges in action? Contrary to our prediction, we find that local media outlets are apparently less inclined to make requests than their counterparts in the national media, such as C-SPAN or Court TV. Outlets that serve the Ninth Circuit made requests in only thirty-one cases, or about two cases a year. Why the local media made so few requests is a puzzle deserving further scrutiny.

Indeed, why so few cases attracted any media attention is a puzzle. More than 70 percent of all requests to televise were granted, so it would seem that the news media could have become a partner in shining a light on the Ninth Circuit's proceedings. However, with fewer than 150 requests made over the course of more than a decade, it is apparent that the news media rarely reached for the light switch.

Discussion

We find that journalists' desire for televising cases heard by a federal circuit court of appeals appears to be driven by some of the same factors that predict media coverage after the fact

5. We cannot determine whether these issues are overrepresented in our sample because we were unable to determine what percentage of the Ninth's docket consists of each issue.

at other courts. Journalists in both instances seek coverage in cases involving constitutional questions and criminal law. Journalists also do not appear to be that interested in technical questions, such as those that arise in en banc panels. For these factors, our analysis is supported by the account of media coverage that emerges from extant research.

Our analysis uncovers several ways in which journalists' desire for televising deviates from established predictors of media coverage. Local journalists appear less likely to seek out this vivid form of coverage than national outlets are, which runs counter to our prediction that they would be more interested. The chief judge does not figure prominently in televising requests, even though the chief justice often serves as a focal point for news coverage.

Our approach reveals much about how the news media covers the judiciary. Coverage that occurs after the decision is announced necessarily relates to the decision-making process itself. We identify factors that might stem from media outlets trying to anticipate the judges' behavior but, crucially, are not directly influenced by the actual case outcome. We also find that televising is not necessarily sui generis: some of the same factors related to media coverage in general are also related to the desire to televise. Additionally, we find that the behavior of journalists may impede judges' goals for televising. Judges hope this type of vivid access will yield educative results, yet the pattern of requests reveals that the picture of court work portrayed is likely to be skewed (as found in media coverage of courts more generally; Segal and Slotnick 1998; Solberg and Waltenburg 2014). Finally, how some of our predictions deviate from our findings encourages future avenues of research.

Our analysis has normative implications for broader relationships between journalists and the federal judiciary. We believe that our study provides clues for how journalists might cover other federal courts. The Supreme Court famously refuses to permit televising, which has led to rebuke from critics ranging from journalists to comedian John Oliver. Longtime judicial reporter Tony Mauro is skeptical of this reticence, writing that "the Supreme Court is far from the fragile flower that its protectors make it out to be by shielding it from a news medium that is no longer new or especially threatening. Courts throughout the world have allowed broadcast coverage for years or decades and survived" (Mauro 2011, 275). If Supreme Court justices are concerned about their coverage, we see no reason to believe that the behavior of journalists covering the Ninth Circuit would differ substantially from that of other courts' press corps. In other words, we anticipate that journalists will utilize similar criteria wherever they pursue greater transparency in the judicial process via televised proceedings. Whether judges and justices will acquiesce to their requests, we suspect, depends on the overlap between news values and the motivations of federal jurists.

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Class Activity

1. What are "news values," and why are journalists motivated to cover courts? Why is it a matter of institutional importance that the media cover courts? Why are judges concerned with how the media portray courts?
2. The authors discuss that judges are more likely to grant en banc televising requests, wishing to promote novel cases and the image of a technical, impartial court. Conversely, however, the authors also find that media outlets are less likely to request televising for en banc cases. How might this reflect a divide between journalists' news values and judges' preferences for

judicial promotion? Between news values and newsworthiness?

3. How is it perhaps counterintuitive to the authors' expectations that national broadcast media outlets seek televising requests more frequently than local broadcast media outlets?

PART VI

POLICY MAKING

Deciding winners and losers, determining the allocation of society's finite resources, courts make policy. Our five contributions in this section clearly illustrate this undeniable fact regardless of which court we examine. Pacelle and Pyle show that there is a dynamism to the law and the resulting development of policy. These scholars show us the pattern of policy evolution at the US Supreme Court—a pattern that goes well beyond the initial landmark case and often continues for decades, ebbing and flowing to build a strong body of precedent that is often credited to the initial case, such as *Brown*, *Roe*, or *Mapp*. Moving down the judicial ladder, Scheb and Sharma review a state court's policy-making role. Using Tennessee death penalty cases as their data and diving into the controversial question of discrimination and the imposition of the death penalty, these scholars show the presence of a more complicated pattern than is ordinarily assumed. While prosecutors are more likely to seek a death sentence based on the race of the victim, the jury is not more likely to impose a capital sentence. This result holds up in the face of a number of statistical controls. Again, looking at state trial courts and their impact on policy making, Professors Smithey and Robinson look at the courtroom working group to suss out policy-making patterns with respect to probation. By approaching problems differently, trial courts make policy by virtue of an accumulation of their decisions, and these policies have significant community impacts and implications. Looking abroad, Reid and Randazzo reveal how the interplay of state participation in intergovernmental organizations yields changes in legal norms and decisions. Focusing on issues of human rights, these scholars demonstrate how supreme courts follow the lead of their national governments, thereby resulting in greater diffusion of human rights norms. Finally, Cardenas and Reid break ground by examining how the Mexican Supreme Court responds to rights claims made by Indigenous Peoples. These cases place courts in a difficult position—pitting the claims of the indigenous population against the prerogatives of the state, of which the judiciary is part and parcel. These scholars find that the Mexican Supreme Court behaves differently depending on the type of right—positive or negative—at stake. Thus these scholars open a whole host of questions regarding judiciaries and their policy-making role when dealing with this often overlooked yet important subset of the population.

Pacelle Jr., Richard L.and Barry Pyle. "Issue Emergence and Evolution in the US Supreme Court."

Scheb II, John M., Hemant K. Sharma. "Race and the Death Penalty in Tennessee, 1977–2016."

Smithey, Shannon Ishiyama, Robison, Kristenne M. "Trial Court Policy Making: The Case of Criminal Probation."

Reid, Rebecca A., Kirk A. Randazzo. "High Courts and International Norms Institutionalization."

Cardenas, Alan, Rebecca A. Reid. “Courts as Colonizers or Protectors? Indigenous Peoples before the Mexican Supreme Court.”

33. Issue Emergence and Evolution in the US Supreme Court

RICHARD L. PACELLE JR. AND BARRY W. PYLE

The construction of judicial doctrine by the US Supreme Court has been compared to piecing together a giant mosaic. Public policy is normally associated with the landmark Court decisions, ignoring the processes that led to such important decisions and the work necessary to flesh out the remaining questions left in the wake of the major pronouncement. Supreme Court decisions, no matter how significant, raise more questions than they answer. Landmark decisions like *Brown v. Board of Education*, *Roe v. Wade*, and *Miranda v. Arizona* did not emerge fully developed, nor were they the last words in their areas of law. In fact, each preceded an explosion of litigation and Court attention in the areas of school desegregation, reproductive rights, and self-incrimination, respectively. Thus it is useful to view judicial doctrine construction as continually evolving through a series of decisions and a number of stages.

Although it is often portrayed as above politics and subject only to the rule of the law, the Supreme Court is an active participant in making public policy. Policy unfolds through the construction of legal doctrine over time. Justices make decisions in individual cases, and those decisions contribute to the construction of policy. Each time the Supreme Court decides a case, that decision becomes part of an evolving precedent that is binding in similar cases. This is a study of the emergence and development of policies in the Supreme Court. We argue that Supreme Court policy emerges and evolves in predictable ways. We consider the initiation and development of judicial policy and doctrine through a framework of policy evolution. This model of issue evolution is concerned with the origin of new issues, how they develop over time, the impact of the environment on these issues, and how issues are related to each other. The process of doctrinal construction involves the emergence of a new issue, which is often the result of activity in a related issue area; periods of stability; increased issue complexity; the spawning of other new issues; and occasionally, a retreat to a previous stage of development (Pacelle 2009; Richards & Kritzer 2002; Bartels & O'Geen 2015).

We believe that long-term policy making by the US Supreme Court follows a four-stage process in which purposive major actors (the justices and lower courts as well as interest groups and individual litigants) interact to address new issues, announce policy, apply policy in subsequent cases, and deal with possible policy conflicts with other issue areas.

Justices construct public policy through the precedents that come from individual decisions. Those decisions are pieced together into doctrine. Doctrine results from the ongoing conversation

that happens among litigants, courts, and interest groups that defines the terms of debate about the constitutionality or legality of an issue. It is important to understand the roots of doctrine. The basis for new cases will affect how that issue area will unfold. It also helps explain why precedents seldom get overturned.

The Judicial Process: Building Doctrine and Making Policy

The Supreme Court makes policy through the process of legal interpretation. Issues of public policy are brought to the judiciary in the form of legal questions posed in the various cases. These questions require some combination of the interpretation of legislation, administrative regulations, past judicial precedents, and provisions of the Constitution. In selecting cases for review, deciding the scope of that review, and making the ultimate decisions on the merits, the Court makes important policy choices and allocates valuable resources (Baum 1997, 2006, 2017).

The Supreme Court is the one national governmental institution that often justifies its decisions and policy choices in writing. The opinion of the Court explains the policy position and provides an extensive justification for the decision. The decision will also be nested within the context of a series of precedents from similar cases. The need to justify decisions provides the justices with the opportunity to continue the construction of an evolving doctrine (Hansford & Spriggs 2006).

However, the judicial system is also passive. Judges cannot just wake up one morning and decide to make a pronouncement on an issue of interest. Rather, they have to wait for an appropriate case to come to the court's docket. Litigants using the courts resemble (and are often part of) interest groups, but they approach the courts rather than (or in addition to) using the elected branches. Litigants use the Supreme Court for a variety of reasons. They may lack the power and resources to go to the elected branches of government. Strategically, the Court may be more sympathetic to the positions they advocate. Some issues, like criminal procedure and the rights of minorities, are more appropriate for the courts than the elected branches. And finally, groups use the courts to protect the gains they made elsewhere in the political structure (Epp 1998; Pacelle 2015).

When a case reaches the Supreme Court, justices rely primarily on four sources of information to help them in rendering decisions and constructing doctrine. First, the justices examine the briefs of the parties; the conflict that gives rise to the particular case involves the two parties to the litigation. Each of those litigants attempts to persuade a majority to issue a favorable decision through its briefs. Second, the justices obtain information regarding the litigants' desired applications of law during oral arguments and can question the attorneys for clarification (Johnson 2004). Third, "repeat players," often in the form of the litigation arms of interest groups, can expand the issue and the conflict beyond the two parties. These groups provide the Court with

their own interpretations of the correct application of the law by filing amicus curiae briefs (Collins 2008). Finally, the justices obtain information to assist them in adjudicating the dispute from the opinions of the lower-court judges who initially disposed of the case (Corley, Collins, & Calvin 2011).

The goal for litigants in a particular case is to win. That is probably not a major revelation, but how and why they win have long-term implications. Remember that the majority opinion in a Supreme Court case is a precedent that sets policy. The ability to win numerous cases translates to the opportunity to shape doctrinal development, to insulate favorable precedents, and to bend the law to the litigant's goals.

On the other side of the table are the justices. Presidents nominate justices who they hope will enact their legal and policy goals. Supreme Court behavior can be described as a policy-making process that is influenced by the justices' individual preferences expressed as legal doctrine and tests. Purposive justices with similar policy preferences form coalitions around these standards to make policy in a given area and, given the opportunity, import the precedent to other issue areas (Bailey & Maltzman 2011).

Although they hope to see their policy views memorialized in doctrine, justices cannot disregard the law and precedent. Thus they adhere to what Gerhardt (2008) calls the "Golden Rule of Precedent": justices need to respect other precedents so that when their views prevail and become precedent, other justices will respect their decisions. In other words, justices treat others' precedents as they would like their own to be treated. Similarly, justices must protect the legitimacy of the institution (Clark 2011). Reckless disregard for the Court's institutional authority can undermine the platform for individual policy goals. If justices are able to attain their policy goals but the Court has no respect from the other branches or the public, then those goals are less viable or may be threatened.

Thus justices work with like-minded litigants and signal them through their acceptance of petitions and decisions in similar cases (Baum 2006). As this process proceeds over time and through successive cases, these legal standards take on substantive meaning and create expectations that inform and influence the preferences of future justices, lower-court judges, litigants, and other participants as they accept, reject, or adapt legal standards in future cases.

Lower courts also play a significant role. The influence of courts of appeals flows up and down the judicial hierarchy. When legal issues are new or when existing rules are incomplete, courts of appeals help with filling gaps or providing a foundation. Thus it is not unusual to find circuit court judges engaged in the process of shaping or creating new legal rules (Hettinger & Lindquist 2012). Once the Supreme Court makes a decision, lower courts have to apply new precedent as it heads back down the ladder. Within the legal system, the opinions are precedents that constrain lower-court judges (vertical precedent) as well as their current colleagues and future justices (horizontal precedent; Corley, Collins, & Calvin 2011; Hettinger, Lindquist, & Martinek

2006). Moreover, majority opinions are guides for litigants, shaping the arguments they make in subsequent written briefs and during oral arguments (Epstein & Knight 1998).

Institutional rules and norms ask the justices to adhere to precedent and make consistent decisions to guide lower courts, governmental agencies, groups, and individuals. The types of questions as well as the responses of the litigants and justices change over time as the stages unfold. This model of issue evolution reveals how issues unfold, take root, and change over time. It also helps us understand how one issue can help create or sustain another issue.

The stages of the process speak to the opportunities and constraints that justices, litigants, and lower-court judges encounter and how they shift over time. New issues require building a foundation. Once that foundation is in place and earns the support of a majority, the dynamics change. The early decisions structure the development of the policy issue. The new issue normally becomes nested within similar reinforcing precedents. Litigants test the limits and seek to push the frontiers a little farther (or limit the reach if they oppose the Court's position). The focus of litigants, lower-court judges, and justices may shift to related areas. There is a deliberate attempt to transplant the favorable precedents to those proximate issues. This is a major reason that the Court seldom overturns precedents. The construction of the individual precedents and the policy and doctrine they create is a slow process, and dismantling similarly takes a long time.

The Rise of New Issues

It is rare for new issues to suddenly appear on the Court's agenda. Instead, new issues represent potential policy-making opportunities or the opening of a policy window (Kingdon 1995). Because Court policy and doctrine are tied to precedents, new issues stand a greater chance of survival on the Court's agenda if actors (litigants, judges, and justices) can tie them to existing precedent in other areas of law. As issues emerge, litigants and justices may look for similar issues to advance. For instance, once the Supreme Court used the Fourteenth Amendment to remove some of the barriers to inequality (i.e., *Brown v. Board of Education of Topeka* 1954), they looked to other issues that might protect civil rights. Freedom of speech and association from the First Amendment were useful vehicles to protect civil rights protests (i.e., *Brown v. Louisiana* 1966; Pacelle 2009; Wahlbeck 1997).

Decisions like *Brown v. Board of Education* (1954) struck important blows for racial equality. It took the Court a little while, but it extended its review to other cases involving discrimination. Using similar precedents, the Court developed and refined scrutiny tests under the equal protection doctrine of the Fourteenth Amendment to extend the logic of Brown and racial discrimination

to issues of gender (i.e., *Craig v. Boren* 1976) and citizenship (i.e., *Graham v. Richardson* 1971) discrimination.

Organized litigation is a major component in the rise and coupling of new issues and the metamorphosis of existing issues. First, many groups are involved in a variety of issue areas. The solicitor general (Pacelle 2003, 2018), American Civil Liberties Union (ACLU; Walker 1990), National Association for the Advancement of Colored Persons (NAACP; Wasby 1995), and conservative groups like the Washington Legal Foundation (Teles 2008) litigate across a range of issues. These groups try to transplant arguments and provisions that have been successful elsewhere. Equality litigation is a classic example, as advocates for the rights of the handicapped and elderly used principles and strategies advanced by the NAACP in race litigation (Olson 1981). Thus it is not surprising that new issues have antecedents in existing policies. Interest groups urge the extension of past decisions or constitutional principles. Justices with specific policy designs may also be involved in paving the way for new issues. This process may accelerate the Court's normal incremental pace of change. In addition, groups operate aggressively when the environment is propitious (the Court is sympathetic) and seek to transplant favorable doctrine. When the environment changes, groups react defensively, retreating to their core and "trimming their argumentative sails" (Kobylka 1995, 125).

Because of its roots in the doctrine of another area of law, the new issue may be viewed in the context of the original area and takes on the color of the older policy area. Once a new issue emerges on its own, it typically lays claim to agenda space for the foreseeable future (Pacelle 1991; Baird 2004). Perhaps more significantly, the breakthrough may lead to a surge of activity in related areas. When an institution decides to consider an issue, it may in effect "commit itself to a whole chain of rationally related issues" (Crenson 1971, 172). Policy entrepreneurs, flushed with success, rush to the next issue to take advantage of the momentum (Kingdon 1995; Baumgartner & Jones 1993). This occurs in Congress as well as the courts. The New Deal was a perfect example of the widespread range of solutions to various economic problems. Similarly, in the 1960s, Congress passed in succession the Civil Rights Act of 1964 and the Voting Rights Act of 1965 and embarked on housing and employments bills to implement Lyndon B. Johnson's "Great Society."

After the Court moved to protect the rights of individuals to be safe and secure in their homes from unwarranted search and seizure (under the Fourth Amendment), litigants and justices moved quickly to expand Fifth Amendment rights (like protections from self-incrimination) and Sixth Amendment rights (like the right to counsel). Groups like the ACLU were involved in all these major cases, and the same justices who supported extending the Fourth Amendment also voted to expand the reach of the related amendments.

On the other hand, if proper conditions are not present, policy windows may not open, and new issues may not emerge. Justices may want issues to "percolate" in the lower courts before they turn their attention to them. For instance, the Court's refusal for years to attend to gay and lesbian

rights is an example of a window that was closed until recently. Petitioners sought entry through a variety of existing windows including criminal law, education, and public employment. Their claims invoked equal protection, privacy, due process, and the First Amendment (Zick 2018).

Policy Framework and Free Exercise of Religion

We conceive of policy initiation and evolution in the Supreme Court as having four distinct stages—episodic, emergent, elaborative, and complex. A fifth stage, exit, is achieved if the Court decides to leave an area altogether. For instance, the Court has reduced its attention to economic issues, and this largely leaves the determination of these issues to other actors, such as Congress (Pacelle 1991). This is a rare phenomenon. Figure 1 traces the typical pattern of policy development for issue areas once they emerge in their own right. Once the new issue is evaluated on its own terms, it begins to move through its own evolutionary cycle. Figure 1 also shows the different expectations for each stage of policy evolution. We use the example of the free exercise of religion doctrine to explain the model because it is a consequential part of the First Amendment; is broadly related to other rights, such as freedom of expression and association; and has an intertwined relationship with establishment of religion cases (like aid to religious schools and public displays of religious symbols).

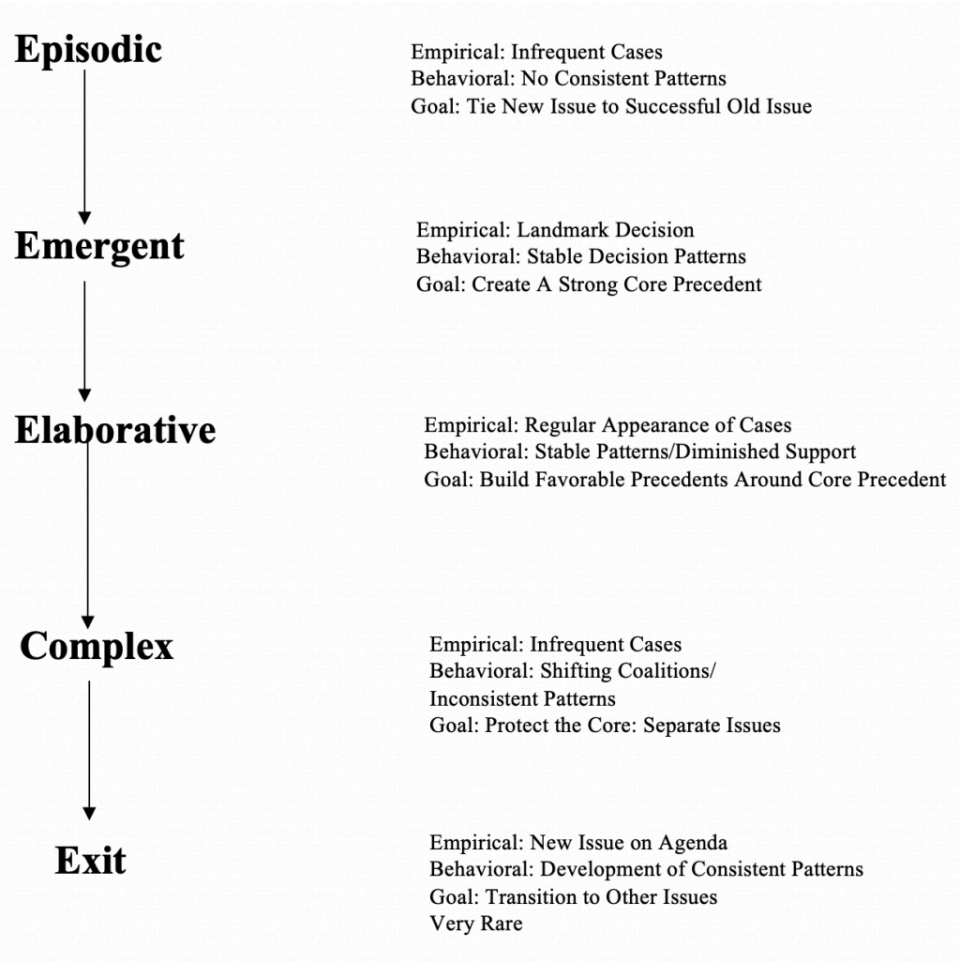

Figure 1. Supreme Court Policy Evolution: Empirical and Behavioral Expectations and Goals of Actors

The initial test or standard for free exercise litigation was the secular regulation rule. That standard was very deferential to the government. In other words, it made it relatively easy for the government (mostly state and local governments) to restrict religious practices. A broad change in the political environment caused in part by the Great Depression (a new party in control of the White House and Congress and eventually the Supreme Court) created the chance to revisit this rule. In an otherwise forgettable case (*United States v. Carolene Products* (1938)), Justice Harlan Fiske Stone filed his famous footnote four, arguing that civil liberties and the rights of insular minorities should be held in a "preferred position." He maintained the Court should adopt a more rigorous standard of review that would not be deferential to the government. Quite to the contrary, this standard asked the government to meet a very high standard before it could restrict individual liberties. The policy window had been thrown open, and a number of groups tried to push their issues through it (Pacelle 1991).

