Elections and the Institutional Capacity of Courts

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Abstract

There is substantial evidence that popular support for courts reinforces judicial independence and that the public's ability to transparently observe judicial processes and decisions moderates that relationship. There is also convincing evidence that elections confer legitimacy on political institutions generally. We join these theoretical perspectives and argue that the greater legitimacy of elected courts and the greater transparency of the environment surrounding elected courts create political pressures on legislatures and executives to extend greater discretion to courts. We evaluate this claim by comparing the institutional capacity of high courts in the American states to their methods of judicial selection and other factors. The data show that courts with elected judges have greater institutional capacity overall, but that this is driven increased discretion over their dockets in particular, rather than greater salary or resources. The results show a connection between elections and the foundations of judicial independence and legitimacy.

Constitutional courts' decisions can have substantial consequences for the distribution of material and symbolic benefits in a society. As such, judicial decisions can undermine the policy agendas of legislators and executives (e.g. Bickel 1989). These actors, however, often possess constitutional authority to limit courts' independence and mitigate their influence. These tools include impeaching judges, limiting courts' discretion in constructing their dockets, and reducing resources allocated to courts (Vanberg 2001, Whittington 2007, Clark 2009). These constitutional means could be applied to pressure judges to make decisions consistent with legislators' and executives' preferred policies. Yet in many democracies, judiciaries appear to operate without substantial interference from legislatures or executives (Hirschl 2004; Stone Sweet 2000). Autonomous courts with discretion over their dockets, sufficient resources to hear and decide cases, and meaningful independence to resolve controversies as they see fit often exist alongside executives and legislatures with constitutional authority to undermine the institutional integrity of the judiciary. These conditions generate a puzzle for political scientists and law scholars: *why do legislatures and executives tolerate independent courts that can undermine their policy ambitions?*

One answer is that popular support for judiciaries constrains election-minded legislatures and executives from pursuing significant court-curbing activities (Clark 2009; Gibson, Caldeira, and Baird 1998; Ura and Wohlfarth 2010). This account of externally-induced support for judicial capacity depends on transparency in the political environment (Vanberg 2001). Electoral backlash against court curbing is only possible if voters can observe moves against courts' institutional capacity. In an opaque political environment, elected officials have greater liberty to undermine courts since voters are less likely to observe attacks on judicial independence.

Judicial elections—popular elections to select or retain judges in office, which are common in Bolivia, Japan, Switzerland, and the United States—provide a double dose of support for the institutional capacity of courts in separation of powers systems. First, elections are among the most powerful legitimacy-conferring institutions in democratic politics, establishing a direct link between public office holders and the sovereign people (Beetham 1991; Lipset 1963). For courts, judicial elections defuse the tension between the practice of judicial review by unelected judges and the principle of majoritarianism intrinsic to contemporary notions of democracy (Bickel 1989).[1] As a

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[1] "Majoritarianism" here merely refers to the principal of majority rule, not majoritarianism as a pattern of institutional constructs complementing proportionality as in Powell (2000).

result, elections enhance voters' support for a coequal judiciary (Gibson 2012). Additionally, judicial elections promote greater transparency in courts' political environments. Elections strengthen incentives for interest groups, the media, and others to inform the public about judges' behavior and courts' decisions, giving judges ample opportunity to communicate potential threats to judicial independence. We therefore hypothesize that, all else equal, courts staffed by elected judges should have greater capacity for independence than courts staffed by unelected judges.