Episodic

The first stage of policy evolution in the Supreme Court is the episodic stage. At this stage, a new issue arises, and the Court searches for some doctrinal home for that new issue. The Court typically finds a related area of law and transplants the precedent, providing a temporary home. The episodic phase is marked by infrequent appearance on the Court's agenda and inconsistency in individual- and institutional-level decision-making. The new issue typically results from a related issue or as a conscious effort on behalf of litigants or justices seeking to transplant success from a different area. At this stage, the Court searches for some help in understanding how to decide the case and where it fits in generally. Litigants may suggest an existing, related doctrinal home for the new issue. The novel area may take a while to develop its own doctrinal identity. Because the issue does not arise annually or with any predictability, the nature of early doctrine at this stage is likely to be unstable.

As the search for a new standard continues, the episodic stage creates opportunities for interested actors to suggest the building blocks for new doctrine. As noted, there is, in effect, a "conversation" among litigants, courts, and interest groups that defines the terms of the debate about the constitutionality or legality of an issue. Litigants, particularly "repeat players" (Galanter 1974), provide the Court with a variety of possible constitutional doctrines and legal rationales as various decision-making alternatives (Collins 2012; Johnson 2004; Baird 2004; 2007). Lower courts also contribute to doctrinal development (Westerland, et al. 2010; Pacelle 2015). Finally, the justices themselves play the role of policy entrepreneurs and suggest doctrinal choices to their colleagues and lobby for their preferred standard through the opinion-writing process (Baum 2006; 2017).

The first major free exercise of religion case (of the twentieth century) to be decided by the Court was *Cantwell v. Connecticut* (1940). Newton Cantwell was proselytizing in a predominantly Catholic section of New Haven, Connecticut. He would stop people on the street and play them a record that was anti-Catholic. He was charged with breach of peace and soliciting without a license. The Court ruled that this violated Cantwell's right to freedom of speech.

In Cantwell, the Court incorporated the free exercise provision of the First Amendment (Cortner 1981) but ultimately focused on the free speech aspects of the case. Thus decisions that upheld freedom of speech helped create a favorable environment for recognizing free exercise rights. The Cantwell case is part of the episodic stage of free exercise policy because the decision began to shape doctrine but did not clearly define the standards for later exercise cases. During the 1943–61 period, the Court decided very few free exercise cases that did not involve free expression. As a result, free exercise doctrine remained in the episodic stage for a generation (Zick 2018).

Free exercise policy evolved from freedom of expression, a related issue area, inheriting the basic structure from their common backgrounds. The connection between the early free exercise cases

and free speech policy was not surprising. Given the proselytizing efforts of the religion, the free exercise questions raised by the Jehovah's Witnesses were inexorably interwoven with free speech concerns (Peters 2000).

The litigation arm of the Jehovah's Witnesses was the first group to establish a consistent presence in the area of free exercise. The Jehovah's Witnesses suffered some defeats along the way, to be sure, but in areas like the flag salute cases, early losses were turned into monumental and symbolic victories. Indeed, the success of the Jehovah's Witnesses served as an impetus for the civil rights movement and its litigation strategies, which in turn were the models for subsequent groups, showing how precedents and strategies get transplanted (Peters 2000). At some point as the issue evolved from expression to the so-called Sunday Closing Laws cases, the Jehovah's Witnesses ceded the area, and the ACLU filled the leadership vacuum. The ACLU was able to help construct the Sherbert test, expand its reach, and try to protect from reversal (Walker 1990).

Emergent

The evolutionary development of free exercise doctrine was an organic extension of the more venerable free speech cases. As a relatively new issue, the presence of existing free speech precedents gave the Court a foundation on which to build free exercise doctrine. The cost, however, was that the development of religion policy was constrained by free speech standards. Developmental pathways shape the evolution of the new issue and constrain the variation. The doctrine woven of free speech and free exercise cases was not always clear, but it lasted decades (Zick 2018).

To achieve its own status, the new policy area must advance to the second phase, the emergent stage. The victorious actors (litigants, groups, and justices) from the episodic stage are encouraged to bring additional cases. But transplanting a precedent is not ideal or always a perfect fit, thus there is a need for litigants and justices to do some tailoring. During the emergent stage, the goal is to create the strongest possible precedent. Normally there is a time of experimentation as litigants and justices strive to create a test or standard that will survive.

Eventually, the justices understand that they need to isolate the new area and develop its own standards. And this leads to the emergent stage. The emergent stage is marked by a couple of elements. First, the issue makes a regular claim to agenda space. This signals the Court's recognition that additional doctrinal work is necessary, and its intention is to address the issue systematically. The Court needs to "invest" or "commit" future resources (in the form of agenda space). Second, the Court finds the issue its own key landmark precedent (Pacelle 1991).

Substantively, emergent-stage cases are first-generation questions, the core concern of the

developing policy area. The stage is marked by the cases immediately preceding, including, and following the central landmark. The landmark defines the core question, and the cases immediately following begin to define and shape the scope of the seminal decision and may limit or constrain the range of long-term deviation (Pacelle 1991; Baird 2007).

In the free exercise of religion cases, the Sunday Closing Law cases (1961) began to shape a new doctrine, and ultimately, *Sherbert v. Verner* (1963) provided the landmark case that defined the emergent stage. In its decisions involving Sunday Closing Laws, the Court refined and developed its test for free exercise. The Court distinguished between direct and indirect effects on religion. The new standard was less deferential than the Secular Regulation rule but still not overly protective of free exercise.

In *Sherbert v. Verner*, the Court fashioned a test to evaluate future free exercise cases. The Court ruled that South Carolina's denial of social service benefits to a woman who was fired because of her refusal to work on her Sabbath was a denial of her free exercise of religion. The essence of Justice Brennan's dissent in *Braunfeld v. Brown* (1961), one of the Sunday Closing Law cases, became the majority opinion in Sherbert. The new standard added an important component to the existing standard: the state must have a "compelling interest" to regulate the exercise of religion. In so doing, Brennan reestablished the close connections between free exercise and free speech (Morgan 1972). The decision had the effect of providing more protection for religious freedom (Eisler 1993). The Sherbert case thus marks the beginning of the transition from the emergent stage to the elaborative stage of issue evolution.
As the emergent stage closes, there is an expectation that the Court will come to evaluate these questions in a consistent manner. There is a standard or test now in place. Justices are policy makers with their own sincere preferences. As members of the Court of last resort, however, justices have an institutional obligation to decide cases in a consistent manner so as to guide lower courts. Thus justices' policy goals are mediated or constrained by institutional rules and norms, and their notions of their judicial roles affect the evolution of policy.

The emergent stage should not be especially long in duration, but it may take a range of cases for the Court to flesh out the doctrine. It does, however, create the shock to the system that begins the process of dynamic growth. This is consistent with Sunstein's notion of "width" (1999, 16–19). Sunstein argues that decisions have "width" if they set a clear standard, are applicable to other cases in the specific issue area, and are the governing principles for that area of law. The landmark structures litigation and decision-making for decades. The decisions that follow in subsequent cases are more fact intensive and thus narrower in applying the existing standard and are found in the elaborative stage.

Elaborative

Once the landmark decision sets the precedent and anchors it in a test or standard, the issue area moves to the elaborative stage. At some point, the Court should resolve first-generation questions in a manner that will guide lower courts. Having settled the core questions in the emergent stage, it is uncertain how much further the justices are willing to go: Will the Court continue to support rights and liberties? At the elaborative stage, the fact situations in later cases present the Court with increasingly more difficult issues. For example, in *Mapp v. Ohio* (1961), the police went into the house without a warrant. It was a relatively clear violation of Dollree Mapp's Fourth Amendment rights. Later search and seizure cases were cast in confounding shades of gray. Is a warrant needed if the police are in hot pursuit of an armed suspect or want to enter a detached garage? In civil rights, Brown banned state-mandated segregation in schools. But how would the Court treat segregation that was accidental or just developed over time? Would the Court sanction affirmative action or "reverse discrimination" to remedy past discrimination?

In the elaborative stage, the justices, litigants, and lower courts begin the process of applying the test and doctrine to issues that come before the Court. Some of these actors try to push the boundaries of the doctrine and nest the landmark precedent in related policy areas. By spreading the range of the precedent out, they hope to create a web to protect the core landmark and make it harder to excise or reverse. Still other justices, litigants, and lower-court judges may seek opportunities to challenge the new doctrine and supplant it with one more closely aligned with their policy goals. Challenges to the new doctrine are aided by the fact that issues grow increasingly complex as the elaborative stage continues. Ultimately, support for the new policy should wane as the issues get more difficult and as justices who supported the emergent-stage doctrine leave the Court.

A number of freedom of religion cases involved employment issues. In some of these cases, an individual might be asked to work on his or her Sabbath. A failure to work might lead to this person's dismissal. The individuals were often denied unemployment benefits. The Court had to rule whether the denial of benefits a violation of the free exercise of religion. These were elaborative cases, raising more difficult questions for the Court. The Court's decisions in cases like *Thomas v. Review Board* (1981), *Hobbie v. Unemployment Commissio*n (1987), and *Frazee v. Department of Employment* (1989) applied the Sherbert test, ruling that these restrictions were violations of the individuals' free exercise of religion.

The Court used Sherbert to uphold free exercise claims in *Wisconsin v. Yoder* (1972 involving the objections of the Amish to compulsory school attendance laws) and *McDaniel v. Paty* (1978; striking a Tennessee law that barred clergy from serving in public office). Overall, the Court's decisions at the elaborative stage were predictably mixed, with some litigants, particularly Native Americans,

forced to endure restrictions on their religious exercise. In *Lyng v. Northwest Indian Cemetery Protective Association* (1988), the Court permitted the Department of the Interior to build roads through sacred burial grounds, rejecting the free exercise claim of the tribes. This was consistent with Court decisions in *United States v. Lee* (1982) and *Bowen v. Roy* (1986). In the latter, the Court ruled that compelling Native Americans to have a social security number in order to receive government benefits did not impair their free exercise of religion. In the former case, the Court refused to allow Amish employers to opt out of the social security program because it violated their religious beliefs.

Given normal expectations and stable membership, the Court should impose consistency and stability on the elaborative-stage cases. Policies remain in the elaborative stage for a long period of time as the Court assimilates new members. Stability and consistency, however, are seldom established because of membership changes or the introduction of multiple issues that arise in individual cases (the complex stage). Even marginal changes can upset the existing stability in decision patterns and send mixed or confusing signals to litigants and lower courts. The combination of mixed signals and changes to the ideological composition on the Court may create an environment for major policy change. At this point, the elaborative stage may come to an end, and the Court might exit the issue, return to the episodic stage, or seek the emergence of second-generation doctrine. The Court's path may be influenced by the number and character of complex-stage cases.

In free exercise cases, the Court continued to use the Sherbert standard but allowed impositions because they were indirect and the government had a compelling interest. Remember that the expectation is that in the elaborative stage, the Court will begin to issue decisions that are less supportive of rights and liberties. The question is why? Because the Court was getting more conservative, there was a question of whether these cases were increasingly being decided in the government's favor because of the difficulty of the issues raised or because the justices were reexamining the fundamental core precedents. In other words, is the Court still supportive of the central precedent of the emergent stage and merely drawing outer boundaries? Or is the reversal a sign that the Court is reconsidering the landmark decision?

A new Court that is antagonistic to its predecessor's precedents can begin to reverse decisions at the elaborative stage. The effect is to send clear signals to litigants interested in paring the original doctrine. If the new Court imposes consistency on elaborative-stage cases, it may raise the question of whether the Court is willing to reconsider emergent precedents. Normally, the type of membership change required to achieve this policy devolution is extensive and must involve wholesale changes in the ideological composition of the Court.

Complex

Policy is expected to evolve from the elaborative to the complex stage. In the complex stage, the cases again present the Court with difficult choices. But they are different from the elaborative stage in that these cases introduce some completely different issues in the same dispute. The issue may be attached to other issues by litigants or by justices interested in pursuing certain policy goals. Because of the multiple issues in these cases, a variety of disparate groups are typically involved, complicating the work of the Court. The justices have to decide which issue (and which precedent) governs. For instance, hate speech has two very different issues: Is it a free speech case or a civil rights case? One precedent governs one issue while a different precedent controls the other issue, and this can lead to contradictory results. Indeed, the issues can split traditional allies, whether they be justices or litigants (Walker 1994).

At the complex stage, supporters of the original landmark will attempt to create a new issue if they have the necessary support or try to separate the individual issues to avoid any damage to the core if they do not. For instance, the ACLU tried to separate the civil rights component out of hate speech cases to protect the free speech precedents. Similarly, civil rights groups would downplay the free speech element and focus on harm to the community. During this stage, the general behavioral impact is expected to be instability in individual and institutional decision-making and coalitional patterns. Some members of the Court may decide the case on the basis of one issue, while their colleagues view a different issue as controlling. Thus votes of individual members and decisions of the Court may appear to contradict votes and decisions found in the elaborative-stage cases. The need for consistency in decisions may induce the Court to separate the issues and address them individually. If this represents a new issue, that issue is expected to form its own episodic or emergent stage while the Court returns the original issue to the elaborative stage.

In our free exercise example, there are numerous cases that raised multiple constitutional provisions. *Goldman v. Weinberger* (1986) and *O'Lone v. Shabazz* (1987) raised complex-stage multidimensional issues: military regulations and prison security, respectively. Goldman was a complex-stage case because military discipline could dictate the Air Force's dress code and deny an Orthodox Jew the right to wear a yarmulke. O'Lone involved a similar need for discipline in a prison that permitted some restriction on the free exercise of religion. In cases like this, the Court has to decide whether freedom of religion or prison security should be the most important issue and then apply the standards that govern that area. Other cases involved religious expression in a public forum and bore no small resemblance to the petitions brought by Jehovah's Witnesses that opened the door to modern free exercise doctrine. Cases raising free exercise questions have allowed the Court to refine its policies regarding the definition, use, and limits of a public forum. *Board of Airport Commissioners v. Jews for Jesus* (1987) and *International Society for Krishna Consciousness v. Lee* (1992) involved proselytizing and solicitation efforts in airports. The groups

consistently raised free exercise claims, but the Court confined its evaluation to free speech in a manner that was similar to its treatment of cases after Cantwell.

Trinity Lutheran Church v. Comer (2017) is a great example of a dispute that arrived as a complex-stage case with both free exercise and establishment elements. The church had a preschool that was denied funds for its playground under a provision of the Missouri Constitution that forbade aid to religious institutions. The state argued that any public aid violated the establishment clause of the First Amendment, but the Court concentrated on the free exercise claim. In its decision, the Court overturned the state's decision to deny benefits to the church. The Court ruled that the exclusion of funds from a neutral secular aid program was a violation of the guarantee of free exercise of religion. The dissenters adhered to the establishment clause claim.

Return to Emergent

In the area of free exercise doctrine, the trend of the elaborative- and complex-stage decisions was increasingly restrictive of free exercise claims. It is important to note that the evolution of doctrine is not necessarily an unbroken chain of advancement. The accumulation of membership changes gave the Court a more deferential attitude toward state regulations. These decisions seemed at odds with the core standard, coming from Sherbert, which was protective of free exercise. When such tensions exist, the Court may decide to reexamine the core questions and return the issue to the emergent stage.

In *Employment Division, Department of Human Resources of Oregon v. Smith* (1990), the Court returned the issue to the emergent stage by abandoning the compelling interest standard of *Sherbert v. Verner*. Attorneys for Smith attempted to tie his case to Sherbert and Thomas because Smith was denied unemployment compensation after being fired for using peyote in a religious ceremony. Although the majority opinion could have reached the same result without tampering with the existing standard, given the state's compelling interest in halting the use of drugs, Justice Scalia's opinion gave the state much wider authority and appeared to revisit the Secular Regulation rule (Long 2000). In doing so, the Court appeared to adopt a two-part test. The first question asks if the regulation of religion exercise is similar to that of secular behavior. If the answer is yes, the Court applies a rational basis test. If the answer is no, the Court uses a compelling interest test. The Court rejected Sherbert and the compelling interest standard, in effect moving the issue back to the emergent stage.

The ACLU could not successfully head off the apparent demise in Smith, but they have supported other groups and individuals challenging state restrictions on religious freedom. While Smith remains the official precedent, the ACLU has had success in winning cases like *Church of the*

Lukumi Babalu Aye, Inc. v. Hialeah (1993) on the merits, thus limiting the potentially negative reach of Smith. The case involved a municipal ordinance against animal sacrifice, a central tenet of the Santeria religion. The Court ruled that Hialeah discriminated against religion and overturned the statute under Smith's adaptation of a compelling interest test.

Occasionally, the Court's doctrinal development attracts the attention (and wrath) of elected officials. Under pressure from an impressive array of organized religious groups, Congress intervened to try to reinstate Sherbert as the governing precedent. Congress passed the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA), which required courts analyzing free exercise cases to use the substantial burden / compelling interest standard that had been in force since the Sherbert decision (Epp 2009).

The Supreme Court rebuffed congressional efforts in *City of Boerne v. Flores* (1997) by declaring that it alone had the authority to determine the meaning of the First Amendment. While the Court dismissed the congressional rebuke, the justices were willing to allow Congress to raise the standards for the laws it passed. Thus the Court allowed Congress to bind itself to the more demanding requirements expressed in RFRA. At the same time, state regulations that fall under the Constitution lie outside RFRA and RLUIPA and are governed by the more forgiving Smith standard. Thus the Court established a bifurcated standard where federal statues burdening religions are governed by RFRA's adaptation of Sherbert, while similar state statues are evaluated under Smith. This bifurcation triggered additional rounds of elaborative-stage litigation as states and communities felt free to restrict the religious freedom of different, often small religious sects.

The most recent complex-stage case to fall under the Smith doctrine was *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission* (2018). A baker refused on religious grounds to make a wedding cake for a same-sex couple. The Court had to balance the Constitution's requirement of equal treatment for the gay couple (under the Fourteenth Amendment) with the requirement of free religious exercise of the baker and his free expression (under the First Amendment). Justice Kennedy's plurality opinion in Masterpiece Cakeshop used the rationale of Smith and Hialeah, claiming that the state commission's hostility to religion placed the case within the protection of the First Amendment. Kennedy said that the ultimate resolution depended on "further elaboration in the courts." In other words, the Court would need to continue the evolution of these issues. Given recent personnel changes on the Court and its apparent unenthusiastic application of Smith, conditions may be ripe for the Court to enter a new episodic or emergent stage. It also remains to be seen if the Court, litigants, lower courts, and elected officials will stay on the path established by Smith and these statutory protections.

The shifts between stages are the result of the unique conversation that takes place among the justices and among the Court, lower courts, other branches of government, and various litigants. Shifts from the episodic stage to the emergent stage represent the willingness of the justices to recognize an issue and adopt a policy to address it in subsequent cases. That policy may be the

result of suggestions by a lower court or litigant or ideological shifts in the political environment. Moving from the emergent to the elaborative stage indicates the willingness of the Court and litigants to use that policy to address increasingly difficult factual questions within a particular issue. Ultimately, the difficulty of those questions may open the new issue up to conflicts with existing issue and policy areas. These conflicts represent the complex stage of issue and policy development. Here litigants or justices may see the benefit of attaching other issues to the new issue or choosing to focus on one issue over another, oftentimes leading to a new round of evolutionary development of policy and precedent.

Taking a Step Back

While we have focused on the evolution of free exercise of religion doctrine, similar dynamics were and are playing out simultaneously in a number of issue areas. Some of those issue areas, such as freedom of speech and establishment of religion, are closely related and resemble free exercise disputes. Because they have similar doctrinal roots, decisions in one of these areas may have implications for related issues. Once a breakthrough occurs in a new issue area, it may lead to a surge of activity in other areas (Downs 1973, 40-45). When the Court issues a landmark decision, it may lead winning litigants and groups to initiate related litigation and try to transplant the success. Groups that are active in multiple areas of law may attempt to transplant success to another area. Lower courts will borrow the precedent and use it for a related area of law. Justices who are supportive of the landmark may be emboldened to try to extend the original decision to other areas.

The Court's reconsideration or reversal of a precedent may also start a surge for reversals in other areas. Just as the announcement of Sherbert triggered similar landmarks in other areas, the reversal of a precedent like Sherbert does not occur in a vacuum. Indeed, the end of Sherbert suggested that threats to the Lemon test from the neighboring area of the establishment clause might be imminent. So far, the demise of the Sherbert test has not led to the end of the Lemon test. In recent years, the Court has either avoided or limited its application of the Lemon test in public prayer cases (see *Lee v. Weisman* (1992) and *Town of Greece v. Galloway* (2014)), public displays of the Ten Commandments cases (see *Van Orden v. Perry* (2005)), and various types of parochial school aid cases (*Agostini v. Felton* (1997) and *Zelman v. Simmons-Harris* (2002)). However, it is clear that the Court may still revisit the emergent stage and modify or reverse the Lemon test.

This model of issue evolution is also useful in helping understand why precedents that are unpopular manage to survive. Just as Lemon has survived to this point, so have a number of precedents that arrived about the same time as Sherbert. Miranda rights have been undermined

with a "public safety" exception and the "inevitability of discovery" exception, but the Court declined the opportunity to reverse it altogether. Mapp has similarly had exceptions, such as "good faith," which suggest that the core will be reevaluated (Pacelle 2004). Roe has been undermined by a plethora of regulations, but the central precedent remains on the books despite the number of sitting justices who publicly rebuked it. Courts do not often overturn their decisions (Ball 1978); rather, through attrition or exceptions in the elaborative stage, justices who are so inclined might undermine the core precedent. At some point, the Court may return to the emergent stage, but the existing precedent often lasts beyond its predicted demise. Many precedents remain in force because the law is settled, and litigants, citizens, and lower courts know the extent of their rights and duties.

Conclusion

Because the policy goals of the justices are considered the most significant influence on decision-making, research tends to concentrate on them to the exclusion of other factors. This framework of issue evolution suggests that institutional rules and norms (respecting precedent and developing consistency in guiding lower courts) also structure decision-making and doctrinal construction. An examination of free exercise doctrine suggests that the behavior of justices and litigants varies under different conditions and by stage.

Constitutional rights are neither self-defining nor absolute. The creation and development of doctrine demands further rounds of litigation. A given policy is born of related issues and helps create or influence other issues. Landmark decisions and their relevant areas of law trace their doctrinal roots to other substantive areas. As a result, decisions in one area will have ripple effects on other areas.

While justices and litigants have a strong incentive to see their policy designs reflected in the interpretation of the Constitution, they face different constraints and have different opportunities as doctrine evolves. Thus their behavior will vary as a function of the stage of policy evolution. During the episodic stage, the goal is to find a temporary home for the new issue and marry it to a favorable precedent. During the emergent stage, the goal is to hone a standard or test for the new area and make it as strong as possible so it will survive the coming cases. At the elaborative stage, the primary goal is to insulate the core precedent so it is protected and harder to reverse. Finally, in the complex stage, the strategic tactic might be to separate the issues so that particularly difficult cases do not harm the core emergent precedent. When conditions change, litigants and justices may have to develop defensive strategies to protect what they gained in better times. The

model also helps explain why, despite the changes in the Court, precedents like Roe, Lemon, Mapp, and Miranda survive.

In some ways, the past is a prologue for free exercise litigation. Footnote four and incorporation opened a policy window, and litigants used the opportunity to change the law. Subsequent changes in the ideological composition of the Court have led to doctrinal retreat, but the process of dismantling doctrine is, like the process of creating it, protracted. It is the nature of spillovers that the retreat that has marked free exercise doctrine spreads to other areas of law, but not completely. The slow nature of change is a function of the need to have stability and predictability in the law, but it is also the result of the purposive behavior of actors who want to protect existing interpretation of the law. In that regard, as Kobylka noted, "it demonstrates the capacity of the law to withstand politically directed efforts at change" (1995, 125).

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Class Activity

Consider the following complex-stage cases. What are the competing issues found in these cases?

- Nebraska Press Association v. Stuart (1976): freedom of the press (First Amendment) and criminal procedure (Sixth Amendment)
- RAV v. City of St. Paul (1992): civil rights, equal protection (Fourteenth Amendment), and freedom of speech (First Amendment)
- JEB v. Alabama (1994): criminal procedure (Sixth Amendment) and gender discrimination (Fourteenth Amendment)
- Rosenberger v. University of Virginia (1995): freedom of speech and freedom of religion

Often after making a landmark decision, the Court turns to related issues. In 1940 in Cantwell v. Connecticut, the Supreme Court began the process of expanding protections for free exercise of religion. In the next decade, they would expand other rights. Give some examples (see below):

- Everson v. Board of Education (1946)
- West Virginia Board of Education v. Barnette (1943)
- Shelley v. Kraemer (1948)
- Sweatt v, Painter (1950)

List and briefly describe the various constitutional protections found in the First Amendment. The Court originally treated them in a similar fashion and later refined the individual tests and standards. Why do you think the Supreme Court addresses these different issues with different doctrines/policies across time and between issues?
Here are examples of different free speech tests, such as clear and present danger and time and place and manner:

- Sherbert test and Smith test
- Lemon test
- New York Times test (libel)
- Memoirs and Miller test (obscenity)
- O'Brien test

Consider the Supreme Court case of Trinity Lutheran Church of Columbia, Inc. v. Comer (2017). Explain the different issues addressed by the majority and dissenting opinions and what doctrine/policies the justices used to resolve those issues. What factors explain the different approaches to the case (i.e., legal or political differences)? In your opinion, which opinion appeared to be more true to precedent? Does your answer match your own beliefs about this case?

Consider a legal dispute in process: East Lansing, Michigan, is barring an orchard owner from participating at the city farm market because the owner does not support same-sex marriage and posted that belief on Facebook. Based only on the post, the city denied the owner a spot at the

market.
Explain how this case involves the following issues:

- Free press
- Free speech
- Religious exercise
- Establishment clause
- Equal protection

Please provide case year.

34. Race and the Death Penalty in Tennessee, 1977–2016

JOHN M. SCHEB II AND HEMANT K. SHARMA

The widespread protests against police violence against African Americans that erupted in the spring of 2020 reinvigorated a long-standing conversation about systemic racism in the United States. Much of this conversation has focused on aspects of criminal justice, including racial profiling, excessive use of force by the police, the militarization of law enforcement, abuse of prosecutorial discretion, wrongful convictions, sentencing disparities, and mass incarceration. And, of course, activists and academicians have long been concerned with racial discrimination in the administration of capital punishment.

In *Furman v. Georgia* (1972), the Supreme Court effectively imposed a nationwide moratorium on capital punishment. Four years later, in *Gregg v. Georgia* (1976), that moratorium ended as the Court upheld a revised death penalty statute. In the decades that followed, a number of states abolished capital punishment, either through legislative or judicial action. Today, twenty-eight states and the federal government (including the military) retain the death penalty for "aggravated" first-degree murders.

Although the Supreme Court continues its support for the death penalty, racial injustice in the application of the ultimate sanction remains a salient issue for the courts. In 2017, the Supreme Court granted habeas corpus relief to a Texas death row inmate who claimed that his trial was marred by racism.[1] In 2019, the high Court provided similar relief to a Mississippi death row inmate who claimed that bias had pervaded the jury selection process in his matter.[2] In North Carolina, there is ongoing litigation of claims by death row inmates suggesting that the selection of juries in their trials was tainted by racism, with the state's supreme court issuing a 2020 decision in favor of one such defendant.[3] Previously, in 2018, the Washington Supreme Court invalidated their state's

1. *Buck v. Davis*, 580 U.S. ___ (2017), https://supreme.justia.com/cases/federal/us/580/15-8049/#tab-opinion-3694347.
2. *Flowers v. Mississippi*, 588 U.S. ___ (2019), https://www.supremecourt.gov/opinions/18pdf/17-9572_k536.pdf.
3. *State of North Carolina v. Cedric Theodis Hobbs Jr.*, No. 263PA18 (Supreme Court of North Carolina, May 1, 2020), https://appellate.nccourts.org/opinions/?c=1&pdf=39338; for additional reading, see Allyn (2019); Woolverton (2018).

death penalty statute in its entirety, holding that "Washington's death penalty is unconstitutional, as administered, because it is imposed in an arbitrary and racially biased manner."[4]

Social scientists have been studying the death penalty—and consistency of its application—since the 1940s. There is now a sizable body of empirical research examining the impact of race on the imposition of capital punishment. Early studies found significant disparities in administration of the death penalty based on the race of defendants (Garfinkel 1949; Johnson 1957). Specifically, "these studies determined that Blacks were indicted, charged, convicted, and sentenced to death in disproportionate numbers" (Bowers et al. 1984, 69–70). However, these early works were criticized for failing to implement adequate statistical controls (Kleck 1981).

Subsequently, in 1983, Baldus, Pulaski, and Woodworth published what is still the most prominent and widely cited of the modern, controlled studies regarding race and the death penalty. Using data on more than two thousand death penalty cases in Georgia from the 1970s, they found that the race of the defendant was not a significant predictor of death penalty decisions. They did, however, find that offenders who killed White victims were more likely to receive the death penalty, even after controlling for numerous other relevant variables, including the nature of the crime, the location of the crime, and the characteristics of offender and victim (Baldus et al. 1983).

More recently, in 2004, Baldus and Woodworth noted that "empirical evidence generally suggests that the United States death penalty system is no longer characterized by the systemic discrimination against Black defendants." Nevertheless, numerous studies have found sentencing disparities based on the race of victims. In reviewing extant research on the issue, Radelet and Borg (2000, 47) concluded that "the death penalty is between three and four times more likely to be imposed in cases in which the victim is White rather than Black." The conclusion that many draw from this line of research is that Black lives don't matter to the criminal justice system, at least not as much as White lives do.

Prosecutorial Discrimination

As Zeisel (1981) observed, prosecutors are pivotal players in the administration of the death penalty. Under modern death penalty procedures, prosecutors must decide prior to trial whether to seek capital punishment; juries can consider the punishment of death only in those cases where

4. *State of Washington v. Allen Eugene Gregory*, no. 88086-7, October 11, 2018, 40, https://cases.justia.com/washington/supreme-court/2018-88086-7.pdf?ts=1539270669.

the prosecutor has decided to seek the ultimate penalty. Thus it is not surprising that much of the research into death penalty discrimination has focused on prosecutorial decisions.

There is considerable evidence that prosecutors are more likely to seek the death penalty in cases in which victims are White, especially when Black defendants are the accused killers (Bowers and Pierce 1980; Hindson, Potter, and Radelet 2006; Keil and Vito 1995; Lenza, Keys, and Guess 2005; Paternoster, Soltzman, Waldo, and Chiricos 1983; Paternoster 1984; Paternoster, Brame, Bacon, and Ditchfield 2004; Radelet and Pierce 1985; Songer and Unah 2006; Williams, Demuth, and Holcomb 2007). In fact, one study found that Black defendants accused of killing White victims were five times more likely to face the death penalty than Black defendants charged with killing other African Americans (Lenza et al. 2005).

What explains the discrepancy with respect to the race of victims? White (1991, 157) suggests the discrepancy reflects a society that values White lives more than Black ones, imputing that prosecutors may share those values. As elected officials, after all, prosecutors are concerned with the reactions of the communities they serve. The murder of a Black victim, especially if he or she has lower socioeconomic status, might be less likely to produce a public outcry for the ultimate sanction. The murder of a White victim, especially when the perpetrator is Black, could be more likely to spark outrage in the dominant community; in such cases, it may be politically risky for prosecutors to drop the death penalty in exchange for a guilty plea.

Discrimination by Juries

Prosecutorial discretion is not the only possible source of racial bias in the administration of the death penalty. One also must examine the behavior of juries, which are charged with deciding between life and death in capital murder trials.

Bowers, Pierce, and McDevitt (1984, 338–39) argue that jurors "embody community sentiments" by having their own preconceived notions of societal members, and as a result, "jurors have difficulty replacing their socially conditioned views of victims and offenders with strictly legal considerations, especially for the crimes they find most shocking and abhorrent," allowing for "extralegal" factors to intrude on the interpretation of aggravating and mitigating factors presented at sentencing.

From a related perspective, Gross and Mauro (1989) argue that a juror's decision to sentence a defendant to death is influenced by the ability to identify with the victim, rather than seeing the victim as a stranger. They suggest that White "jurors are more likely to be horrified by the killing of a White than of a Black, and more likely to act against the killer of a White than the killer of

a Black," which is "a natural product of the patterns of interracial relations in society" (Gross and Mauro 1989, 113).

Capital Punishment in Tennessee

From the time capital punishment was reinstated in Tennessee in 1977 until 2018, 193 defendants convicted of first-degree murder have been sentenced to death.[5] Yet there are only 51 inmates on Tennessee's death row today: 23 are White, 26 are Black, 1 is Hispanic, and 1 is Asian.[6] The attrition of Tennessee's death row population is due more to natural death, reversals of sentences by appellate courts, executive clemency, and exonerations than to actual executions. Only 13 inmates have been put to death in Tennessee since 1977,[7] but seven executions have occurred since 2018, increasing the political salience of capital punishment in the state.

We choose to focus our study on Tennessee for several reasons. First, nearly all the studies of this kind have focused on one state. The overwhelming majority of death penalty cases occur at the state level and each state has its own death penalty procedures and statutory factors governing the applicability of capital punishment.

The literature in this area has grown incrementally over the decades as additional states have been subjected to the kind of analysis we perform herein. Of course, there is also the opportunity factor. Tennessee has produced records that can be translated into a data set, giving us the opportunity to add an analysis of this state's death penalty behavior to the literature.

Hypotheses

In line with the literature discussed above, we do not expect to see significant differences in prosecutorial or jury behavior based on the race of the defendant, but we do expect significant differences based on the race of the victim. Specifically, we hypothesize that: (1) Defendants

5. Barchenger (2018).
6. Tennessee Department of Correction, "Death Row Facts," https://www.tn.gov/correction/statistics-and-information/death-row-facts.html.
7. Death Penalty Information Center, "Number of Executions by State and Region since 1976," https://deathpenaltyinfo.org/number-executions-state-and-region-1976.

convicted of murdering White victims are more likely to have been selected for the death penalty by prosecutors; and (2) In the subset of cases selected for the death penalty, defendants convicted of murdering White victims are more likely to be sentenced to death by juries. We expect these hypotheses to hold even after controlling for a series of other variables relating to defendants, victims, and crime characteristics.

Data and Methods

Our data are derived from documents prepared pursuant to Tennessee Supreme Court Rule 12, which mandates the completion of detailed reports on first-degree murder convictions. In all cases resulting in a first-degree murder conviction, irrespective of the sentence, Tennessee trial judges are required to complete a section of a Rule 12 form for each convicted defendant. Prosecutors and defense attorneys also must complete certain sections of the Rule 12 form. The Rule 12 form asks for numerous facts about the criminal case as well as background information on both the defendant and victim(s). Once completed, the forms are transmitted to the Tennessee Administrative Office of the Courts.

Reports are scanned, summarized, compiled, and made public by the Administrative Office, which updates the compilation and releases a new CD-ROM every year. The 2017 update to the Rule 12 database contains summaries of 1,555 murder convictions rendered by Tennessee trial courts from 1977 to 2016, inclusive. Unfortunately, the summaries, which are unsorted image files, must be individually coded and entered into a statistical program (STATA). Also problematic is the level of missing data on many of the background variables. Fortunately, with the assistance of several diligent students, we were able to fill in many of the gaps in the summaries by reading newspaper reports and appellate court opinions.[8]

Unfortunately, not all first-degree murder convictions are included in the Rule 12 database. A 2018 study by two Tennessee attorneys found that more than 1,000 first-degree murder convictions have been omitted from the Rule 12 database, simply because trial judges failed to submit the required forms (MacLean and Miller 2018). Undaunted, we proceed with our analysis, but our next task (beyond the scope of this paper) will be to more fully incorporate these missing cases into our dataset.

8. The authors wish to thank Kristen Wagers, Mariah Williford, William Gilman, and Sawyer Smith, all former students at the University of Tennessee, for their assistance in constructing our data set and filling in missing data.

Our primary analysis herein focuses upon all defendants convicted of first-degree murder in the state of Tennessee from 1977 through 2016 for which a Rule 12 report exists. We examine the role of race (both for defendant and victim) in the following: (1) the prosecutor's decision to seek the death penalty, and (2) the jury's decision to return a death sentence. Dichotomous dependent variables are created for each of these considerations.

The dataset also contains numerous variables relating to defendants, victims, and crime characteristics, many of which we utilize as independent variables in our statistical models. Beyond that, we include control variables related to the quality (and types) of evidence presented to jurors in capital cases, a matter that some previous literature has neglected. Based on the literature, our hypothesis is that race of the victim will have a significant impact on both of our dependent variables, even after appropriate controls are introduced.

Because our dependent variables are dichotomous, we employ logistic regression. We have estimated two models: one in which the dependent variable is the prosecutor's decision to seek the death penalty; and another for the subset of cases in which the prosecutor sought the death penalty. In both models, a pro-death penalty decision is coded 1 (in the first model, for a prosecutor's decision to seek the death penalty, and in the second model, for a jury's decision to impose a death sentence).

In keeping with the previously discussed literature, our primary independent variables are the race of the defendant, labeled *Black Defendant*, and the race of the victim, labeled *White Victim*. As noted above, we expect that the race of the defendant will not be a relevant consideration, but we hypothesize that the race of the victim will. We also include thirteen control variables that are drawn from the literature. We divide these variables into four categories: (1) Characteristics of the Homicide; (2) Evidence Against the Defendant; (3) Victim Traits; and (4) Defendant Traits.

Characteristics of the Homicide

To account for the possibility that different types of homicides could be evaluated differently by prosecutors and juries, our first set of controls pertains to the nature of the homicide.

Three or More Victims is coded 1 when a defendant kills three or more victims within the same crime spree or within a forty-eight-month period. We select three victims or more because that is a statutory aggravating factor for the death penalty in the state of Tennessee; specifically, the statute references three victims in a "single episode" or in a forty-eight-month period—and our

coding is tailored accordingly.[9] Previous studies have controlled for the number of victims and found that the likelihood of a death sentence increases with that number (see Baldus et al. 2009; Phillips 2008; Pierce and Radelet 2011; Radelet and Pierce 1985; Unah 2009; Weiss et al. 1996).

Dangerous Concurrent Crime is coded 1 when the homicide was accompanied by any one of the following: arson, robbery, burglary, kidnap, aircraft piracy, child abuse, or a bombing. Each of these categories is listed separately in the Rule 12 database, and we collapse them into a single variable where the presence of just one is coded as 1, and the absence of all is coded as 0. Prior literature has addressed this matter in different ways. Phillips (2008) accounts for the presence of additional felonies like these by listing them individually as controls in a regression model. Pierce and Radelet (2011) use a count variable to find that each additional felony increases the likelihood of a death sentence. However, in keeping with the work of Weiss et al. (1996) and Radelet and Pierce (1985), we elect to collapse the presence or absence of one of these crimes into a single dichotomous variable. Kremling et al. (2007) discuss differences between count and dichotomous variables that account for felonies in regression models like ours and imply that the presence of a felony is likely to increase the likelihood of a death sentence regardless of exactly how a regression model captures additional crimes.

Rape is coded 1 to account for a homicide that was accompanied by a rape. Songer and Unah (2006) and Unah (2009) highlight the need for considering this matter as a separate control in isolating a more heinous murder, as does the work of Phillips (2008) and Williams et al. (2007). Thus we treat this as a separate variable, distinct from the previous variable that collapses other felonies together. We expect that homicides accompanied by rape will be more likely to result in a capital charge from a prosecutor and an overall death sentence from a jury.

Abnormal Method of Killing is coded 1 if any of the following "unusual" methods of killing occurred: stabbing, throat-slashing, drowning, beating, poisoning, burning, strangling/suffocating, pushing off a high building, or hitting with a vehicle. The relationship between method of killing and likelihood of a capital sentence has not been addressed extensively in the literature, but Phillips (2008, 820) addresses this matter without finding statistically significant results. We suspect that an unusual method of taking a life might be perceived as more heinous (perhaps more so by juries than by prosecutors), and thus may be more likely to lead to a death sentence.

Urban County is coded 1 for each of the four Tennessee counties that contain the state's largest cities: Knox County (Knoxville), Davidson County (Nashville), Shelby County (Memphis), and Hamilton County (Chattanooga). Paternoster et al. (2004, 44) note that death penalty studies should control for potential jurisdictional differences, as "any attempt to deal with any racial disparity in the imposition of the death penalty…cannot ignore the substantial variability that

9. Tennessee Code Annotated § 39-13-2004(i).

exists in different state's attorneys' offices in the processing of death cases." Pierce and Radelet (2002, 2005) offer two articles that control for differences between urban and rural jurisdictions, noting that rural jurisdictions are more likely to impose capital punishment for similar offenses, perhaps because heinous crimes in such areas may be more likely to "shock" the collective conscience of jurors.

Evidence against the Defendant

We also include a set of control variables that previous literature has failed to address in depth: the nature of the evidence against the defendant. In terms of how this information might interact with race, Pierce and Radelet (2002, 41) suggest that the race of a victim "might correlate with the amount of resources that law enforcement devotes to gathering evidence." Berk et al. (2005) do control for defendant statements, eyewitness testimony and informant testimony in their study of race and the death penalty. We control for the following:

Familiar Witness ID is coded 1 if the defendant is identified as the killer by either a police officer or, as the Rule 12 database says, a "familiar person."

Confessed is coded 1 when the defendant confessed to committing the homicide.

Scientific Evidence is coded 1 if scientific evidence linked the defendant to the homicide.

Coperpetrator Testified is coded 1 if a coperpetrator testified against the defendant.

We expect that the presence of these types of evidence should make prosecutors' decisions to seek capital charges and juries' decisions to impose death sentences more likely, as these factors reduce the uncertainty involved in determining a verdict and attenuate concerns over potentially unjust outcomes.

Victim Traits

White Victim is our primary independent variable and is coded 1 when the victim is white and 0 in

all other cases.[10] We expect that homicides involving white victims will be more likely to result in a prosecutor's charge of a capital offense and also will be more likely to result in a death sentence from a jury, as discussed in our literature review.

Female Victim is coded 1 if the victim is a female. In this regard, Unah (2009, 160) notes that "White females are perceived as a subgroup deserving of special protection and this has often led to differential responses to their victimization." Williams et al. (2007, 870) note that "several studies find that cases with female victims are more likely to receive a death sentence than cases with male victims." Their own research finds that the victim's sex is more relevant to juries than to prosecutors, a distinction that our models will reconsider (Williams et al. 2007, 884).

Victim Was Law Enforcement or Public Official is coded 1 if a law enforcement officer or public official is the victim. It seems logical to suggest that killing a police officer is likely to be perceived as more heinous by both prosecutors and juries (Cheatwood 2002, 863). It would seem reasonable that prosecutors and juries would perceive the killing of a public official in much the same way.

Defendant Traits

Black Defendant is coded 1 for a Black defendant and 0 for all others. Conventional wisdom from some scholars holds that Black defendants are more likely to receive the death penalty, but research suggests this may not be the case.

Previous Violent Felony is coded 1 when a defendant has a previous conviction for a violent felony. Along these lines, Phillips (2008, 820) says that a violent criminal history can impact the likelihood of a death sentence, as do Weiss et al. (1996, 623) and Baldus et al. (2009, 584). Pierce and Radelet (2002, 78) also state that "the defendant's prior criminal history [is] generally considered to be an important factor in the imposition of the death penalty," with such a history increasing the likelihood of a death sentence.