We evaluate this prediction by estimating a statistical model of courts' institutional capacity in the American states—in which judicial elections are widely, but not universally, utilized—as a function of states' judicial selection institutions. The American states provide a nearly ideal testing ground for our argument. The states are equivalent in general institutional structure—a common party system, separately elected executives and legislatures, etc.—but their courts of last resort vary substantially in capacity. Capacity, here, refers to the court's latent ability to determine and execute its own workload as it sees fit—to choose which cases it will hear and rule on those cases as it prefers. Of course, this requires resources, such as the discretion to determine caseload, the expertise to make well-reasoned rulings, and the latitude to issue opinions that infringe upon legislative or executive policy agendas. Institutional capacity should therefore be evident in allocations of such resources that permit courts' to pursue "policy agendas independently" (Ura and Wohlfarth 2010, p. 943). This notion of capacity is similar, but not equivalent, to both "institutionalization" (Polsby 1968; McGuire 2004) and "professionalization" (Brace and Hall 2001; Squire 2008), which are both associated with judicial independence. For example, the institutionalization of the United States Supreme Court is associated with invalidations of federal laws, invalidations of state laws, and the frequency of "landmark" decisions (McGuire 2004). Professionalization in state courts of last resort is associated with docket space allocated to "have nots" (Brace and Hall 2001) and citation of decisions by other courts (Caldeira 1985). Courts' institutional capacity is a necessary condition for judicial independence, but the two are distinct. *Independence* refers to the observed autonomy of courts from legislative and executive meddling, and *capacity* refers to the courts' institutionally determined ability to construct its docket, manage its workload, and ultimately deliberate and decide cases. While a good deal of our discussion is devoted to *independence*, our theoretical and empirical focus is firmly on *capacity*.

To capture capacity, we revisit the problem of measuring courts' institutional development

in the American states. Prior efforts have relied on indicators of courts' resources and docket discretion, such as compliance with American Bar Association model plans for judicial organization, judges' salaries, numbers of law clerks, and dummy variables indicating mandatory or discretionary jurisdiction in different types of cases (Brace and Hall 2001; Caldeira 1985; Hayo and Voight 2007; Squire 2008). Below, we gather measures of state courts' institutional parameters from the Bureau of Justice Statistics' State Court Organization Reports published in 1998 and 2004 and analyze the dimensional structure of judicial salaries, clerk support, and docket discretion. Factor analytic estimates indicate that the constituent elements of the index should also be analyzed separately— with discretion loading one dimension and salaries and clerk support loading on another. We therefore estimate models on the separate component indicators, rather than forcing them into a single measure.

The data provide support for our theoretical prediction that elected courts possess greater capacity than unelected courts, but that these results are principally powered by the relationship between elections and *docket discretion* and there is little or no relationship between elections and either judges' salary or allocation of clerks. We discuss these results and their implications for understanding the institutional structure of courts and the market for high-quality candidates for judicial office. Our findings inform ongoing debates about judicial selection mechanisms and also raise new questions regarding the institutional foundations of judicial independence.

Judicial Capacity and the Separation of Powers

Judicial independence has its foundations in institutional arrangements. Comparative studies of judicial independence note the importance of institutional protections for judges' decisions from external political pressures. In particular, the focus of these studies has largely been on the role of formal safeguards for judges' positions and economic well-being, such as establishing procedures for removal from office and salary protections (Hayo and Voigt 2007; Helmke 2010; Carrubba et al. 2015). These studies generally find that these institutional structures support judicial independence.[2]

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[2]However, scholars have found that political context moderates the influence of constitutional safeguards for judicial independence. For example, Carruba et al. (2015) and Rios-Figueroa (2007)

Institutional safeguards for judicial independence, however, are often checked by constitutional provisions that empower legislatures and executives to exercise political control over judicial processes or otherwise avoid complying with court rulings (Clark 2009; Whittington 2007). Political mechanisms for undermining judicial independence include: limiting courts' budgets and staffing, limiting courts' discretion to choose cases, packing courts with friendly jurists, removing judges from office, and ignoring or evading decisions made by the judiciary. Judicial independence is, therefore, a political construction reflecting legislators' and executives' choices to abstain from punishing judges or evading courts, or to affirmatively enhance courts' discretion and resource support (Graber 2005; Hirschl 2004; Keck 2004).