Male Defendant is coded 1 if the defendant is male. Streib (1990) offers a study of cases from 1900 to 2005 and finds that females are less likely to face the death penalty than males. In discussing Streib's work, Songer and Unah (2006, 183) observe: "Empirical evidence suggests widespread reluctance on the part of prosecutors, judges and juries to sentence female offenders to death."

10. We have excluded from the analysis the small fraction of cases with multiple victims where the victims were not all of the same race.

Hindson et al. (2006, 572) also find that prosecutors seek the death penalty more often against males.

Results

Before delving into our regression models, we provide some baseline statistics related to our sample of cases. The first noteworthy finding is that Blacks are disproportionately represented among persons convicted of first-degree murder (see table 1). Although Blacks make up about 17 percent of Tennessee's population, they represent 48 percent of the first-degree murder convictions in our data. While it may be the case that murder rates vary by race, this discrepancy may also represent systemic discrimination in that White defendants may have been more likely to secure acquittals or convictions for lesser homicides through plea bargaining. Inequality in legal representation may well be involved here. While potentially important, that issue is beyond the scope of the instant research.

Between 1977 and 2016, prosecutors in Tennessee sought the death penalty in 26 percent of first-degree murder cases that resulted in convictions. In 42 percent of these cases, juries returned death sentences; thus, 11 percent of all first-degree murder convictions resulted in death sentences. Table 1 suggests that being White actually increased a defendant's likelihood of being selected for, and receiving, capital punishment, as did the alleged killing of a White victim.

	% of all first-degree murder convictions (n=1555)	**% cases where prosecutor sought the death penalty** (n=410)	**% cases where jury returned a death sentence** (n=172)
Defendant's race			
White	49%	57%	62%
Black	48%	40%	35%
Other	3%	3%	3%
Race of victim(s)			
White	61%	73%	75%
Black	35%	25%	24%
Other	4%	2%	1%

Table 1: Racial profiles of cases

Note: Interpret table as follows: Of all cases in the dataset, 49 percent involved White defendants; in cases where the prosecutor sought the death penalty, 57 percent of defendants were White, and so on.

Figure 1 compares the rates at which prosecutors sought, and juries returned, death sentences—intersecting the race of defendants and race of victims. It shows that prosecutors were more likely to seek the death penalty, and juries more likely to opt for death, when victims were White. Thus at first glance, we may have evidence in support of our hypothesis that prosecutors and juries engage in discrimination based on the race of the murder victim. The race of defendants does not appear to have mattered as much to prosecutors. However, juries were more likely to return death sentences when both defendants and victims were White.

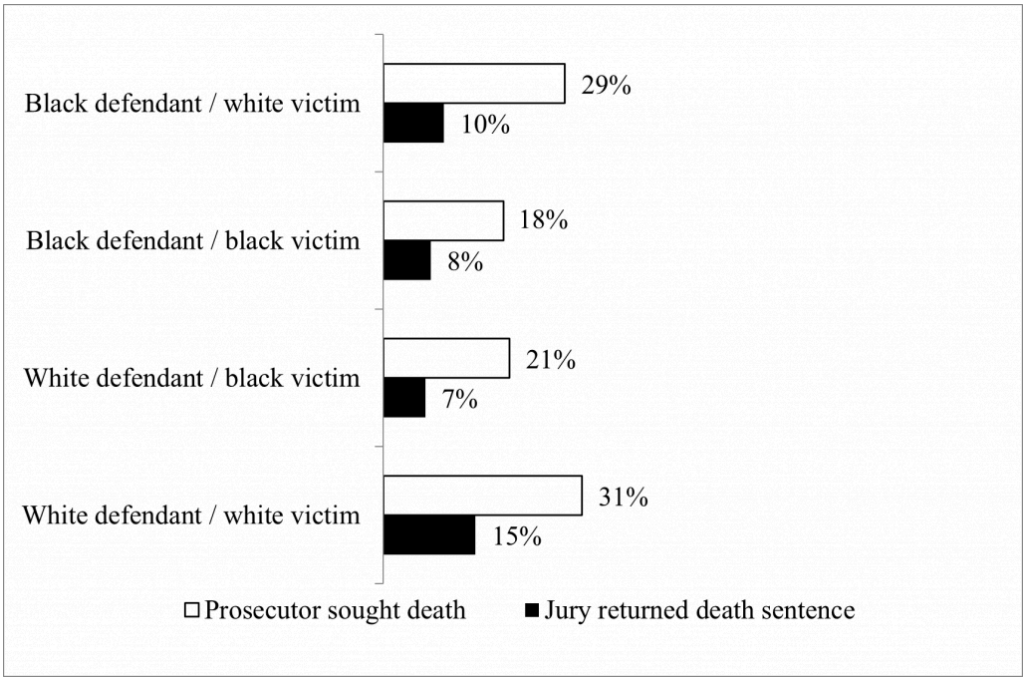

Figure 1
Rates at which prosecutors sought and juries returned death sentences by race of defendants/victims
Note: *Interpret this figure as follows: Prosecutors sought capital punishment in 29 percent of cases where Black defendants were accused of killing Whitevictims, and so on.*

Figure 2a displays the rate at which prosecutors sought the death penalty for White defendants and Black defendants over the period of our study. The most striking feature of the graph is the more or less steady decline in the rate at which prosecutors sought the death penalty, irrespective of the race of defendants. With regard to race of defendants, the graph shows that, in most years, prosecutors sought the death penalty at a slightly higher rate when defendants were White.

Figure 2b compares the rate, over time, at which prosecutors sought the death penalty when there were White victims and Black victims. It does show that, in most years, prosecutors were more likely to seek the death penalty when murder victims were White.

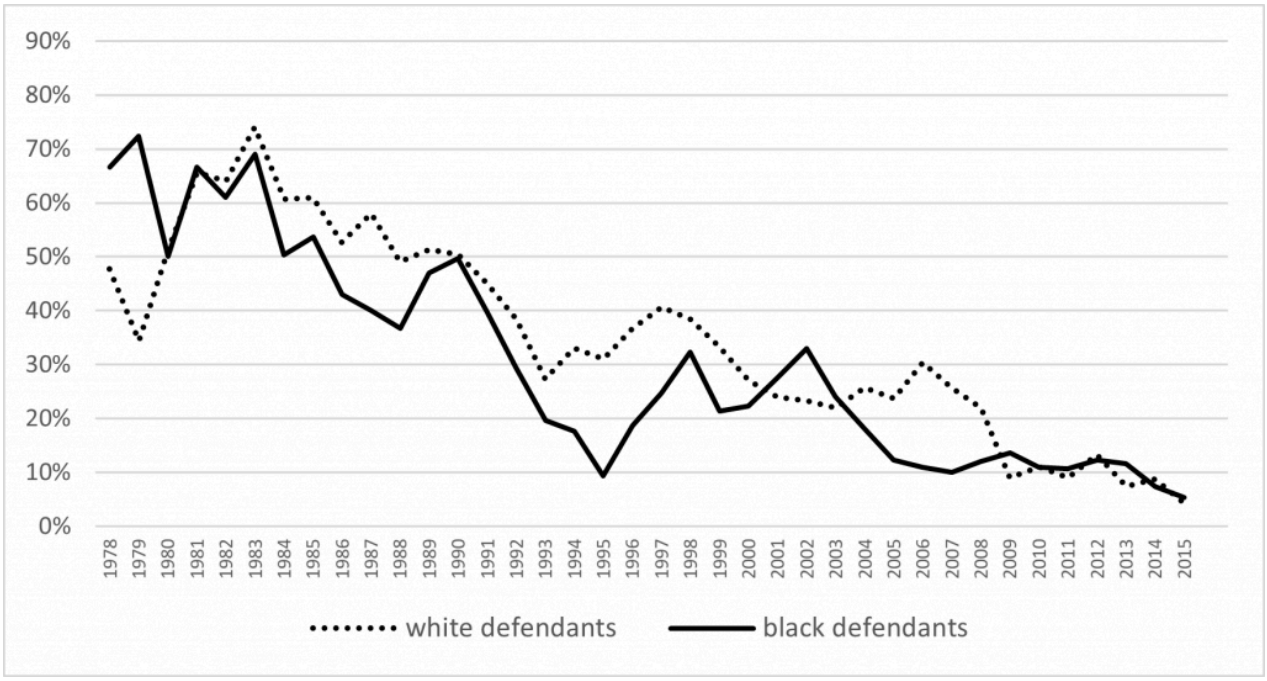

Figure 2a
Prosecutors sought death penalty by race of defendant
(3-yr moving avg)

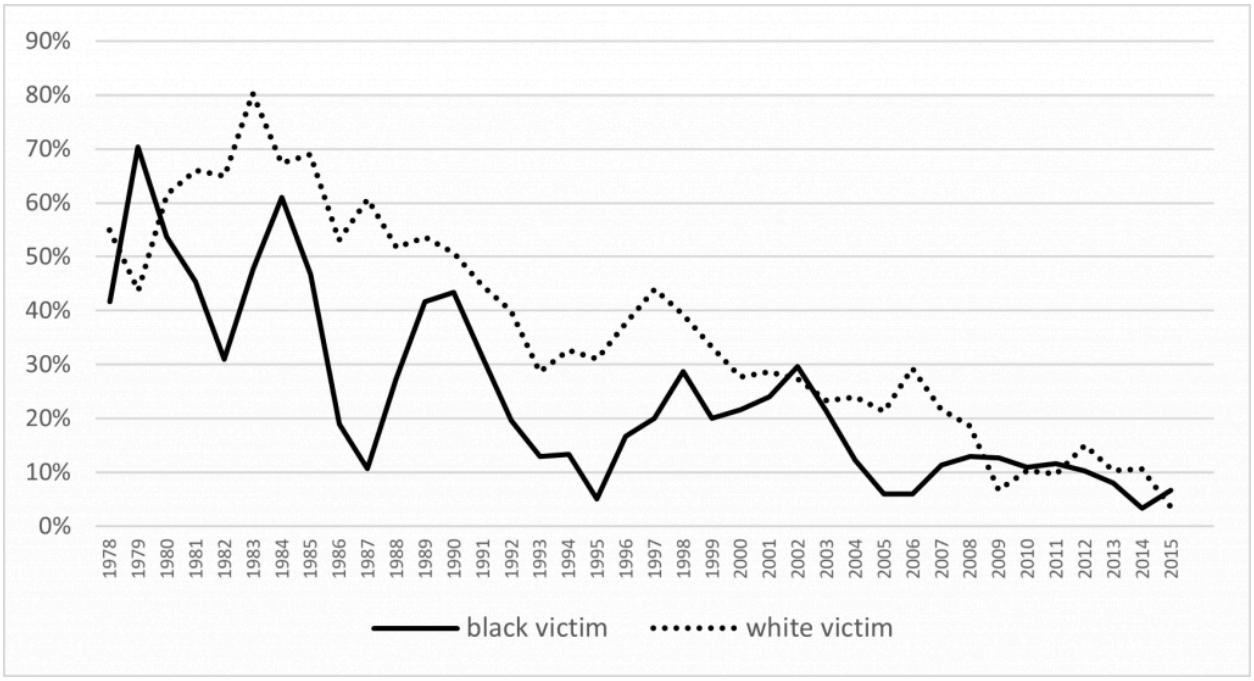

Figure 2b
Prosecutors sought death penalty by race of victim
(3-yr moving avg)

Figure 3a shows the rate at which juries sentenced White and Black defendants to death; figure 3b displays the same for White and Black victims. Figure 3a shows that, in most years, juries were more likely to return death sentences when defendants were White. Figure 3b indicates that juries were more likely to opt for death when victims were White.

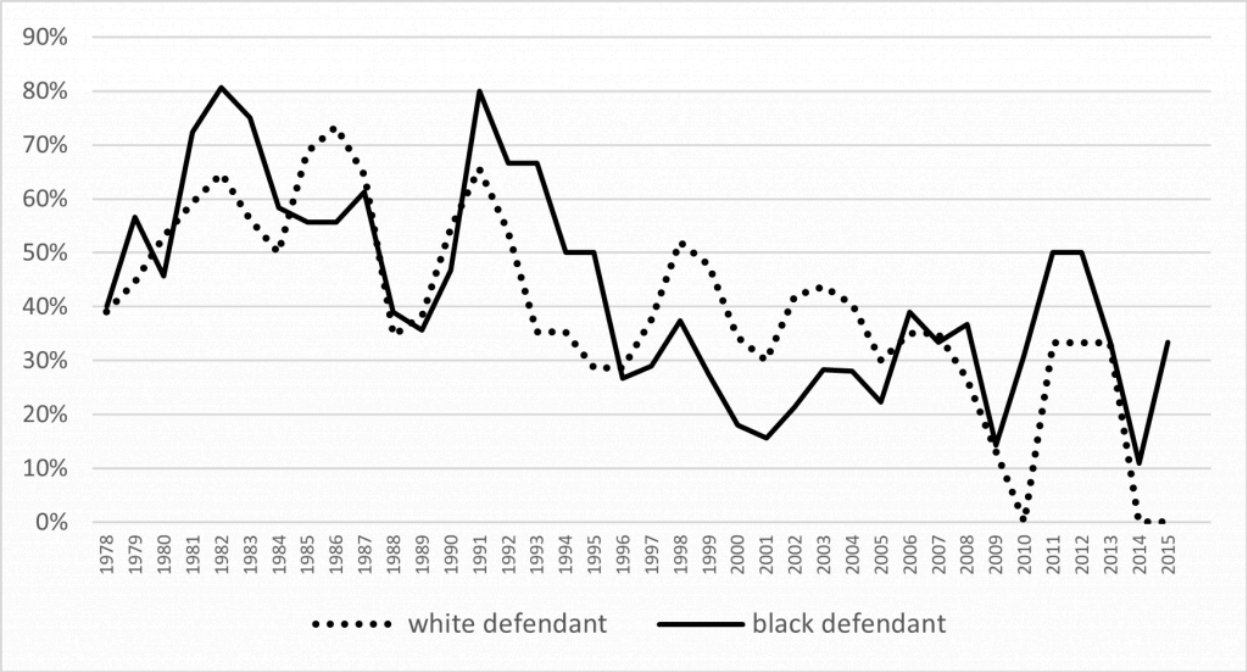

Figure 3a
Jury imposed death sentence by race of defendant
(3-yr moving avg)

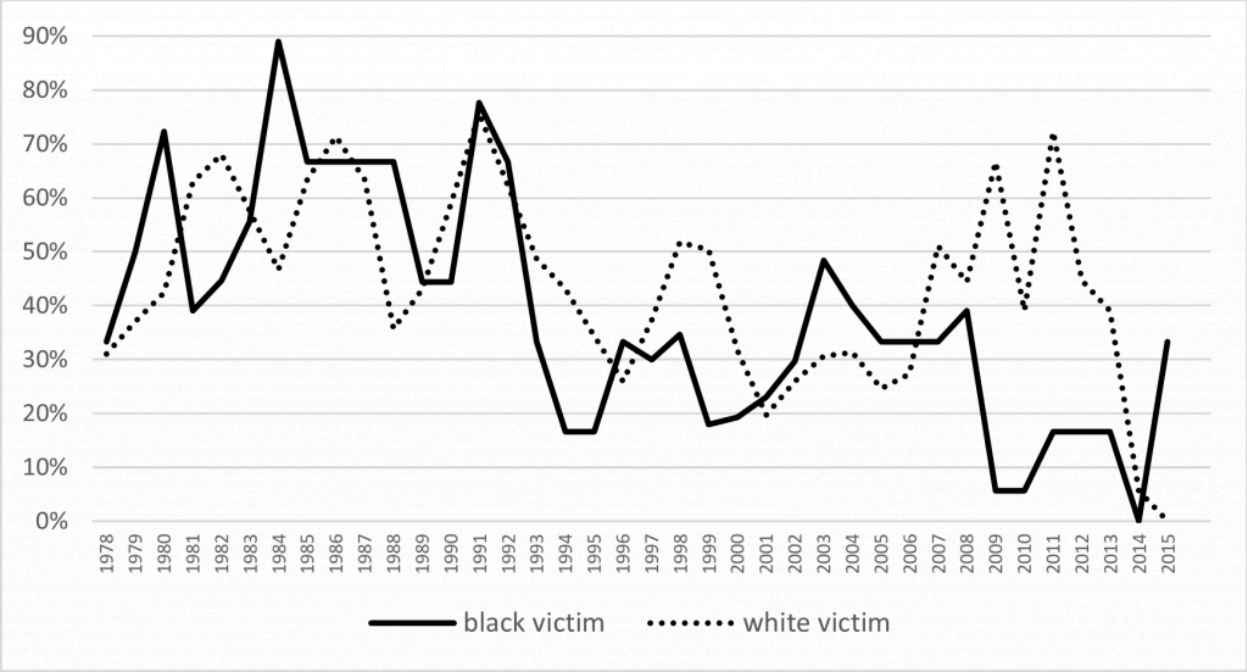

Figure 3b
Jury imposed death sentence by race of victim
(3-yr moving avg)

Thus far, the data appear to support our hypotheses. The next step is to determine whether these apparent racial differences persist when other factors are taken into account. To this end, we turn to our logistic regression models. In addition to examining the race of defendants and victims as independent variables, we incorporate our series of independent variables related to the other traits of defendants and victims, the characteristics of crimes, and the nature of the evidence presented by the state.[11] We develop two models, one focused on the prosecutor's decision to seek the death penalty, the other focused on the jury's decision to return a death sentence.

11. While we have data on numerous variables in these categories, we have chosen to incorporate only those variables that are statistically significant in one or both of our models or those that are theoretically relevant to the analysis.

A Model of the Prosecutor's Decision to Seek Capital Punishment

Table 2 provides the results of a logit model where the dependent variable is the prosecutor's decision to seek the death penalty. Although the defendant's race is not a significant predictor of prosecutorial decisions to seek the death penalty, the race of the victim is, as we expected, a significant predictor of prosecutors' behavior. When the victim is White, *ceteris paribus*, the prosecutor is approximately 1.5 times more likely to seek a death sentence. However, it should be noted the effect of a female victim is just as strong—also approximately 1.5 times more likely for the prosecutor to seek death in such cases.

Independent variables	Coefficient	P value	Standard error	Odds ratio
Victim traits				
White victim	.395**	.016	.163	1.48
Female victim	.391***	.004	.135	1.48
Law enforcement or public official	1.58***	.000	.414	4.83
Defendant traits				
Black defendant	-.181	.269	.164	.835
Male defendant	.279	.306	.273	1.32
Previous violent felony	.672***	.000	.126	1.96
Crime traits				
Urban county	.010	.941	.135	1.01
Three or more victims	1.72***	.000	.334	5.6
Abnormal method of killing#	.150	.266	.135	1.16
Dangerous concurrent crime^	.284**	.027	.129	1.3
Concurrent rape	1.07***	.001	.454	2.92
Evidence				
Coperpetrator testified	.580***	.006	.212	1.79
Familiar witness ID	.486*	.090	.287	1.63
Defendant confessed	.911***	.000	.203	2.49
Scientific evidence	.483*	.069	.266	1.62
Constant	-2.43	.000	.310	
Pseudo R-squared	.10			
Correctly classified	75.4%			
Number of cases	1555			

Table 2: Logit model of prosecutor's decision to seek the death penalty

Dependent Variable = Prosecutor Sought Death Penalty

= stabbing, throat-slashing, drowning, beating, strangle/suffocate, poisoning, burning, pushing off high building, or hitting with a vehicle

^ = arson, robbery, burglary, kidnap, aircraft piracy, child abuse, theft, or bombing

*= p<.10; **= p<.05; ***= p<.01; two-tailed test

While the effect of the victim's race on prosecutorial decisions is not completely eliminated by our controls, we should note that several other factors appear to have a much greater effect on prosecutors. In particular, the killing of a law enforcement agent or public official (4.83 times more likely), a murder accompanied by rape (2.92 times), a murder accompanied by a dangerous concurrent crime other than rape (1.3 times), the presence of three or more victims (5.6 times), and a defendant's prior violent felony conviction (1.96 times) all had a statistically significant impact in increasing the likelihood of a prosecutor's decision to seek the death penalty. Moreover, all four of our evidence variables, including the presence of scientific evidence (1.62 times), an identification from a witness previously familiar with the defendant (1.63), a coperpetrator's testimony against the defendant (1.79 times), and a defendant's confession (2.49 times), are all statistically significant.

A Model of the Jury's Decision to Return a Death Sentence

Table 3 presents the same logit model, except here the dependent variable is the jury's decision to return a death sentence. This analysis is limited to the 26.4 percent of all cases where prosecutors sought the death penalty. For table 3, unlike in the previous model, and contrary to our hypothesis, the race of the victim does not have the expected impact on juries. In fact, when everything else is taken into account, the presence of a White victim appears to reduce the odds that the jury will opt for death (although the coefficient is not statistically significant). However, if the victim is a member of law enforcement or a public official, the odds ratio indicates a greater likelihood (6.3 times) of the jury imposing a death sentence.

Independent cariables	Coefficient	P value	Standard error	Odds ratio
Victim traits				
White victim	-.138	.676	.329	.871
Female victim	.342	.194	.264	1.41
Law enforcement or public official	1.84***	.006	.663	6.3
Defendant traits				
Black defendant	-.996***	.003	.338	.369
Male defendant	1.17*	.086	.681	3.22
Previous violent felony	1.48***	.000	.253	4.42
Crime traits				
Urban county	.647**	.016	.268	1.91
Three or more victims	-.287	.554	.485	.750
Abnormal method of killing#	.-.215	.410	.261	1.24
Dangerous concurrent crime^	.082	.730	.239	1.08
Concurrent rape	.101	.834	.481	1.11
Evidence				
Coperpetrator testified	1.65***	.000	.386	5.22
Familiar witness ID	1.29**	.014	.524	3.63
Confessed	1.17***	.001	.339	3.21
Scientific evidence	1.49***	.001	.450	4.41
Constant	-3.02	.000	.746	
Pseudo R-squared	.199			
Correctly classified	73.66%			
Number of cases	410			

Table 3: Logit model of jury's decision to impose the death penalty

Dependent variable = jury returned death sentence

= stabbing, throat-slashing, drowning, beating, strangle/suffocate, poisoning, burning, pushing off high building, or hitting with a vehicle

^ = arson, robbery, burglary, kidnap, aircraft piracy, child abuse, theft, or bombing

*= p<.10; **= p<.05; ***= p<.01; two-tailed test

The race and sex of the defendant do have some impact on juries—but maybe in a manner that some would find surprising. First, Black defendants actually are *less* likely than Whites to get the death penalty (odd ratio of .369); males, though, are much more likely than females to be sentenced to death (odds ratio of 3.22).

It is noteworthy that juries appear to be strongly influenced by the nature of the evidence. The testimony of an alleged coperpetrator (5.22 times), a confession by the defendant (3.21 times), an identification of the defendant by a familiar witness (3.63 times), and the presence of scientific evidence (4.41 times) all make juries much more likely to hand down death sentences. The defendant having a previous felony conviction also appears to have a large impact in the same direction, just as it did with prosecutors (odds ratio of 4.42). Ultimately, this may serve as a positive pronouncement regarding the imposition of capital punishment in Tennessee, as the evidence variables appear to carry greater explanatory clout than do variables related to racial characteristics (whether of the defendant or the victim). Finally, we also note that juries in urban counties appear to be more likely to return a death sentence than juries in rural counties (odds ratio of 1.91). A theoretical explanation for this finding might be related to increased crime rates in such regions, and a potential for jurors to respond with a "tougher" stance on criminal conduct; future research may wish to address this matter more specifically.

Discussion

Our hypotheses were only partially supported by the analysis. Although Tennessee prosecutors were more likely to seek the death penalty when the victim of a death-eligible homicide was White, juries were not impacted by the race of the victim when it came to imposing a death sentence, while controlling for a litany of variables related to the victim, the defendant, the homicide itself, and the nature of available evidence. Moreover, race-of-defendant effects are not apparent in our research, as Black defendants in Tennessee were neither more likely to be charged with a capital crime by prosecutors nor more likely to be sentenced to death by a jury. Additionally, our research demonstrates that a defendant's criminal history and whether a victim was a law enforcement or public official are very strong predictors of *both* prosecutorial decisions to seek and jury decisions to impose capital punishment. Generally, it seems likely that high-profile killings—such as those of public figures and those whom members of the community look up to as providing an important public service—would engender sentiments leading both prosecutors and jurors to support capital punishment. Along the same lines, the statistical significance of our criminal history variables could be indicative of a perception that defendants with prior violent felony convictions may be incapable of rehabilitation.

Furthermore, when it comes to juries, the types of evidence available, more so than the race of a victim, seem to have a powerful impact on the likelihood of a death sentence. Perhaps for some jurors, it follows, the quality of evidence can play a role in reducing concerns related to imposing a capital sentence on an innocent person. In that regard, our results may instill confidence in the jury system, especially since prosecutors could have motives other than seeking justice (e.g., electoral considerations) influencing their decisions. Buttressing this assertion is the finding that a prosecutor is more likely to seek a death sentence when a homicide victim is female; however, our research also demonstrates that a victim's sex does not affect juries that are deciding whether to impose a capital sentence. Even so, juries appear less likely to impose a death sentence on female defendants than on male defendants, which may suggest that jurors are less sympathetic to male defendants sitting before them.

Concluding Thoughts

Our findings suggest that future research regarding capital punishment in this country should separate the prosecutorial decision to seek the death penalty from the jury decision to impose it, as different influences can impact each phase. Beyond that, future research also should account for the evidence that juries consider while pondering the implementation of this nation's most severe criminal sentence; our results demonstrate that the nature and quality of evidence, perhaps even more than the racial demographics of relevant parties, plays a critical role in the imposition of capital punishment in the state of Tennessee.

Finally, given the importance of these evidence variables and the variables related to prior criminal history, we suggest that future research examine the interaction between the racial characteristics in our models and the variables that address evidence and prior criminal history—to assess whether the interplay between and among key variables holds any relevance for this process. In short, future research might wish to consider if the race of the victim might impact the level of urgency driving the evidence-collection process; thus, a subsequent paper could intersect evidence collection variables with the race of the victim and the race of the defendant in capital cases. Moreover, while our paper does not show evidence of explicit bias against defendants along racial lines, our finding that prior criminal history is a strong predictor of a death sentence could be masking underlying discrepancies in felony convictions across races, a matter that future research should confront more directly.[12] Overall, although this paper focuses

12. In our data, 48 percent of Black defendants had previously been convicted of one or more violent felonies, as opposed to 35 percent of Whites. The difference is significant at .000.

only on the state of Tennessee, our work adds to a body of literature examining racial influences on prosecutorial discretion and jury decision-making in states that still utilize capital punishment.

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Classroom Exercises

1. Have a discussion on the problem of selection bias as it relates to the instant research. Could it be that African Americans are overrepresented in the data set because White defendants were more likely to be convicted of lesser forms of homicide as the result of plea bargaining? If this were true, would it affect the findings regarding discrimination based on the race of defendants as well as crime victims?
2. Ask students to find the statutory aggravating factors provided in different state statutes. Each student could be assigned a different state. This would require students to learn how to locate and read state statutes. When the information has been collected, have a discussion on how these factors vary across states. To facilitate this exercise, a compendium of statutory aggravating factors can be found at https://deathpenaltyinfo.org/facts-and-research/crimes-punishable-by-death/aggravating-factors-by-state.

35. Trial Court Policy Making

The Case of Criminal Probation

SHANNON ISHIYAMA SMITHEY AND KRISTENNE M. ROBISON

Criminal probation seldom attracts the attention of political scientists, but it is one of the most significant aspects of judicial policy making. Trial courts sentence far more Americans to terms of probation each year than to jail or prison. Individuals on probation comprise the largest share of individuals under criminal supervision in the US, reaching a total of over 3,450,000 people and an expense of more than 3 billion dollars by 2018 (Pew 2018: BJS 2016: Maruschak and Minton 2020; US Courts 2013). The number of people affected, and the heavy degree of public investment, means that probation policies and practices deserve the attention of judicial scholars. As Friedman (2016) suggests "It's impossible to understand the true scope of America's criminal justice system without looking at probation."

In this paper, we examine the probation cases handled by the trial courts in a typical American county that we call "Creekview." As we focus on these cases, we highlight three of the ways in which trial courts make policy. First, we show that trial courts do more than merely enforce the policies made by the legislature or appellate courts—they are important policy-makers in their own right. Second, we explain that trial court judges are not solo actors when they make policy. They do their work within a web of relationships, the "courthouse working group," that is characterized by shared norms, mutual dependence, and exchange. Third, we explain how trial court policy making takes place within a series of environmental conditions that enable some policy options while constraining others.

Probation as Policy

Probation has become an increasing share of trial court policy making over the last three decades. In the 1970s and 1980s, reformers argued that the criminal justice system should move away from the sharp dichotomy between imprisoning offenders or releasing them with minimal supervision (Morris and Tonry 1990; Petersilia et al. 1992). They recommended expanding probation to include a wider range of "intermediate punishments" that could be carried out while offenders lived in their communities. Policy makers acted on this suggestion by significantly expanding the range of sanctions that could be applied to individuals in lieu of incarceration. Courts responded by significantly increasing their use of intermediate sanctions, vastly expanding their reliance on

probation as a key sentencing choice.[1] As a result, the number of probationers ballooned from just over 1 million in 1980 to a peak of 4,293,000 in 2007 (BJS 2016).[2]

Although the range of intermediate sentencing options was created by legislatures, trial courts were the institutions that decided on the mix of conditions to impose. Choosing which options will apply to which offenders is a multistage process, where judges weigh a variety of factors before they impose a sentence. Among these factors are the nature of the charges filed by the prosecutor, the offender's risk of reoffending and need for services (usually presented in a report compiled by the probation staff), and the nature of the offender's prior record. Since the majority of criminal court cases result in a sentence of probation, this takes up considerable court time.

Judges also decide what to do with individuals who violate the conditions of their probation. Once probation officers notify the court of a probation violation, judges choose whether to hold a revocation hearing.[3] During these hearings, judges review the nature of the violation and decide whether probation should be continued, revoked and reimposed, revoked and extended, or revoked and replaced with incarceration. Because more than one-quarter of individuals on probation will undergo these hearings, revocation considerations add significantly to the probation work done by trial courts.[4] The resources required have been significant enough to

1. There are three categories of probation conditions. The first group, known as "standard conditions," include requirements that probationers desist from crime, avoid known criminals, participate in work or attend school, notify the probation office of any change of address, seek permission for trips outside the county, pay fines or fees, and check in periodically (often once per month) with the probation officer. The second group of "therapeutic conditions" requires participation in programs—alcohol or drug treatment, mental health counseling, anger management, parenting or literacy classes—based on the hope that participation will help probationers rehabilitate themselves. The third group of conditions is often considered "punitive" because it increases the cost and intrusiveness of supervision for probationers. Punitive conditions include heavy monetary fines, license suspension, increased frequency of reporting, home checks, house arrest, urine testing, no contact orders, and mandated community service. For further discussion, see Cole, Gertz, and Bunger 2004; Doherty 2016.
2. During that same period, the number of people in prison climbed from approximately 100 inmates per 100,000 Americans to over 700 per 100,000.
3. Probation officers have a degree of discretion in choosing how to respond to evidence of probation violations. "When offenders do not comply with supervision stipulations, officers may impose stricter requirements, financial burdens, or even recommend that an offender's probation or parole term be revoked, and the offender imprisoned. Therefore, community corrections officers are in a critical position" (Ricks et al. 2016, 337–8). See also Jones and Kerbs (2007).
4. For example, when Florida began reporting revocations in 2003, it added almost 100,000 felony cases to its official count of 389,127 felony cases (LaFountain et al. 2009, 24).

prompt some counties to create separate units just for conducting revocation hearings (Taxman 1995).

Over time, the pattern of decisions adds up, so that court policy is visible in the aggregated set of probation sentences. On the whole, American trial courts have used probation to become more punitive (Doherty 2016). They have also "widened the net" by imposing tougher conditions and subjecting probationers to more extensive supervision. This in turn increased the odds that judges would resentence probationers, either by extending the time to be served in the community or replacing community supervision with incarceration (Horman and DeMercurio 2009; Gross 2010; McIvor 2016). A significant share of prison admissions each year result from probation revocations.[5]

Trial Courts as Policy Makers

The work of trial courts is central to the study of judicial politics because trial courts are responsible for the vast majority of the judicial policy making that occurs. The first point to stress about trial court policy making is that trial courts both originate policy and affect policy in the ways they apply the doctrines made by others. The trial court judge "works on the front lines" of the justice system—defining problems, formulating alternatives, and adopting solutions (Mather 1995, 188). The power to originate policy—to "whip it up from scratch"—is particularly noticeable when cases present issues that have not been encountered before. Policy also gradually accumulates as trial courts' responses to recurrent issues establish consistent patterns (Mather 1998).

It is at the trial court level where abstract legal doctrines become practical policy. Appellate courts announce legal principles. Trial court judges and lawyers then clarify and elaborate on those principles as they interpret legal doctrines and apply them to real disputes.[6] For example, trial court lawyers and judges have the responsibility of handling pretrial negotiation, deciding on the

5. In Pennsylvania, for example, the cost of incarcerating individuals for probation and parole revocations is approximately $100 million per year (Mahon 2019).
6. In their classic work, Johnson and Canon (1984) argue that the efficacy of judicial policies hinges on four "populations"—the interpreting population, which decides on the meaning of the decision; the implementing population, which is in charge of putting the policy into practice; the consumer population, which gains or loses directly as a result of the policy; and the secondary population, which has no direct stake in the policy but may bring pressure to bear on those who do. Trial court personnel embody three of these four populations.

admission of evidence, conducting trials, and assigning sentences. Appellate court doctrines only take effect when other policy-makers turn abstract principles of law into concrete decisions.[7]

The second point to stress about trial court policy making is that trial court business is conducted within a network known as the "courthouse working group," a series of "regular participants—judges, defense attorneys, prosecutors, police, court staff—who must cooperate with one another if they are to do their jobs" (Church 1995, 135). Each person within the group cooperates with the others because each "has interests and goals he or she cannot readily accomplish alone" (Cole, Gertz, and Bunger 2004, 5). Judges need lawyers to negotiate bargains in order to avoid a backlog of cases. Prosecutors need defense attorneys to accept the bargains they offer, and defense attorneys need to obtain bargains that their clients will accept instead of insisting on a trial. If one part of this system breaks down, the result is significant disruption for everyone.[8]

The members of the courthouse working group develop a set of shared norms that we call the "courthouse culture." These norms are learned, internalized, and reinforced by the repetitive interaction between group members. The local culture includes legally relevant factors such as prior record and severity of the crime but also includes judgment calls that allow biases relating to moralism, social acceptability, and stereotypes to influence probation decisions (Steffensmeier et al. 1998; Leiber et al. 2011). The courthouse culture defines what is considered appropriate in the interactions between working group members. For example, the courthouse culture tempers the retributive impulses of prosecutors and restricts the degree to which defense attorneys insist on adversarial due process (Bach 2009; Heumann 1977). Group culture affects how criminal behavior gets categorized and the specific amount of punishment ordered.[9] Group norms constrain individual discretion and facilitate efficient case processing, as attorneys make recommendations to their clients with the knowledge of which outcomes are likely.

7. Court personnel regularly report the idea that courts lack sufficient resources to conduct trials in more than a very small percentage of cases, even though court workload does not explain different degrees of plea bargaining in different jurisdictions (Church 1995). There is nevertheless strong pressure across courts to achieve a negotiated settlement in order to avoid the time, trouble and uncertain outcomes of a trial (Mather 1995; Heumann 1977).
8. Court personnel regularly report the idea that courts lack sufficient resources to conduct trials in more than a very small percentage of cases, even though court workload does not explain different degrees of plea bargaining in different jurisdictions (Church 1995). There is nevertheless strong pressure across courts to achieve a negotiated settlement in order to avoid the time, trouble and uncertain outcomes of a trial (Mather 1995; Heumann 1977).
9. Sudnow (1965) referred to the idea of a standard label used to categorize illegal behavior as the "normal crime" and the typical punishment handed down as the "going rate."

The third point to stress about trial court policy making is that the policy options available to trial courts are strongly influenced by the local environment. Counties vary significantly in terms of the conditions that make specific sentencing choices available. Median income, civic norms, rates of crime and substance abuse, jail or prison capacity, and the presence or absence of social service agencies all affect what options are on the table. Some counties have no drug rehabilitation facility, making it difficult to sentence offenders to drug treatment. Others lack the diversion programs that are used elsewhere to provide special supervision for juveniles, veterans, or the mentally ill. Even if court personnel believe in the efficacy of diversion programs, their use depends on

> the cooperation of various agencies including police, treatment providers, courts, and welfare agencies…the success of these programs depends on a wide array of social services, specialized professionals and even recreation programs….Successful diversion may depend, for example, on placement in an after-school program, but a rural community may have none. It may depend on treatment of concurrent mental health and delinquency problems, even as such treatment is unavailable in a rural community.
>
> (Pruitt 2009, 396–98)

Environmental conditions, often completely beyond the control of courts, will provide judges with some policy options while limiting or foreclosing others.

Creekview Adult Probation

To provide a more in-depth look at the way that trial courts make policy through the probation process, we collected data on the adult probation population of "Creekview" County, a medium-sized county in the northeastern United States. Creekview is a Rust Belt county with declining population and industry accompanied by a fair share of opioid abuse. Creekview Adult Probation provides community supervision for those arrested and convicted in the county that then get sanctioned to probation. In September 2011, the Creekview Adult Probation office employed 11 probation officers and four administrators, as well as a number of support and collections staff, supervising a caseload of 1,253 probationers. We drew a random sample of 500 probationers for which we collected a variety of data, from probation office files and public records, then followed them for six years. Examining the patterns evident in probation sentencing and supervision reveals some interesting insight into policy making in that local courthouse.

First, our data reveal clear patterns of judicial policy making in the area of probation sentencing.

Probation is used much more frequently for some crimes than others. The influence of local priorities is apparent when we compare these figures to those for the state as a whole (see table 1).

	Creekview	**State**
Felony	27%	25%
Misdemeanor	70%	66%

Table 1: Share of probationers by offense type

The largest share of Creekview probationers plead guilty to misdemeanors, which is slightly higher than the state average. We see greater disparity when we compare the kinds of offenses for which people are serving community sentences (see table 2).

	Creekview	**State**
Property Offense	34%	21%
DUI	33%	23%
Violent Offense	10%	14%
Drug Offense	8%	15%

Table 2: Share of probationers by type of crime

Convictions for property crimes and DUI comprise the majority of probation sentences in Creekview, which is considerably higher than is typical in the state.[10] The relatively small share under supervision for drug crimes or crimes of violence does not suggest that these problems are not taken seriously in Creekview, but instead that local courts view these as more serious crimes that deserve a sentence of incarceration.

The intermediate punishments used in Creekview present a mix of punitive and therapeutic policies. Those convicted of DUI often have their licenses suspended (punitive), but they may also be required to attend DUI school to learn to drive more responsibly (therapeutic). More than half of probationers were required to submit to a drug and alcohol assessment, so that

10. The district attorney expressed frustration that he could not convince local judges to sentence many petty property offenders to prison. His response was a classic example of net widening. When faced with offenders with a series of petty thefts arrests, he regularly asked judges to impose terms of probation that would run consecutively, in order to increase the odds that such offenders would be rearrested and incarcerated for violating their probation conditions.

individuals suffering from addiction could be identified and compelled to undergo treatment for substance abuse. While rehabilitation is designed to help addicts (therapeutic), the expense and time away from work or home that is required to undergo treatment may impose additional hardship (punitive). Very few probationers were required to participate in other therapeutic programs, such as mental health screening, anger management, or domestic violence prevention classes.

The pattern of probation policy in Creekview fits with the national trend toward using probation as a form of punishment. A much higher share of Creekview probationers was subject to intensive supervision—25 percent of our sample was subject to more frequent reporting and drug testing, compared to 8 percent in the state as a whole. Just over one in five probationers was sentenced to a period of house arrest (median length 90 days), which was accompanied by a start-up charge of $50 and a $20 per day fee. All probationers in Creekview were also required to pay fines and court costs, with a median assessment of just over $1,000. Twenty percent are required to pay restitution to their victims, with a median charge of $746. Many of the people to whom these financial penalties apply are economically marginal, which is reflected in the more than 25 percent who still owed money to the probation office at the end of 2015, more than four years after we first explored their records. The overall pattern demonstrates that judges regularly make use of punitive options.

Creekview's approach to probation demonstrates our second point about trial court policy making—that trial court policy is made by a working group that cooperates according to shared norms, rather than by judges in isolation. In the area of probation policy making, the working group includes judges, prosecutors, and defense attorneys, but also probation officers. The probation officer acts as the agent of the court, putting the plea bargains negotiated by attorneys and the sentences handed down by judges into effect. They have significant discretion in deciding whether probationers are complying with the terms of their sentences in ways that make the difference between an offender's continuing on probation or serving time (Doherty 2016).[11] Probation officers in Creekview often use their discretion to counsel probationers who admit to minor drug use, while recommending revocation for repeat offenders who fail to desist from harder drugs. One officer commented that "normally when you revoke, you don't put someone in jail for their first positive or just being discharged." Another reported that "as the types of drugs have become more serious, we are less likely to revoke someone for marijuana. If someone is using an IV drug, we often revoke to save them."

The regularity of interaction between probation staff and the rest of the working group in

11. Much of this goes on without direct review by others, so long as probation officers themselves do not bring the case back to the attention of the judge. One exception here is rearrest of the probationer, which will result in additional appearances in court.

Creekview reinforces a shared point of view. Their supervision practices and their attitudes toward probationer behavior both influence and are influenced by local group norms. As in other parts of the US, Creekview probation officers appear regularly in court to provide information in advance of sentencing and in subsequent review hearings.[12] Their discretion is bounded by administrative oversight and the need for judicial approval to make good on threats of revocation or the imposition of additional legal sanctions. The attitudes and sentencing patterns of judges are clear to probation staff, who in turn explain to their clients the ways judges are likely to respond to negative behaviors or attempts to reform. In Creekview, norm-sharing is facilitated by physical proximity—the probation office is located immediately adjacent to the courthouse, where all criminal trials take place and in which the offices of county judges and the district attorney are housed. The bond between the members of the Creekview working group was so strong that the president judge recruited probation staff to help design and oversee the county's new drug court program that launched in the middle of our study.

We also see cooperative policy making among members of the working group through the creation of employment programs for individuals under community supervision. Reflecting a strong shared belief that unemployment encourages criminality,[13] members of the working group developed two programs designed to help probationers find gainful employment. The first program allows offenders to complete their court-ordered community service by working for the county government. By proving themselves to be reliable workers, probationers have the opportunity to make themselves attractive hires for jobs with the county. The second employment program emerged from the efforts of the district attorney who worked with Creekview judges and social service agencies to identify businesses in the county that were amenable to hiring individuals with felony convictions. Because both programs are viewed as successful by courts and probation

12. Probation officers may influence court decisions through the presentencing reports they submit. Commentators like Rosecrance (1988) and Leiber et al. (2011) suggest, though, that the content of presentencing reports reflects less what probation officers value than what judges will accept. "The emphasis in such accounts is on the efforts of other actors to persuade the judge, since it is the judge—not the probation officer or prosecutor—who is the final arbiter in sentencing" (Leiber et al. 2011, 320).
13. Due to economic decline in Creekview, finding and maintaining full-time employment is seen as very challenging. Finding legitimate employment benefits the community as well as the individual, given that employment significantly reduces the odds of reoffending. See, for example, the Criminal Justice Policy Group (2019).

staff,[14] judges now regularly consider including participation in such programs as a condition of probation.