Public Opinion, Transparency, and Courts' Institutional Capacity

Although many developed democracies include independent judiciaries (Hirschl 2004; Stone Sweet 2000), there is substantial variability in independence between courts across contexts (Rios-Figueroa 2007; Carrubba et al. 2015) and within individual courts over time (e.g. McGuire 2004; Kramer 2002). An extensive literature in political science identifies reasons that legislatures and executives accede to judicial review practiced by independent courts. One prominent account of political support for judicial independence proposes that public support for courts creates electoral incentives for legislators and executives to avoid court-curbing activities. When support for courts is sufficiently high, election-minded legislators' who would otherwise prefer to make policy choices without the constraint of judicial review' are constrained' to respect judicial decisions *as well as the institutional integrity of a court* ... [by t]he fear of ... a public backlash' against court-curbing activity (Vanberg 2001, p. 347 [emphasis added]; Carruba 2009; Ura and Wohlfarth 2010). When support is low, however, courts are vulnerable to punishment (Helmke 2010; Helmke and Staton 2011; Taylor-Robinson and Ura 2013). These claims are consistent with evidence that institutionalized constitutional courts in developed democracies typically enjoy a deep reservoir of public support (Gibson, Caldeira and Baird 1998; Gibson, Caldeira, and Spence 2003; Vanberg 2001, 2005).

Alone, public support for judicial independence is insufficient to prevent policymakers from undermining courts' institutional integrity. The link between public opinion and judicial independence

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find that unified party control of legislative and executive branches of government makes formal protections for judicial capacity for independence less effective.

is conditional on "transparency," the public's ability to observe judicial processes and other political actors' responses to judicial decisions (Vanberg 2001). Transparency can vary between countries, over time, and even from case to case. For example, some court cases employ procedures, such as oral arguments, that make them easier for the public to observe than cases argued only in writing (Vanberg 2001). Also, some issue areas attract participation from larger numbers of interest groups and media outlets than others (Conway, Jordan, and Ura 2018; Davis 2011; Collins and Cooper 2012). If there is insufficient transparency in a court's political environment, voters can observe neither judicial behavior nor politically motivated efforts to undermine judicial independence. As a result, elected officials have less fear of public backlash and are freer to pursue court-curbing activity by eroding the court's institutional capacity' i.e., stripping its discretion, reducing clerk allocations, or cutting judicial salaries. Transparency is particularly salient for courts since they generally receive less media attention than the other branches of government (Slotnick and Segal 1998).

The moderating influence of political transparency has considerable empirical support. In a number of interviews, Vanberg (2005) shows that both German judges and members of parliament are keenly aware of the political nature of their relationship, with members of parliament adding that they are careful to avoid public scrutiny when attempting to evade court decisions. In quantitative analysis, he also shows that the German constitutional court acts more independently in more salient cases. Staton (2006, 2010) observes similar patterns in Mexican judicial politics. Cross-national analyses also find that countries with higher degrees of press freedom also have more independent judiciaries (Hayo and Voigt 2007; Melton and Ginsburg 2014).

Elections, Legitimacy, and Transparency

Around the world, elections typically play no part in choosing judges. American federal judges, for example, are chosen by presidents with the advice and consent of the Senate. This is common; in most countries, judges are appointed by political executives and confirmed by a legislature. However, judicial elections are utilized in several countries. Many American states employ elections

to select or retain judges, including justices on constitutional courts of last resort.[3] Judges are elected to Bolivia's Supreme Tribunal of Justice. Japan's Supreme Court judges face periodic popular retention votes. Some Swiss cantons also use elections to select judges.

We argue that elections for judicial offices advance judicial independence and courts' institutional capacity through two reinforcing channels. Figure 1 summarizes our core theoretical arguments. First, although the relationship between judicial elections and public support for courts is complicated, there is compelling evidence that the net effect of using elections to fill judicial offices is to enhance courts' legitimacy among ordinary citizens (Gibson 2012). Second, election campaigns create transparent environments in which information regarding judicial officeholders and courts' decisions is more readily available, reducing citizens' costs to learning about the courts' activities, interactions with other branches of government, and impact upon their lives more generally. This fact increases citizens' appreciation of the judicial branch while also making any attempts by the legislative or executive branches to infringe on the courts' independence more easily observable. This legitimacy, appreciation, and attention to court curbing give courts the public support they need to demand more discretion and resources or resist attempts to diminish their institutional capacity.

We begin with the direct effect of elections on legitimacy. Elections are among the most powerful legitimizing institutions in politics (Beetham 1991, Lipset 1963). Electing judges confers the imprimatur of the people's sovereignty on jurists and their courts, promoting loyalty to legal institutions. Moreover, by introducing a layer of popular political oversight into the process of selecting judges, elections incentivize judicial compliance with public sentiment. As a result, judges who face competitive selection or retention elections make decisions that more closely match public senti-

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[3]The American states have a long history of varied methods of judicial selection and retention. Judicial elections were first adopted in early 1800s as a means to make judges independent from the influence of governors and state legislatures, who at the time appointed all non-federal judges (Shugerman 2012). The move towards nonpartisan and retention elections at the beginning of the 1900s came as an effort to remove the power of party bosses and political machines in partisan nominating processes (Kowal 2016). Even today, concerns over independence from special interest groups and the public in general motivate calls to end judicial elections and reestablish appointment procedures (Kowal 2016).

Figure 1: Elections and Courts' Institutional Capacity
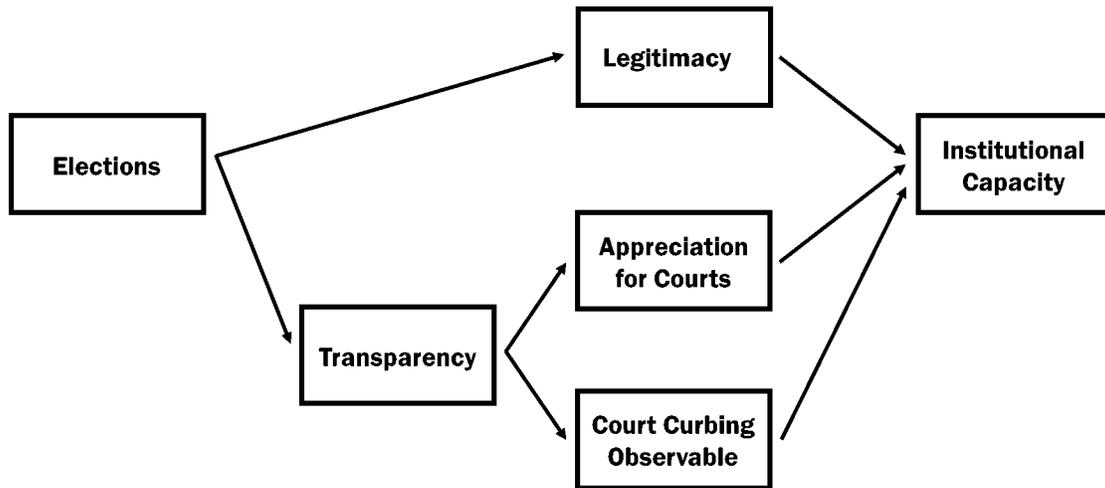
ment than the decisions of judges who are retained in office by other means (Brace and Boyea 2008; Shepherd 2009), which is likely to enhance public evaluations of courts as well (Durr, Martin, and Wolbrecht 2000).

Of course, it is possible that judicial elections may also create challenges to the legitimacy of courts. Elections come with campaigns, fundraising, interest groups, advertising (positive and negative), and other potentially unsavory accoutrements that may undermine citizens' perceptions of courts and judges as fair or impartial (Gibson 2012). Former United States Supreme Court Justice Sandra Day O'Connor has been a prominent advocate of the position that electoral politics injure the performance and standing of courts. Indeed, O'Connor takes the extreme position that, "judicial elections are inconsistent with our commitment to a constitutional democracy" (O'Connor 2009, p. 487). Likewise, the Brennan Center for Justice (Kowal 2016), the American Judicature Society (2008), and the American Bar Association (2000) specifically endorse the elimination of competitive elections in judicial selection and retention systems as a remedy to real or perceived judicial impartiality that flows from campaign fundraising and other features of electioneering.