We can also see shared attitudes in action by exploring the typical probation sentence, or "going rate," for crimes in Creekview. The median sentence length is twelve months. The largest share of probationers (48 percent) is required to report once per month. The use of fines and fees is universal, despite the economic marginality of many probationers. Probation debt creates economic burdens that make it harder for individuals to exit probation successfully (Harris 2016). When asked about this, probation staff relayed the ideas, widely shared in Creekview, that paying probation debt is morally appropriate and that it is only fair for those who have prompted the expenditure of public resources to pitch in to help pay the cost.[15] These responses may also reflect pessimism about the efficacy of their work and the potential for probationers to desist from crime. When asked about program outcomes, one veteran probation officer said, "They all come back," even though the recidivism data contradict that negative impression.[16] The key here is not that the working group's view is objective, but that it is subjectively theirs and that it influences their behavior in common.

The response to domestic violence crimes provides an additional example of the "normal crime" and the "going rate" in Creekview. State laws provide that a wide variety of crimes committed against a person with whom one shares a child, a current or former spouse or cohabiting partner, or their parent or guardian, can be charged as acts of domestic violence.[17] While a number of probationers in our sample were charged with offenses that would qualify (such as terroristic threats, harassment, disorderly conduct, and cyberstalking), few were officially labeled or charged

14. One probation officer shared this story during an interview: "One of my clients is working now. The judge went out of his way to use supervision program to create a position to have him hired through….They liked him so much that they said 'hey if an opportunity ever came up we would like to hire him.' Well a long story short, the judge said 'well maybe we could do something part time through the supervision program because there's supposed to be a couple of people retiring in September/October.' He's working for the county now and he's probably going to end up with a full-time job."
15. By 2014, Creekview had two full time staff and one part-timer whose efforts were completely devoted to debt collection, a combined salary and benefit expenditure of well over $100,000 annually. The costs of ensuring that probationers pay $20 may well outweigh the revenue generated.
16. More than 60 percent of probationers managed not to reoffend during the four years we followed their progress. Given that many of the probationers came from challenging backgrounds, and experienced regular surveillance during their time on probation, this is a positive result.
17. State law lists 31 domestic violence misdemeanor charges: https://www.pcadv.org/policy-center/misdemeanor-crimes-of-domestic-violence/.

as "domestic violence." Instead, as in Wasileski and Poteyava's (2019) study of magisterial courts,[18] we find a courthouse culture that conceptualizes these crimes without particular regard for the domestic violence component. Sentences handed down for terroristic threats, simple assaults, or disorderly conduct very seldom include a requirement to attend classes for domestic violence prevention.[19] "No Contact" orders in Creekview more commonly require probationers to stay away from places like gas stations or grocery stores than other people.[20]

This lower level of response to domestic violence is indicative of our third point about trial court policy making—trial court decisions are made within a series of environmental conditions that judges, attorneys, and probation officers do not fully control. While many communities have had success with batterer intervention programs and coordinated community responses to domestic violence,[21] these options are currently unavailable in Creekview. Limited budgets meant that domestic violence services were directed toward survivors rather than perpetrators. Not having organizations that provide antibattering programming in the immediate area discouraged Creekview's judges from requiring probationers to participate in domestic violence prevention. Even though judges, attorneys, and probation officers in Creekview are aware that domestic violence is a social problem requiring a public response, it is very difficult to require probationers to attend programming that does not exist locally.

The local environment provides limited options when sentencing probationers with addiction issues. Substance abuse is rampant in the county; the President Judge told one reporter that 90 percent of the trials list could be traced to drug addiction, an opinion echoed by attorneys and probation officers.[22] Judges in Creekview rely on the county's one rehabilitation provider to provide addiction screening, even though it was not feasible for the center to assess all of the probationers. Frustration with the problem led Creekview to create a separate Drug Court in order to provide a highly structured experience that involved greater discipline and support, as well as consideration of other social issues playing out in the lives of probationers with substance abuse problems. The increased demand that such programming places on the system's resources (in

18. Wasileski and Poteyeva (2019, 13) interviewed magisterial judges in rural counties of Pennsylvania, the majority of whom "raised concerns about the number of batterers who were initially charged with simple assault but then the charges were reduced to harassment."
19. Only five of our sample of 500 probationers were assigned to DV classes, which were conducted online in a program provided by the state instead of local service providers.
20. Of the 67 "no contact" orders issued to our probationers, 70 percent (47) were for property offenses, while 30 percent (20) were for crimes of violence.
21. See Mederos (1999); Pence and Shepard (1999).
22. More than half of our sample of probationers being ordered to undergo a drug and alcohol assessment, even if they had no documented history of drug or alcohol abuse.

money, time, and human capital) means that not everyone who might benefit can be required to take part as a condition of their probation.

We can also see environmental constraints affecting the employment programs. Cooperative employers in the local environment made it possible for judges to order some probationers to participate in the Jails-to-Jobs program, but there were limits to how frequently judges could choose that option. The program was not open to individuals whose most serious offense was a misdemeanor, which excludes the majority of people on probation. Many others are ineligible because, in order to balance concerns over retribution and public safety, the program excluded individuals who have been sentenced for sexual offenses, who have protection from abuse orders, pending criminal cases or revocation hearings, or who continue to owe money for restitution. The Jails-to-Jobs program should be seen as illustrating our larger point that trial court policy making is a creative but not purely autonomous process. Trial court policy making is both facilitated and constrained by factors outside the full control of judges.

Discussion

Those who are interested in the way that courts make policy should pay attention to the decisions of trial courts in the area of criminal probation. The lion's share of criminal court decisions in America results in a sentence of probation, making criminal probation a key trial court policy. Each year, millions of people serve terms of probation (twice as many as are held behind bars) and billions of dollars are expended to provide for their supervision. We owe it to ourselves, as students of the courts, to understand more about this significant aspect of judicial policy making.

In this study we describe three lessons to be learned about trial court policy making. First, that trial courts initiate policy in the way they solve problems in particular cases and in the way individual decisions accumulate into patterns of response. Second, that judges make policy as part of an ongoing "team effort" of the courthouse working group, characterized by repeated interaction, cooperation, and shared views of how to dispose of cases appropriately. Third, that trial courts are not completely autonomous but instead must make decisions in light of the resources provided by their local communities. In Creekview, we saw a pattern of policy making that makes probation a more punitive process, based in part on shared courthouse norms but based in other ways on the absence of sufficient local resources.

One lesson of our study is that people who want to explain trial court policy making should avoid thinking of courts in isolation. Our exploration of Creekview demonstrates how limited an explanation based purely on individual judges' motivations would be. Numerous factors outside the courthouse shape the policies courts adopt. The probation conditions assigned by judges

and overseen by probation officers are highly contingent on the availability of resources in the community. Often quite mundane factors, like the presence or absence of public transportation, can affect the ability of probationers to access services (Pruitt 2009; Gross 2010), in turn affecting the tendency of attorneys and probation officers to recommend, and trial court judges to impose, specific sentencing options. The imposition of additional responsibilities by outside authorities may tax the ability of courthouse staff to provide conscientious supervision of probationers, especially if staffing cannot expand to keep pace with caseloads and additional state mandates.[23]

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23. For example, the Pennsylvania Legislative Budget and Finance Committee Report (2015, S-1) noted that "County probation and parole offices must contend with new responsibilities, including increased emphasis on evidence-based practices, many of which are labor intensive; registration provisions of the Adam Walsh Child Protection and Safety Act; monitoring ignition interlock devices for certain DWI offenders covered under Leandra's law; collecting DNA samples from offenders; and various reporting requirements from the Pennsylvania Commission on Crime and Delinquency (PCCD) and the Administrative Office of Pennsylvania Courts. Counties have received little or no new funding for these additional tasks. Actuarial presentencing assessments—a time-consuming requirement—is likely to soon be another unfunded mandate."

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Exercise to Accompany Smithey and Robison

1. Listen to season 3, episode 1 of the podcast Serial ("A Bar Fight Walks into the Justice Center"): https://serialpodcast.org/season-three/1/a-bar-fight-walks-into-the-justice-center.
   Discuss three ways that episode highlights trial court decisions made within the context of the courthouse working group.
2. Research your county's criminal probation department's use of community services for probationers' punitive and rehabilitative sanctions.
   In what ways does access to these community services constrain or enable court policy making?
   How do your county's resources compare with those described in the article?

36. High Courts and International Norms Institutionalization

REBECCA A. REID AND KIRK A. RANDAZZO

In 2004, a bitter dispute erupted in Ukraine over its recent presidential election. Initially, Viktor Yanukovych (the pro-Russian candidate) claimed victory. In response, the citizens of Ukraine and international election observers claimed election fraud. Because of growing pressure from the international community, and fearing potentially violent protests by Ukrainian citizens, the Ukrainian Supreme Court annulled the election results and ordered a new election, which was eventually won by Viktor Yushchenko (the pro-Western candidate). This example serves to illustrate how international law and pressure from international organizations intersect with and can influence domestic law.

Research by international relations scholars has focused recently on the influential role of international institutions on domestic politics and political outcomes. For example, Pevehouse (2002) reports that states belonging to regional intergovernmental organizations (IGOs), such as the European Union and Organization of American States, with highly democratic states as members generally improve their democracy ratings in subsequent periods. Other scholars demonstrate how dialogues and interactions within these IGOs allow norms to diffuse throughout the international community (see Risse, Ropp, and Sikkink 1999; Finnemore and Sikkink 1998). Each of these studies indicates that international institutions exert influence through processes of socialization (i.e., where states learn to behave in appropriate ways through their interactions with other states) that cause states to modify their behavior.

Perhaps the most prominent area in which such socialization appears successful is that of human rights. Greenhill (2010) notes that IGOs can promote human rights norms by "providing venues for interstate socialization." As such, IGO participation allows states to interact with other countries and share their norms, values, and behaviors. Over time, these interactions socialize IGO members to share more norms and values, which in turn lead states to modify their behavior in order to act more consistently with the new norms. Hence increased IGO participation can have a "powerful influence on states' human rights practices," where states can be socialized into improving their human rights practices simply through participation in international institutions (Greenhill 2010).

If these conclusions are correct and membership in IGOs can influence states to alter their human rights practices, then they beg the question about how these new practices become incorporated in the domestic legal system. Presumably, domestic courts must rule on disputes in order to adopt the new human rights norms into the laws of their country. As Risse, Ropp, and Sikkink indicate,

"The incorporation of international human rights norms into domestic institutions and law is a necessary precondition for the eventual establishment of fully rule-consistent domestic behavior" (1999, 249; see also Finnemore and Sikkink 1998). Yet scholars have not examined specifically either the types of roles played by domestic courts or whether they are necessary for changes in human rights practices.

This chapter addresses the question of legal institutionalization (i.e., the process of incorporating legal norms into domestic laws and institutions) by analyzing data across ten common-law countries to determine whether domestic high courts follow these newly acquired socialized human right norms. Among the domestic institutions potentially able to incorporate new international norms, the judiciary is most able to legitimize these norms and mandate changes to domestic law as a result. Hence we ask, Does increased IGO participation lead to high courts increasingly favoring rights claimants in subsequent time periods?

The Role of Domestic High Courts in Norm Institutionalization

National high courts become ideal actors for the institutionalization of international norms because of their ability to alter domestic law within states. Such institutionalization is necessary to ensure implementation regardless of individual beliefs (Risse, Ropp, and Sikkink 1999, 17). In other words, transforming international or foreign norms into domestic ones is necessary for those norms to change the identity of the state—to make sure that the norms are viewed the same way by citizens as domestic laws. Essentially, judicial institutions have the unique ability to transfer the "foreign" international norms into domestic law, thereby ensuring compliance to these institutionalized norms.

Additionally, states' choices to violate human rights appear to be "linked to the effectiveness of a domestic legal system, which is the main enforcement mechanism of legal obligations, both internal and international" (Powell and Staton 2009). By participating in IGOs, it becomes more difficult for states to defect and not implement international obligations because ordinary citizens have the opportunity to bring lawsuits against the state before domestic courts (Powell and Staton

2009).[1] The judiciary, therefore, is the institution most likely to curb state inclinations to violate human rights as well as reinforce human rights practices among the civil society.

Hence courts are the ideal actors for both (a) adopting international human rights norms by incorporating them into domestic law and (b) their ability to curb state inclinations for rights violations.[2] Yet previous research has not examined empirically whether such institutionalization of international law occurs systematically. In other words, when courts decide cases, are they actually incorporating these international human rights laws into their domestic laws? This leads to our primary hypothesis:

> **H1:** As a state's participation in IGOs increases, its national high court will expand (i.e., increase) protections of human rights.

Courts are also important institutions for international norm institutionalization because of the unique role they have in interpreting constitutional bills of rights. Constitutional bills of rights enable individuals to bring rights-related cases before courts, yet these legal documents are also interpreted and enforced by the courts. As such, the courts essentially determine which rights are enjoyed by citizens as well as the degree to which and under what circumstances they can be enjoyed.

While courts have the unique ability to interpret constitutional bills of rights, the mere presence or absence of these legal documents has important implications for rights-related norm institutionalization. For example, the adoption of the Canadian Charter of Rights and Freedoms in 1982 provided the Canadian Supreme Court additional authority to expand individual rights, which in turn led to the legal mobilization of several groups advocating for additional rights (Morton and Knopff 2000, 24–25). Similarly, the new constitution adopted by Brazil in 1988 not only included protections from arbitrary actions (negative rights) and political rights of participation (positive rights) but also recognized diffuse and collective welfare rights, thus introducing new rights responsibilities for the state (Arantes 2005). Furthermore, Colombia's new constitution in 1991 also

1. Some IGOs establish regional or international courts that allow individuals to request (via lawsuit or other legal complaint) those courts to hear cases against state violations of human rights. For example, individuals living in states that are part of the Organization of American States (OAS) can petition the Inter-American Commission of Human Rights to submit their complaints to the Inter-American Court of Human Rights.
2. This ability to curb state behavior assumes effective judicial systems (so that citizens are likely to seek redress through them) and assumes judicial independence.

included a bill of rights with strong judicial enforcement of human rights, which "infused rights-oriented discourse" into the country (Espinosa 2005, 75).

Therefore, the presence of a constitutional bill of rights facilitates the expansion of human rights through creating new language, raising awareness of rights protections, and promoting the development of new organizations aimed at increasing protections that are often referred to as "support structures" (Epp 1998).[3] Essentially, the growth and diversification of these organizations, the increases in financial support, and the changes in the accessibility of the courts enable rights groups and individuals to push their preferred rights policies into the policy-making judicial system (Epp 1998; Morton and Knopff 2000; Moustafa 2003). In this manner, the judiciary becomes an avenue for policy making in the interests of the rights organizations as well as for individuals. Consequently, because of the importance of a constitutional bill of rights for the expansion of rights protections, we believe that the effects of international rights norms will be conditional on the presence of a constitutional bill of rights. Thus a second hypothesis is necessary:

H2: The effects of IGO membership will be more pronounced in countries that possess a constitutional bill of rights.

Research Design and Data

Data for this analysis come from the High Courts Judicial Database (HCJD), compiled by Haynie, Sheehan, Songer, and Tate.[4] Specifically, we examine decisions from the following courts: the High Court of Australia (1969–2003), the Supreme Court of Canada (1969–2003), the judicial committee of the House of Lords of England (1970–2002), the Supreme Court of India (1970–2000), the Supreme Court of the Philippines (1970–2003), the Supreme Court of Appeal of South Africa (1970–2000), the Constitutional Court of South Africa (1995–2000), the Court of Appeal of Tanzania (1983–1998), the US Supreme Court (1953–2005), the Supreme Court of Zambia (1973–97), and the Supreme Court of Zimbabwe (1989–2000).

3. Despite its seminal status, Epp's (1998) support structure analysis is falsified both as a direct influence on rights litigation and as a necessary but insufficient condition for rights litigation by Sanchez-Urribarri et al. (2011).
4. The HCJD is available from the University of South Carolina's Songer Project (www.songerproject.org).

The dependent variable in our analyses is the proportion of pro–individual rights decisions rendered by national high courts for civil liberties cases only. This variable is calculated as the percentage of pro–individual rights decisions[5] for each country on an annual basis. To examine the effects of international norm diffusion, we employ two primary independent variables. The first simply measures the number of full IGO Memberships possessed by a state in a given year.[6] The data are taken from the Correlates of War 2 International Governmental Organizations data set, providing each country's annual participation in IGOs. We argue that as states increase the number of their full IGO memberships (as opposed to associate or observer memberships), they are more likely to experience pressure from the international community to adopt international human rights norms. Consequently, we expect a positive relationship to exist between this variable and the dependent variable. Thus as the number of full IGO memberships increase, we expect an increase in the proportion of pro–individual rights decisions.

As stated in our second hypothesis, we believe the effects of IGO participation is conditional on whether a country possesses a constitutional bill of rights. Therefore, to measure this interdependent relationship, we include a dummy variable Constitutional Bill of Rights (measured 1 if a country possesses a bill of rights) and interact it with the continuous variable measuring the number of full IGO memberships. Consequently, the variable IGO Membership * Constitutional Bill of Rights Interaction measures the effects of IGO memberships only for those countries possessing a constitutional bill of rights.[7]

Empirical Results

Before viewing the results of our empirical models, it is useful to examine some preliminary evidence pertaining to the influence of international norms on domestic human rights law. Figure 1 presents initial evidence of the relationship between full IGO memberships and the proportion of pro–individual rights (i.e., liberal) decisions rendered by high courts in civil liberties cases. In

5. Pro–individual rights decisions occur when the individual wins while the state loses. In many instances, these are considered more liberal decisions. Conservative decisions generally occur when the state wins while the individual loses.
6. Greenhill (2010) demonstrates that the diffusion of norms does not depend on the type of IGO in which a state participates. Consequently, we simply count the number of full IGO memberships and do not distinguish based on IGO type.
7. Due to the inclusion of the interaction term, the variable "Number of Full IGO Memberships" now captures these effects only for countries without a constitutional bill of rights.

this graph, one immediate observation concerns the relationship of IGO membership and the proportion of pro–individual rights decisions in the United States. For every country except the United States, there appears to be a positive trend. Yet in the United States, this trend is either nonexistent or potentially negative. Further empirical inspection (not shown here) reveals that the United States is indeed an outlier. Therefore, we remove the United States from any further analysis in order to not bias any results.

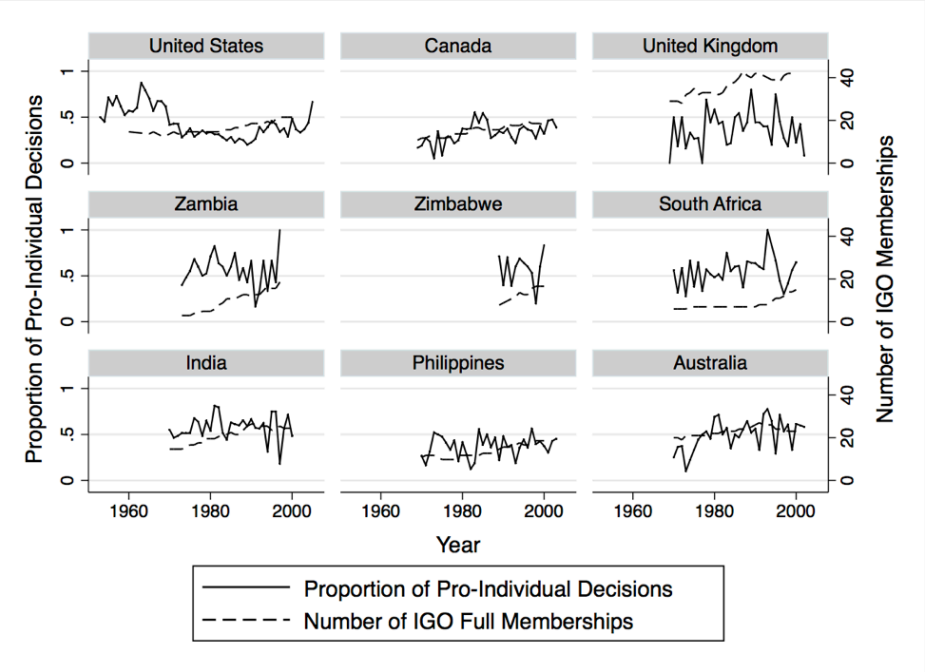

Figure 1. Proportion of Pro-Individual Decisions and Number of IGO Memberships

Once we did this, we ran a regression model to determine the effects of IGO membership on the proportion of pro–individual rights decisions. We determined that the regression model is more appropriate for this analysis because the dependent variable is a continuous, ratio-level measure with a meaningful 0 value. More specifically, we employ a fixed effects regression model to control for any potential variation caused by any country-specific characteristics not explicitly measured. These results, displayed in table 1, demonstrate that the fixed effects approach is appropriate.

	Coefficient (Standard Error)	***t-Statistic***	***Significance***
IGO Membership	-.001 (.001)	-0.85	0.396
Bill of Rights	-.079 (.021)	-3.83	0.000
*IGO Membership * Bill of Rights Interaction*	.005 (.001)	5.29	0.000
N	5325		
Number of Groups	9		
F	26.49		
Probability > F	0.000		
R^2 *(within)*	0.015		

Table 1. Proportion of Pro-Individual Decisions

Note: Coefficients represent the results of a fixed effects model with standard errors in parentheses. The dependent variable is the annual proportion of pro-individual (i.e. liberal decisions) in civil liberties cases per country.

The results in table 1 provide mixed support for our two hypotheses. More specifically, we see that the empirical data do not support our first hypothesis concerning IGO membership generally. This influence is not significantly related to the proportion of pro–individual rights decisions by national high courts. However, for states with a constitutional bill of rights, the number of full IGO memberships is statistically significant and positive.

Placing the Results into Substantive Context

Examining empirical results within a table of coefficients does not offer an opportunity to see the substantive context of these effects. Therefore, to gain a better picture of what IGO membership and a constitutional bill of rights means for pro–individual rights decisions by national high courts, we offer two graphs. The first graph, figure 2, reveals the effects of IGO membership for countries without a written bill of rights. Immediately, we can see that there is not much difference in the proportion of decisions favoring individual rights between countries on the low end of IGO membership (0.46) and those on the high end (0.44). Additionally, because the confidence intervals are so large, there is no meaningful distinction for IGO membership in these countries.