Nonetheless, empirical analyses of the influence of judicial selection mechanisms and judicial election campaigns on the courts' public standing show that the net effect of elections is to *enhance* the public's support for courts as independent institutions. Contested campaigns, manifested, for instance, in the form of negative campaign attack ads, may indeed have a detrimental effect on perceived judicial legitimacy (Gibson 2008). However, the public's increased support for judicial

institutions arising from its participation in the election process significantly outweighs this loss (Gibson 2012; Gibson, et al. 2011). Gibson (2012) concludes that "objectionable campaign activities diminish institutional legitimacy, but that the size of the negative effect of campaigns is smaller than the magnitude of the positive effect that flows from allowing the people to say who their judges will be" (see also Bonneau and Hall 2009; but see Benesh 2006).

Judicial elections also promote greater judicial transparency. Election campaigns create opportunities and incentives for incumbent judges, their challengers, interest groups, and the media, among others, to attempt to inform the public about the work of courts (Streb 2007). Yanus (2002), for example, shows that American state courts of last resort staffed by elected judges receive significantly more media attention than courts staffed by appointed judges. Of course, much of this additional attention is charged campaign content rather than neutral new coverage. Yet, even negative campaign advertisements provide meaningful opportunities for the voting public to learn about officeholders (Geer 2006). Campaigns are a kind of coordinated opportunity for voters to hear "fire alarms" about judges' conduct in office, the decisions of courts, and threats to judicial independence that are not as readily perceptible to voters who cannot participate in judicial selection (McCubbins and Schwartz 1984, Huber and Gordan 2004).

To reiterate, courts composed of elected judges should exhibit greater institutional capacity than courts composed of unelected judges for two reasons: 1) elections increase diffuse support for judicial institutions, providing courts a well of public backing to demand increased capacity or resist efforts to decrease their capacity; 2) elections yield transparency which enables voters to observe other public officials' attempts to evade judicial decisions or undermine courts. We therefore hypothesize that, all else equal, courts staffed by elected judges should exhibit greater institutional capacity than courts staffed by unelected judges.

It is possible that judicial elections result in greater capacity due to a convergence of preferences from the branches of government. Electoral mechanisms for judicial selection and retention mean that judges are subject to the same popular oversight as their coordinate elected legislators and executives. This could harmonize the political preferences of judges with politicians in legislatures and executive offices (see Funston 1975). In turn, politicians may increase the institutional capacity of allied courts to bolster their expected good work. This possibility is important, as while it would lead to the same results empirically this mechanism is quite different than the one already proposed.

Our mechanism argues that capacity will result from politician's fear of curbing an elected court, even if it is an ideological enemy; this mechanism argues that capacity results from a elections leading to ideologically friendly courts. We consider this possibility in the next sections.

Assessment

In order to test this theoretical claim, we estimate a series of statistical models of the institutional capacity of state courts of last resort conditioned on judicial selection mechanisms and several control variables related to states' judicial workloads and political environments. We begin by measuring court capacity. As noted, institutional capacity is similar to the related concepts of institutionalization and professionalization. Institutionalization refers to an organization's differentiation, durability, and autonomy (Polsby 1968). McGuire (2004), for example, measured the Supreme Court's institutionalization over time by taking the first principal component of time series measuring associate justice salaries, the Court's agenda-setting powers, the development of rules of the Supreme Court, the Court's location, the federal judicial experience of the Court's membership, the role of law clerks, and the justices' circuit riding duties. Professionalization refers to institutional resources that allow its members to "produce and digest information in the policymaking process" (Squire 2008, p. 225). Brace and Hall (2001), for example, measure professionalization with the first retained factor among the number of clerks for the chief justice, the number of clerks for the associate justices, the difference between the justice salary and the average judicial employee salary, the number of authorized supreme court justices per 1,000 state residents, and the size of the court's docket. Squire's (2008) index of state courts of last resort institutionalization includes judicial salaries, justices' clerk support, and docket discretion.