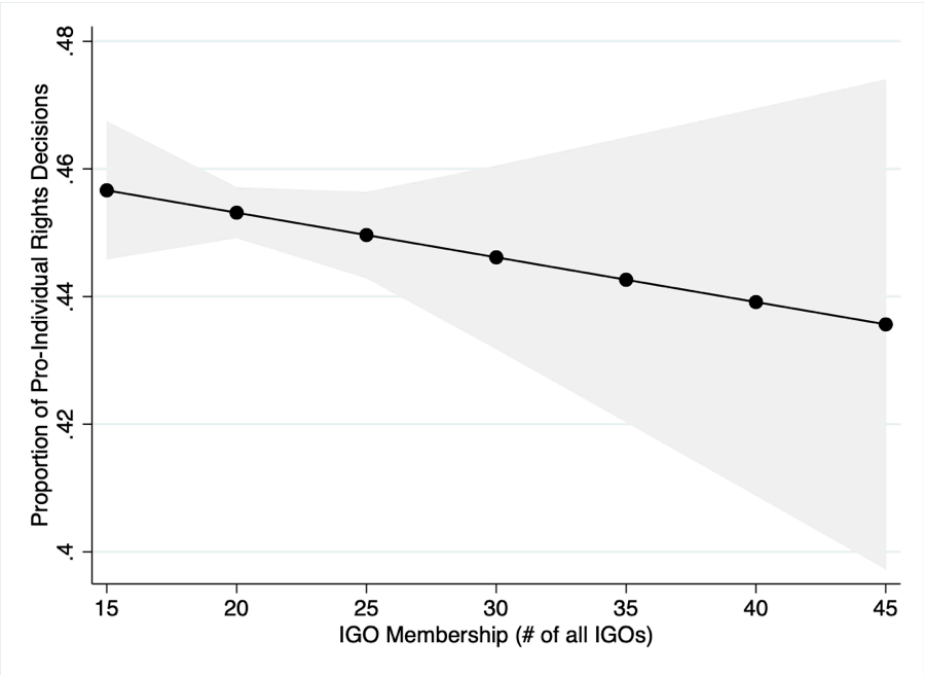

Figure 2. IGO Membership on States without Bill of Rights

In contrast, figure 3 presents a graph of IGO membership for countries that possess a constitutional bill of rights. Within these countries, we see a very visible and positive effect. Countries with few IGO memberships rule in favor of individual rights approximately 47 percent of the time. As these states join more IGOs, the proportion of pro–individual rights decisions jumps to just under 65 percent—an almost 20 percent increase. Therefore, the presence of a constitutional bill of rights significantly affects the influence of IGO membership. High courts in countries with a written bill of rights are substantially more likely to render pro–individual rights decisions as the countries join more IGOs.

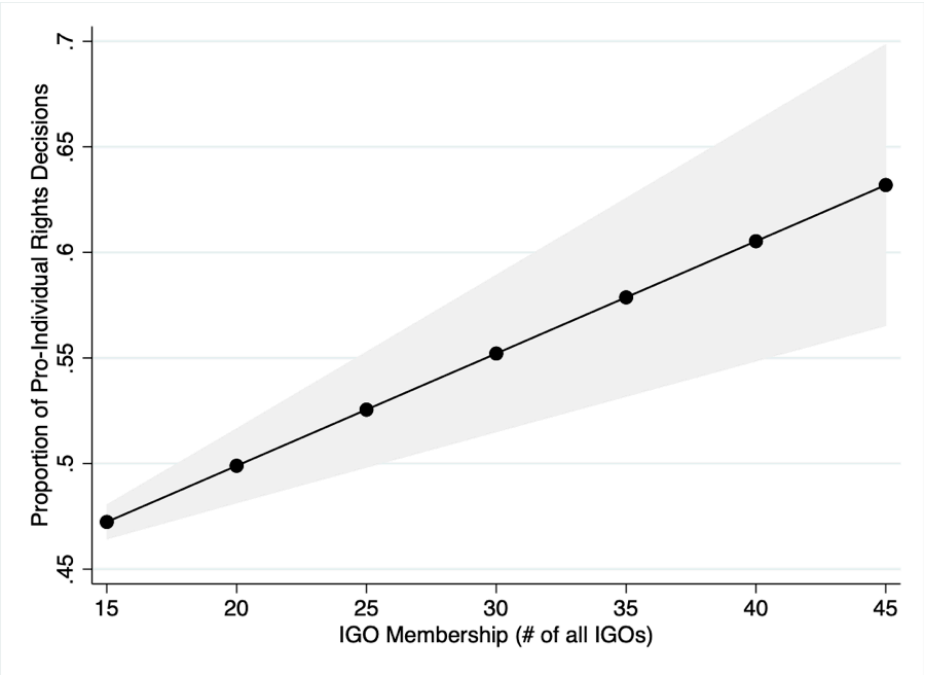

Figure 3. IGO Membership on States with Bill of Rights

Conclusions

Our chapter examines whether domestic high courts follow international rights norms and whether the interpretation and protection of rights by domestic courts are influenced by state participation in multiple IGOs. Our primary contention is that increased participation in IGOs leads to greater exposure of the state to international norms and legal conventions. Under this assumption, then the question becomes whether this exposure leads to an expansion of human rights by the domestic high court.

The empirical evidence indicates that the answer to this question is yes; however, the influence of international norms through IGO participation operates conditionally based on whether the state possesses a constitutional bill of rights. These results offer a promising first step to understanding how international and domestic laws interact in the area of human rights, but additional research is necessary. One question that remains involves the nature of IGOs: Are certain types of organizations more successful at norm diffusion than others? In this study, we treat all IGOs as equal, yet in reality, some IGOs are more suited toward the socialization of human rights norms than others. For example, some IGOs explicitly mandate certain levels of human rights protections in order for a state to join and/or maintain its membership. Furthermore, some IGOs are designed specifically to focus on human rights, and these seem more likely to effectively alter state behavior (compared to IGOs whose primary goals include economic development

or environmental sustainability). Finally, some IGOs possess their own judicial bodies that can enforce state commitments to human rights compared to other IGOs that possess no formal monitoring or enforcement mechanisms. Further research is needed to more precisely understand these nuances and their potential effects on states and domestic court decisions.

Still, this study provides a promising first step in demonstrating that IGO participation affects domestic political institutions. Therefore, this evidence offers hope to human rights activists and organizations seeking to improve rights protections. The data indicate that IGO participation can effectively transform the domestic legal landscape even in states without strong prior commitments to human rights.

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Class Activity

1. For the following IGOs, identify which are rights-oriented (defined as organizations that possess an explicit mission toward promoting rights, or actively engage in rights-promoting activities or funding).

- African Union (AU)
- Association of Southeast Asian Nations (ASEAN)
- European Union (EU)
- International Atomic Energy Agency (IAEA)
- International Monetary Fund (IMF)
- Islamic Development Bank (IDB)
- North Atlantic Treaty Organization (NATO)

- Organization of American States (OAS)
- United Nations (UN)
- World Trade Organization (WTO)

2. For the IGOs listed above, identify which have judicial bodies. Based on these results, which IGOs are more likely to affect state behavior through domestic high court decisions? Why?

37. Courts as Colonizers or Protectors?

Indigenous Peoples before the Mexican Supreme Court

ALAN CARDENAS AND REBECCA A. REID

Indigenous Peoples remain one of the most vulnerable populations in Mexico. Mexico has one of the highest populations of Indigenous Peoples in the Americas, where 21.5 percent of the population identify as indigenous (INEGI 2015). Yet 71 percent of the indigenous population live in extreme poverty (Molina 2018). In 2016, 3.2 million Indigenous Peoples lacked the economic means to purchase basic nutritional food items, and 50.3 percent did not have access to basic services in their homes, such as a concrete floor, running water, and electricity (Rosas 2019). Sixty percent of Mexican indigenous populations have completed less than primary school, and only 2 percent have completed a tertiary education (World Bank 2015). Inequality in Mexico places Indigenous Peoples at a great disadvantage, directly threatening their ability to survive as political and cultural communities. Today, twenty-three indigenous languages are in danger of extinction in Mexico (Escobar 2019). It is thus imperative to evaluate the Mexican judiciary's ability and willingness to secure the rights of indigenous communities that are necessary for their continued survival.

While courts are frequently heralded as serving as impartial mediums through which marginalized communities can secure their rights, this dynamic may not hold for Indigenous Peoples. In particular, unlike other minority groups that seek equality through their inclusion *within the colonial state*, Indigenous Peoples seek the repatriation of indigenous land and sovereignty, as distinct political and cultural nations. Thus Indigenous Peoples seek recognition *as separate nations* with equal sovereignty and powers as the colonial state, which requires the state to relinquish land, resources, and power. Since courts are part of the colonial political structure and contingent on the survival of the colonial state, we ask: To what extent does the Mexican Supreme Court protect Indigenous Peoples' rights? This chapter thus seeks to fill a gap in judicial scholarship, which tends to overlook and ignore Indigenous Peoples (Pommersheim 2012) and processes of colonization, by offering the first systematic, empirical inquiry into judicial decision-making on Mexican indigenous rights.

Colonization

Colonization is the process of settling among, and establishing control over, the Indigenous Peoples of an area and appears predominantly as a reference to a historical period of colonialism.

However, *colonization is an ongoing and cumulative process and structure* that seeks the perpetual subjugation of Indigenous Peoples in order to maintain colonial power structures and eliminate challenges to state authority and power (Borah 2018; Muñoz 2013; Sierra 2005). Challenges to state authority and legitimacy arise inherently from the existence of indigenous First Nations—which are precolonial, self-determinative, sovereign political communities with exclusive authority over their territory, resources, and peoples. Colonial power thereby imposes the oppression and elimination of these indigenous communities to maintain state claims for rightful authority and governance over occupied territories. In short, unlike other minority groups that seek equality through their *inclusion within* the colonial state, Indigenous Peoples seek the repatriation of indigenous land and sovereignty, as separate and equal cultural and political nations. Thus unlike individual rights from other minority groups, indigenous rights are collective rights based on these communities' political and cultural sovereignty as distinct nations that precede the colonial state and thereby lay claim to the territories and power sought to be unilaterally held by the colonial state. As such, indigenous rights conflict with state interests, and state governments have ensured limited recourse for indigenous communities through policies producing disenfranchisement, violence, poverty, and assimilation.

For example, the arrival of the Spanish in 1521 to what is today Mexico led to an estimated 85 percent of the Mexican indigenous population being killed through a combination of slavery, disease, and exploitative labor extraction. Colonial institutions sought to subjugate Indigenous Peoples through forced labor, requiring the payment of tribute to Spanish colonizers as well as to Spain (Boyd et al. 2019). Even when slavery was formally abolished in 1542, Indigenous Peoples remained slaves via debt peonage, where laborers were forced to work to pay off a debt to the employer who ensured that the laborers never earned a livable wage, never gained their own assets, and never could pay off the debt (Reséndez 2016).

Even after Mexico's independence from Spain in 1821, the exploitation of indigenous labor was an enduring feature of Mexican society (Joseph and Henderson 2003). Indigenous Peoples had their lands seized, leaving indigenous communities unable to sustain themselves and thus forcing them to sell their labor and becoming increasingly indebted to the point of being sold to landowning patrons (Joseph and Henderson 2003, 244). By the onset of the Mexican Revolution in 1910, a large proportion of Indigenous Peoples was completely landless (Medrano 2010, 184). The post–World War II shift to industrialization further left Indigenous Peoples in extreme poverty as they were forced to move or travel to city outskirts to search for jobs in urban areas (Joseph and Henderson 2003). Any remaining indigenous lands and natural resources were taken and privatized, and foreign industries were permitted to extract natural resources that reside within indigenous territories (Boyd et al. 2019). Hence colonization as a force to subjugate, assimilate, and dominate the Indigenous Peoples of Mexico did not end after slavery or the independence of Mexico from Spain; rather, colonization still thrives in modern-day Mexico.

The results of colonization include the extreme poverty and violence that Indigenous Peoples systemically experience, as well as limited ability for Indigenous Peoples to secure their rights (Calvo-González 2016; Correia 2018). Generally, Indigenous Peoples in Mexico have two options for fighting back against government encroachment upon their rights: rebellion and litigation. Indigenous uprisings occurred frequently throughout the country. In virtually all cases, including the Zapatista 1994 rebellion, indigenous protestors were violently struck down by state forces, including the Yaqui, Mayo, Juchitec, Maya, Apache, Comanche, Tzotzil, and others.[1]

Indigenous ability to succeed in litigation remains limited due to the perception that indigenous interests undermine national economic interests and due to their relative lack of power and resources to effectively navigate the judicial system. For example, because Indigenous Peoples do not always speak Spanish and because virtually all aspects of government function—including applications, law, and legal proceedings—are written and conducted only in Spanish, they are forced to rely on certified interpreters and translators for proper legal representation in court (Escobar 2019). While there are sixty-eight distinct indigenous communities in Mexico, there are only twenty-four certified attorneys that can legally practice, speak, and translate Spanish and some indigenous language—thereby leaving many indigenous communities without any legal representation (Toribio and Reyes 2016). Even policies that are designed to protect indigenous claimants require the government to recognize indigeneity (Speed and Collier 2000) and authenticate historical documents titling land to indigenous communities (Medrano 2010), thereby leaving indigenous claimants dependent upon government determinations.

Furthermore, Indigenous Peoples have limited access to national electoral mechanisms and have limited legislative representation. None of the major national political parties create space for Indigenous Peoples, prioritize these communities' representation, ensure their access to the national political arena, or promote their political participation. In 2018, there were only thirteen indigenous congressional representatives (out of five hundred seats),[2] and in 2017 there were only five indigenous representatives.[3] Furthermore, bills to create a quota system or mandate the inclusion of representatives of Indigenous Peoples on legislative ballots are consistently rejected.[4] The lack of representation limits indigenous access to influence national agendas and policies. Hence Indigenous Peoples remain vulnerable and subject to nonindigenous policies via democratic institutional mechanisms. As such, courts are thus often the only "legitimate" institutional method by which Indigenous Peoples can seek rights protections and remedy violations.

1. Though the Zapatista movement was more successful than previous movements in that it effectively garnered international attention and led to constitutional reforms to secure some indigenous rights.
2. *Financiero* (2018).
3. Global Americans (2017).
4. Global Americans (2017).

Yet courts face a dilemma when adjudicating these cases. On the one hand, the Mexican Supreme Court's (Suprema Corte de Justicia de la Nación) role is to interpret the Constitution and limit government power accordingly to protect individual rights. As such, the Court may seek to protect indigenous rights in order to fulfill its constitutional mission[5] and garner increased legitimacy for itself and/or the government within which it sits. On the other hand, granting indigenous rights can threaten the social order and government power because they implicitly recognize preexisting indigenous sovereignty (i.e., prior to colonization) as a self-determinative political community with exclusive authority over its territory and people. Thus the recognition and protection of indigenous rights weaken state claims to legitimate authority over occupied territories and require that the state relinquish its authority over land, resources, and people.

Defining Indigenous Threat to Government Interests

At the heart of the dilemma faced by colonial courts is whether to protect indigenous rights when such protections can reduce government power and hinder government policy interests. A court could attempt to promote its legitimacy, and state legitimacy, by acquiescing to indigenous rights in order to show the public and indigenous communities that the court is unbiased, fair, and rights-oriented. Yet if the court grants indigenous rights then the court could suffer negative repercussions from the state, since it would be actively obstructing state interests, goals, and policies. Facing this dilemma, a strategic court may try to balance these competing incentives by "having it both ways" and recognizing some indigenous rights and not others in order to promote its legitimacy and avoid court-curbing retribution in response to unfavorable decisions (Clark 2009). This strategy may be feasible in that not all rights claims reflect equal threat to the state. Rights claims can be categorized into positive and negative rights, depending on the relationship of the claim to the government.

Specifically, positive rights consist of rights that require government action, such as its provision of goods or services, to fulfill a rights obligation. Thus positive indigenous rights are where Indigenous Peoples are relying upon government authority for the provision of these goods or

5. However, many parts of the Mexican Constitution are symbolic rather than binding (Zamora et al. 2004), especially if the constitutional provision lacks corresponding implementation legislation. The Mexican constitution is viewed as a normative and exhaustive document that outlines broad policy goals; yet constitutional provisions mandate no obligation for fulfillment. The interpretational flexibility to not enforce constitutional provisions unless explicitly supported by legislation may incentivize the Court to reject indigenous rights claims.

services. Positive rights thereby reinforce or expand government authority and power because they rely on the state to fulfill these rights obligations. For example, indigenous rights claims seeking the provision of indigenous cultural and educational materials require government action in order to provide these resources. Because indigenous communities are relying on government action for the creation and dissemination of these materials, these cases affirm, reinforce, and legitimize the power of the colonial government. To ask the government to provide these rights implicitly affirms that the government has the authority to secure these rights. Positive rights thereby make Indigenous Peoples dependent upon the central government for these rights.

Negative rights, on the other hand, are those where the government is restrained from acting or interfering in particular areas or issues, thereby limiting government action and authority (Currie 1986). Negative rights claims are thus threatening to the state because they seek the limitation of government power. For example, the right of consultation is a negative right in that it compels the state (and third parties) to consult with indigenous communities prior to engaging in any activity that would affect indigenous communities. This right curtails government power by requiring indigenous consultation—and presumably consent—before implementing any policy or action that would affect them. In other words, the right to consultation limits the ability of the government to act unilaterally.

Cases involving indigenous sovereignty, autonomy, self-determination, land ownership, and jurisdictional powers are also representative of negative rights claims, where Indigenous Peoples are seeking to limit and reduce government authority relative to their own authority within their lands and communities. In these cases, Indigenous Peoples are asking the Court to force the state to return land and resources, to acknowledge indigenous sovereignty, and to recognize self-determination and autonomy of indigenous communities. These rights thus terminate unilateral state action and authority over indigenous land, resources, and peoples. This is threatening in individual cases, where each negative rights protection directly limits state power, but also in the aggregate, since the entirety of the Mexican territory was originally held by Indigenous Peoples, and granting these rights to some indigenous communities could incentivize other communities to litigate for similar results. In short, these rights ask the Court to force the state to recognize a competing sovereign authority and relinquish its ability to own and exploit indigenous land and resources.

Thus these two categories of rights have different effects upon state power, which may motivate the Court to protect less-threatening rights (i.e., positive rights) while rejecting more threatening rights (i.e., negative rights). This strategic balancing act of protecting some rights and not others can allow the Court to maximize its position as a legitimate, rights-oriented institution while maintaining state interests when they are most directly threatened, thereby preserving the social order and avoiding state retribution. Hence we expect that cases pertaining to negative

indigenous rights are less likely to garner Court support compared to cases pertaining to positive indigenous rights.

> **H1**: Indigenous Peoples are less likely to win cases seeking the protection of negative rights compared to cases involving positive rights.

Data and Methods

We constructed an original dataset consisting of all indigenous-related cases adjudicated by the Mexican Supreme Court using all publicly published decisions available on the Supreme Court website: https://www.scjn.gob.mx. We define indigenous-related cases as all cases with either an indigenous petitioner or indigenous respondent, including cases with nonindigenous petitioners/respondents on behalf of Indigenous Peoples. This dataset consists of 126 cases from 2002 to 2019.

However, the data publicly available on the Mexican Supreme Court website is not a comprehensive list of cases. For instance, Rivera (2016) notes that throughout the early 2000s more than 300 constitutional controversies were filed by various state representatives against congressional action regarding the limitations of the San Andrés Accords. Yet the website data includes only 44 of the more than 300 constitutional controversies, with 43 cases determined in 2002, and 1 case determined in 2003. This implies that the available data are not exhaustive. Because Court summary and statistical reporting[6] do not identify indigenous cases, we have little recourse to identify the docket from which these cases are taken or changes in the Court docket over time.[7] Without a clear explanation for the selection of case publication and the amount of

6. Estadística mensual, Julio 2019, Suprema Corte de Justicia de la Nación, https://www.scjn.gob.mx/sites/default/files/pagina/documentos/2019-09/SGAEM0719.pdf.
7. Furthermore, not all cases contain equal information. Some cases only contain only the case number or only the subject information and nothing else. The cases whose description included sufficient information detailing the petitioning party, the issue, the date, and verdict, were coded onto the dataset. Cases that did not include any information are omitted from the dataset. Most of the published cases available on the Supreme Court website are "highly reduced summaries" of the Court's final judgment that are usually drafted by clerks of the Court (Zamora et al. 2004, 193). While the Mexican Supreme Court has made considerable effort to become a more transparent institution

information provided within each case, the availability of data could present validity issues. Hence our results, while accurate for the data we have, cannot be used to infer Court behavior and decision-making more generally. The available case files are, nonetheless, the only data available for public access, and thus the only medium through which to empirically examine the behavior of the Court and Indigenous Peoples' case law.

The dependent variable for our analyses is case outcome, where we distinguish between cases that are in favor of the indigenous litigant(s) versus cases that represent losses to indigenous litigants. Most of the case outcomes were clear losses and wins, except for three remanded cases and one partial win. The three remanded cases were coded as losses, because these cases did not achieve success in the Court and thus depend on a lower court decision. The partial win case was coded as a win because the main rights claim of this case was granted.[8] The data consist of a total of fifty-seven wins and sixty-eight losses. However, the combination of sampling issues and limited number of observations preclude any quantitative analysis. As such, we offer qualitative analyses to evaluate how the Supreme Court treats indigenous rights, focusing on comparisons between negative rights and positive rights cases. We identify negative rights cases as all cases whose claim seeks the limitation or termination of government interference within indigenous affairs, while positive rights cases depend on government provision and action. Within our data, there are a total of seventy-nine negative rights cases and forty-six positive rights cases.

We also divide our cases by case type to acknowledge unique characteristics of the Mexican legal system as well as different levels of threat across case type. In particular, we distinguish between

in recent years (Castillejos-Aragón 2013), the publication of specific cases online could be due to administrative limitations, as the Supreme Court faces significant caseloads that often make them unable to spend time composing full opinions for each case and electronic publication may be delayed (Zamora et al. 2004). It is also possible that the publication of specific cases is strategic. Staton (2010) argues that judicial communication strategies, such as the selective promotion of cases on public websites, are designed to improve transparency of the court in certain cases so as to promote judicial legitimacy and power. In other cases, the court may prefer public ignorance to avoid undermining judicial legitimacy (Staton 2010).

8. A*tracción* cases are coded as losses if the Court decided to not take the case, which is a total of sixteen cases.

constitutional controversies,[9] *amparo*,[10] and *attraction*[11] cases. Constitutional controversies establish precedent and apply nationally, rather than only to the individuals who are party to the suit. As such, these decisions reflect changes to national policy in lasting ways. Indigenous rights cases presented as constitutional controversies are thus particularly threatening to government power in that they alter national policies in each case. In contrast, amparo and attraction cases

9. Constitutional controversies (*Controversia Constitucional*) represent concrete claims challenging the constitutionality of laws. These cases are part of the Court's mandatory jurisdiction, and the Supreme Court has original and exclusive jurisdiction to hear these cases in *pleno* (i.e., *en banc*). These cases permit elected government officials and representatives, but not individual citizens, to file constitutional controversies on behalf of their constituents when a law or policy that is passed by state or federal legislative branches conflicts with constitutionally protected rights (Finkel 2005; Domingo 2000). These cases are largely designed to resolve separation of powers and federalism questions, particularly adjudicating interstate boundary disputes, federal interbranch conflicts, and state-municipal conflicts over the autonomy of local governments (Staton 2010). Constitutional controversies establish precedent with the intention of maintaining legal consistency and applicability across the nation (Vargas 1996).
10. *Amparo* cases protect individuals from abuses of government authority and is an old institutional feature of Mexican law, created in the early nineteenth century and codified in the 1857 Constitution and later in the 1917 Constitution, which remains in effect today. Part of the Court's mandatory jurisdiction, amparo claims seek to resolve cases involving violations on individual constitutional rights (Borah 2018). These cases represent concrete, a posteriori claims under the jurisdiction of federal courts. (A posteriori refers to the fact that the case can only occur after a violation has occurred and the party in the suit has suffered an injury. This is in contrast to a priori cases that can resolve future, potential violations and injury. Concrete claims refer to the fact that the claim has generated actual injury to the parties of the suit, while abstract review refers to the possibility of future injury but where the injury has not yet occurred.) If amparo is granted, then the judgment offers the individual in the suit protection or redress, often in the form of stopping the implementation of government action or mandating a specific action by public officials. Generally, there is a high level of government compliance with the Supreme Court's amparo decisions (Zamora et al. 2004).
11. Generated via a 1988 constitutional amendment, attraction (*atracción*) cases are those that ask the Supreme Court to "attract" a case that usually falls outside of its jurisdiction, arguing that the elements of the case present fundamental implications for the law (Castillejos-Aragón 2013). If the justices agree in attracting a case, then the court hears the appealed case that would otherwise fall outside of its jurisdiction (Staton 2010). Hence as discussed in Reid (2020), these cases reflect the Court's nonmandatory jurisdiction where the Court can decide whether to hear a case.

do not establish precedent, cannot nullify laws, and only apply to the individuals in the suit.[12] In order for an amparo ruling to become precedent,[13] the Court must issue five similar amparo rulings in plenary session by a vote of at least eight (out of eleven) justices in agreement and without any contrary rulings (Gledhill and Schell 2012).[14] Once a ruling becomes precedent, then that precedent applies to all other courts and cases. These legal rules make amparo and attraction cases less threatening to government power than constitutional controversies in that they are generally limited to specific individuals. Hence we expect that the Court is less likely to support indigenous rights in constitutional controversy cases compared to *amparo* and attraction cases, in addition to being less likely to support negative rights relative to positive rights within each case type.

Results

All the constitutional controversies in our data reflect negative rights claims. Furthermore, all these cases result in a loss, except for a single case decided in 2014. This preference to reject indigenous rights claims in constitutional controversies may reflect the Court's reticence to support indigenous rights when it is most costly and threatening to government power. However, this inference is limited in that the vast majority of these cases occur in 2002 (43 cases) originating in Oaxaca and Chiapas in response to 2001 constitutional reforms that were enacted in response to escalating pressure derived from the 1994 Zapatista rebellion.[15]

12. Others who face the same problem (even by the same agency) must file separate suits, and the Court rarely consolidates cases.
13. Precedent here refers to *jurisprudencia obligatoria*. As a civil law nation, Mexico does not have a legal tradition of precedent, but *jurisprudencia obligatoria* has developed to ensure stability and consistency in law in a manner similar to precedent.
14. There is "informal precedent" as well, which refers to when three or four cases have been decided such that it seems likely that the law with become precedent, thereby incentivizing and signaling to lower court judges to follow that ruling (Zamora et al. 2004). These likely or upcoming precedents, however, have no official legal weight until they meet the formal requirements.
15. The Zapatista Army of National Liberation (EZLN) began organizing in 1983 in response to poverty in Chiapas and organized a revolt in 1994, which was met with violent state repression. Conflict continued until the 1996 San Andrés Peace Accords was signed by President Zedillo, but he never sent the agreement to Congress for legislative ratification and instead increased military presence in Chiapas. The conflict remained unresolved with rights repression and violence until President Fox entered office in 2000 and immediately submitted a watered-down version of the Accords for

The single indigenous win before the Court occurs in case 32/2012. This constitutional controversy was filed by the indigenous community of Cherán, asking the court to review violations of the indigenous community's right of sovereignty after the state passed electoral reforms concerning their community without prior consultation of the community. The Court supported the indigenous community's claims, citing the constitutional obligation for prior consultation.

For comparison, in 2015 a similar electoral reform case (constitutional controversy 41/2015) resulted in an indigenous loss, where indigenous members of the city council of San Juan Juquila Mixes were removed from office by the state governor and replaced with members of his own political party. The Court found that the unilateral removal of these indigenous members did not violate any procedural laws because it was carried out via citizen assembly. Furthermore, the Court held that the defendants did not even have standing, since constitutional controversies can only be filed by government officials—which was a position they no longer owned due to their removal.

For amparo and attraction cases, our data consist of forty-eight amparo cases and sixteen attraction cases, and there is more variation across positive versus negative rights and case outcomes. Table 1 shows the breakdown of case outcome by positive versus negative rights in each case type.

Type of right	**Number of case wins**	**Number of case losses**
Positive amparo	29	5
Negative amparo	9	5
Positive attraction	4	5
Negative attraction	6	1

Table 1. Case outcomes in *amparo* and attraction cases

Descriptively, indigenous success before the Court occurs most for amparo cases pertaining to positive rights claims. Since indigenous litigants appear to win amparo cases frequently, it appears that amparo proceedings are an effective method of obtaining indigenous rights. For attraction cases, indigenous litigants actually won more cases when claims consisted of negative rights, while they tended to lose slightly more cases pertaining to positive rights. This descriptive result seems to contradict our hypothesis; however, these differences are small—and recall that these cases fail to take into account both the underlying docket from which they are drawn and the selection

legislative ratification and amended the Constitution in 2001 to grant states the option to allow indigenous self-governance (Eisenstadt 2011).

processes the Court uses to decide whether they want to hear attraction cases as part of their discretionary docket.

To better investigate the relationship between positive and negative indigenous rights and court outcomes, we qualitatively examine cases by issue area. The most frequent legal claims issued by indigenous litigants in our data consist of the rights to native language materials, the right of prior consultation, and the recognition of indigeneity. The provision of native language material reflects a positive rights claim since the government is obligated to act to provide these goods. While this right to native language materials is designed to assist Indigenous Peoples with maintaining their traditional languages within their communities and navigating Spanish institutions, this provision also makes Indigenous Peoples dependent upon the colonial government to have access to basic materials in languages they understand and to have the ability to survive as cultural communities threatened with the loss of their language and culture through hundreds of years of assimilation and exploitation. In other words, Indigenous Peoples are required to rely on the colonizing government to preserve their linguistic and cultural heritage, to obtain an education in a language they can comprehend, and to navigate political systems that they had no input in creating, yet to which they are subjected.

The rights of prior consultation and recognition of indigeneity form negative rights in that they require the government to limit unilateral action, as well as to carve out areas within which the state has minimal or no authority. For the right of prior consultation, these claims require the government to consult with indigenous communities to negotiate intended government (and third party) activity, rather than the government unilaterally pursuing its interests at the expense of Indigenous Peoples. The recognition of indigeneity is a negative right in that once recognition is obtained, then the government is required to limit its activities with regard to that individual or community. In essence, recognition of indigeneity mandates that the individual or community are eligible for indigenous rights such as autonomy and self-determination, which are not available to nonindigenous peoples, which directly reduces the authority of the state over that individual/community.[16] As such, we expect that the Court is more likely to support indigenous claims asking for the provision of native language materials (i.e., positive right) and less supportive of claims

16. The recognition of indigeneity allows individuals and communities to pursue both negative and positive rights claims. However, because indigeneity creates a political space within which state power is limited and can be further limited via negative rights claims, we categorize this claim as a negative rights claim. In essence, the more people and communities recognized as indigenous, the less power the state has over all these groups. Indeed, a prominent political strategy used in several countries to facilitate indigenous extermination by ensuring that they have few, if any, protections or resources upon which to rely is to fail to recognize Indigenous Peoples (Reid and Curry 2019).

seeking the enforcement of rights of consultation and recognition of indigeneity (i.e., negative rights).

Provision of Native Language Materials

Cases pertaining to government responsibility to provide Indigenous Peoples with educational and judicial materials in their native languages include four full cases in our dataset. Three of these cases seek educational material for Indigenous Peoples. Specifically, case 272/2019 originates as an amparo suit from the state of México requiring the provision of educational materials for Indigenous Peoples with disabilities. Cases 19/2016 and 584/2016 arise from Hidalgo as an attraction and amparo suit, respectively, seeking native-language educational materials for public schools. In all three cases, the Supreme Court voted in favor of indigenous litigants, which is consistent with our expectations regarding positive rights, since these cases do not threaten government power or authority.

Amparo case 78/2014 involves the request of an indigenous petitioner against the Human Rights Commission of the State of Hidalgo after the Commission failed to provide the petitioner with information concerning his legal status in his native Hñähñu (Otomi) language. The petitioner had solicited his information for a criminal procedure in his native language, but the Commission only provided him with the information in Spanish, claiming that the petitioner did not need the documents since he spoke Spanish. The Supreme Court held that Indigenous Peoples have the right to request documents in their native languages and that the responsible institutions must provide them, even if the petitioners speak Spanish. Thus the Court provided positive protection for the indigenous litigant by affording him translated documents. Consistent with our expectations, this positive rights case does not directly threaten government authority; instead, it expands governmental powers in a way that makes indigenous litigants dependent upon the federal government for resources to participate or even navigate within colonial institutions.

Right of Prior Consultation

The right of prior consultation consists of the requirement of governments, public officials, and businesses to consult with indigenous communities prior to any construction, extraction, or appropriation of indigenous lands and resources, as well as prior to the passage of new laws that would affect indigenous communities. The intent of this right is that any policy, construction, or

development project would receive indigenous consent before its initiation. However, the right to prior consultation, pursuant the Mexican constitution, does not actually require indigenous consent—just consultation. This reduced obligation therefore allows for indigenous communities to be presumably involved in the decision-making processes but does not allow them to directly dictate or impact the outcome. In other words, prior consultation rights can be fulfilled and construction can occur even if the indigenous communities consulted did not consent to the construction. Hence the threat inherent in this negative right is limited in that it only requires consultation rather than consent; however, it still marks a negative right in that it forces the state to negotiate with Indigenous Peoples before engaging in the intended activities.

The cases in our dataset consisting of the right of prior consultation as the primary legal claim include cases pertaining to genetically modified organisms (GMOs), the passage of new laws, infringement or development on indigenous lands, and environmental damage.

Protection from GMOs

Six cases in our dataset reflect cases from indigenous communities seeking redress for the introduction of genetically modified organisms (GMOs) into indigenous lands, specifically those related to soybean GMOs: 241/2015, 198/2015, 499/2015, 270/2015, 500/2015, and 498/2015. All these cases are amparo suits with negative rights claims from Campeche and Yucatán. In all cases, the Court granted legal victories to indigenous litigants regarding rights of consultation. For example, in amparo case 499/2015 multiple indigenous communities filed for protection against the General Directorate of Food, Agriculture, and Fisheries and the General Directorate of Environmental Impact and Risk. These indigenous communities claimed that the General Directorate released genetically modified soybeans into their lands and cited harmful environmental repercussions that threatened their community well-being as well as their cultural integrity. They argued that the permit to release GMO soybeans onto their communal lands was invalid and that the organization failed to properly consult with the affected indigenous communities. The Court confirmed that these organizations had violated the indigenous communities' right to consultation, determining that there was a lack of appropriate consideration for the communities' cultural well-being.

Hence these cases obtained legal victories in terms of rights of consultation despite seeking negative rights claims. This is contrary to our expectations, though we should also note the potentially limited legal victories achieved here. In particular, while the Court agreed with indigenous litigants that their rights of prior consultation were violated, this does not directly protect indigenous lands from previous, continued, or future GMO dissemination. Instead, these

indigenous litigants are now only guaranteed in their ability to consult with the General Directorate of Food, Agriculture, and Fisheries and General Directorate of Environmental Impact and Risk. Previous environmental or cultural damages were not redressed by the Court, and no federal protections were installed. Furthermore, the Court explicitly limits the application of any potential federal protections to only these specific indigenous litigants, so that other affected communities (not a party to these specific cases) must undergo the lengthy and costly litigation process to obtain similar rights.

Passage of New Laws

Action of unconstitutionality case 31/2014 was filed by the President of the Human Rights Commission of the State of San Luis Potosí, arguing against the constitutionality of a state law. Action of unconstitutionality cases allows branches of government, subgroups of branches, and political parties to petition the Supreme Court arguing against the constitutionality of legislation that applies to the general population. The petition before the Supreme Court asserted that the state law violated several provisions of the Mexican constitution regarding the indigenous right of prior consultation, where the law had not been properly consulted with affected Indigenous Peoples prior to its passage. The Supreme Court issued a winning verdict for indigenous communities, enforcing that indigenous communities must always be consulted prior to carrying out any legislation or amendment that affects indigenous communities and declaring the state law null and void. This outcome is contrary to our expectations in terms of negative rights; yet it also reflects issues of federalism, where the state law is overturned in favor of federal laws. Thus it is possible that the federal government and indigenous communities shared mutual interests in this case.

Infringement upon Indigenous Land

Several cases before the Supreme Court pertain to infringements upon indigenous lands due to development projects, mining, and the building of roads, windmills, and universities. These cases thus reflect the government or government-granted third parties' power to use or extract from indigenous lands without the adequate prior consultation with Indigenous Peoples who own those lands. While all these cases thus constitute negative rights claims, seven cases resulted in indigenous victories before the Court, while four resulted in losses.

For example, case 23/2014 asks the Court to review an amparo claim against the state of Guerrero, where the state had granted a mining concession without appropriate prior consultation with the indigenous community. The Court upheld the indigenous litigants' argument, finding that the state had sought to exploit and extract natural resources from indigenous land without conducting prior consultation.

Amparo 781/2011 was filed against the Barrancas del Cobre Trust for a development project organized by the Secretariat of Tourism. The indigenous community cited the exploitation of their land and the lack of consultation for the development project and sought remunerative redress for damage caused by the project construction. The Court supported the indigenous community partially, where the amparo was only afforded in recognition of the lack of proper prior consultation. The Court held that the community did not provide sufficient evidence showing that damage was done to their territory, hence dismissing their second claim. Thus the Court upheld the right of prior consultation but did not provide redress for the alleged environmental damage.

Amparo case 600/2018 asks the Supreme Court to review the construction of a windmill farm by a Spanish company on indigenous lands without prior consultation. The indigenous litigants argued that the permits for construction should not have been issued prior to the consultative process and that consultative process was not properly carried out since the indigenous community and company did not formally meet to agree to the terms and conditions (as the process was mediated by the Secretariat of Energy). The Supreme Court issued a loss to the indigenous litigants, stating that the terms and conditions were clearly communicated between both parties and that the issuance of a permit does not necessarily indicate the immediate initiation of a project.

These cases thus show that while the Court offers indigenous wins in terms of consultation, these rights are curtailed to the extent that the Court avoids requiring direct consultation to discuss terms and conditions, avoids providing redress for environmental damages caused by these projects, and enables the issuance of project permits prior to consultation processes.

Environmental Damage

Two cases pertain to indigenous communities explicitly requesting redress in response to environmental damage in their lands: 522/2018 and 631/2012. One case resulted in an indigenous victory (631/2012), while case 522/2018 resulted in an indigenous loss.

Attraction case 552/2018 asks the Supreme Court to attract an amparo case filed by an indigenous community who cited damages to their community as a result of the expropriation of a part of their territory to construct a hydraulic dam. The construction project caused ecological damages

and flooding that resulted in the displacement of Indigenous Peoples living on the affected land. The district court dismissed the request, citing a lack of standing of the petitioning litigants as representatives of the communities. The Collegiate Court forwarded the case to the Supreme Court to consider for attraction, but the Supreme Court decided to not attract the case (which we consider a loss since the community has no further avenues for redress).

Amparo case 631/2012 involves the Yaquí tribe from the state of Sonora suing multiple federal agencies and the state of Mexico for environmental damages caused by the construction of an aqueduct and for the failure to consult the affected communities. The Supreme Court held that the state of Mexico and environmental agencies did not properly consult the indigenous communities and affirmed the lower court order for appropriate consultation with the Yaquís. The Court further stated that if any environmental damage was reported then construction would be required to be suspended.

Hence the Supreme Court appears to regularly affirm indigenous rights of prior consultation, which is contrary to our expectations for negative rights cases. In most of these cases, however, the Court grants that the right of consultation was violated as a simple acknowledgment but never includes reparations to remedy environmental or cultural damages. Similarly, suggesting that the right of consultation is fulfilled so long as the terms and conditions are "clearly communicated" (amparo 600/2018) instead of enforcing mutual negotiation between parties ensures that indigenous consent is irrelevant and limits indigenous agency in controlling their lands. These cases may suggest that the Court is more comfortable with affirming abstract or limited indigenous rights in a manner that does not directly threaten government economic interests.

Recognition of Indigeneity

There are two cases that pertain to the recognition of indigeneity: 156/2011 and 64/2016. Case 64/2016 involves a constitutional controversy from Oaxaca arguing for the legal recognition of an indigenous group so as to preserve their culture and land. Consistent with our expectations, the Court issued a loss to these indigenous litigants.

Amparo case 156/2011 originates in Hidalgo where a suit was filed against The National Commission for the Development of Indigenous People (CDI) and other organizations for failing to recognize the indigenous petitioners' municipality as indigenous, thereby violating the community's right to self-determination. The Supreme Court determined that because the state of Hidalgo already recognized the municipality as indigenous via a state governor decree, the case failed to meet formal requirements to appear before the Court, which declared itself legally incompetent to adjudicate the matter. This loss is consistent with our expectations regarding

governmental threat in that the Court's issuance of a loss hinders the ability of that Hñähñu (Otomi) community to be federally recognized and thereby obtain indigenous protections. In addition, the Court's decision to deflect indigenous recognition to a state governor risks the devolution of indigenous affairs that often leaves Indigenous Peoples without adequate protection and directly erodes their sovereignty rights by inviting conflict with local officials (Reid and Curry 2019). Hence both cases pertaining to indigenous recognition conform to our expectations that this type of negative right pushes the Court to serve as a colonizing force rather than a guardian of rights.

Conclusion

These three areas of legal claims reveal that the Court does not uniformly reject indigenous rights claims. Yet the Court appears much more comfortable in affirming positive rights, as shown in the provision of native language materials, than negative rights that may undermine or threaten government power. While the Court does not reject all negative rights cases, the cases involving the right to prior consultation illustrate the limited stance the Court takes in affirming negative indigenous rights. Instead of providing substantive reparations or protections, the Court consistently affords only the simple acknowledgment of violations of the right of consultation—a right which, in and of itself, serves mostly as a symbolic, legitimating performance. Without requiring indigenous *consent*, the right of consultation is designed to appease dissent, without fundamentally altering the colonizing structures and processes that systematically disenfranchise Indigenous Peoples even within their own jurisdictions and lands. Without the right of consent, the right to consultation is merely a nice way of "clearly communicating" to Indigenous Peoples what will be (unilaterally) done to their lands (amparo 600/2018). Furthermore, the Court's hesitancy to recognize indigeneity corroborates its limited role in protecting indigenous rights in the face of state interests.

Nonetheless, these results suffer from the lack of publicly available documentation that could otherwise assist in more in-depth legal analysis and systematic evaluation. This analysis suggests that there is much to be desired in the Mexican Supreme Court's protections of indigenous rights. The 2018 presidential victory of Andrés Manuel López Obrador promised a new relationship between the state and Indigenous Peoples, particularly with the creation of the 2018–24 National Program of Indigenous Peoples.[17] We hope that these efforts include more robust indigenous rights protections and more effective avenues for redress within the Mexican courts, to promote a

17. Instituto Nacional de los Pueblos Indígenas (2018).

more fair, diverse, and vibrant democracy and to protect the rule of law through the advancement of indigenous rights.

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Student Activities

1. Write down as many names for Indigenous Peoples or First Nations you can think of. How many could you list?
2. In how many classes did you learn about Indigenous Peoples? In what context did you learn about them? Were they always discussed in the past tense or only during colonialism? Reflect on how you have been introduced to indigenous issues.
3. Write a land acknowledgment identifying on whose (indigenous) lands you and/or your university reside. A land acknowledgment is a short statement that identifies the relevant

> Indigenous Peoples on whose land you/the institution now reside, as an expression of gratitude and appreciation to honor the Indigenous Peoples who have lived, worked, and protected that land.

For more information on land acknowledgment statements:

https://nativegov.org/a-guide-to-indigenous-land-acknowledgment/

https://www.teenvogue.com/story/indigenous-land-acknowledgement-explained

https://usdac.us/nativeland

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