Qualitatively, the latent properties of institutionalization and professionalization are quite similar. While institutionalization and professionalization might be distinguished conceptually, these two notions of institutional development are operationalized by substantially overlapping sets of observable characteristics. Moreover, both judicial institutionalization and professionalization have been shown to have similar consequences for judicial behavior (Canon and Baum 1981; Brace and Hall 2001). Similarly, increased institutionalization has a positive long run impact on the amount of "meaningful political authority" a court can wield (McGuire 2004 p. 141), and Squire (2008)

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speculates that the professionalization of state courts of last resort may explain a court's willingness to "engage the new judicial federalism movement" (p. 235). Our notion of courts' institutional capacity can be reasonably understood as the significant intersection of judicial institutionalization and professionalization and a necessary condition for judicial independence and influence.

We proceed with the same basic approach to measuring state court capacity as the work just cited. We collect information on the degree of discretion the court enjoys in choosing to hear criminal, civil, and administrative appeals; the number of law clerks assigned to the chief judge and associate judges on each court; and the salary of the chief judge and associate judges (expressed as a ratio of each state's median income). Salary data are from the National Center for State Court's Judicial Salary Resource Center (2004), and state median income data are from the United States Census Bureau (2016).[4] The remaining characteristics are taken from the State Court Organization Report (Bureau of Justice Statistics 1998, 2004). The extent of each court's discretionary jurisdiction in civil, criminal, and administrative cases are assigned values of 0, 1, 2, or 3, indicating no jurisdiction (the court may not hear the relevant cases), mandatory jurisdiction (the court must hear the relevant cases), mixed jurisdiction (the court must hear certain relevant cases), and discretionary jurisdiction (the court may to choose to hear any relevant case), respectively. These data are available for two years, 1998 and 2004, which correspond to the publication of the State Court Organization report by the Bureau of Justice Statistics. Notably, each of these characteristics are at the mercy of lawmakers and may be changed legislatively (with executive consent) or, in the case of salary and staff components in some states, merely by executive decree.

We analyze these data with exploratory factor analysis (EFA) to assess the degree to which the different institutional characteristics conform to a common latent factor. The results of this analysis are reported in Table 1. Three factors are retained by Kaiser's (1960) criterion.[5] These

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[4]We use nominal dollars rather than constant dollars in these calculations. Because judicial salaries are expressed in relative terms compared state median incomes, the exact units cancel out. The resulting ratios are comparable over time regardless of any inflation that occurred.

[5]Kaiser (1960) notes that, "for a principal component to have positive Kuder-Richardson reliability (coefficient alpha) it is necessary and sufficient that the associated eigenvalue be greater than one." This property informs Kaiser's suggestion to retain only factors with eigenvalues of at least one.

Table 1: Factor Analysis of Judicial Capacity for State Courts of Last Resort

Indicator	Factor 1	Factor 2	Factor 3
Civil Case Discretion	0.75	-0.51	0.14
Criminal Case Discretion	0.73	-0.53	0.06
Administrative Case Discretion	0.68	-0.37	0.09
Chief Justice Clerks	0.61	0.48	-0.49
Associate Justice Clerks	0.62	0.47	-0.50
Chief Justice Salary	0.41	0.61	0.47
Associate Justice Salary	0.36	0.57	0.54
Eigenvalue	2.63	1.81	1.04
Proportion	0.38	0.26	0.15
Cumulative	0.38	0.64	0.78

Factors retained by Kaiser's (1960) criterion.

explain virtually all of the relevant variance in the institutional capacity indicators. Consistent with previous scholarship, we find that a single dimension explains the fair amount of the variance in the observed capacity indicators, but by no means all or even a majority of it. Factor loadings are highest for the three discretionary jurisdiction indicators (0.75 to 0.68) and lowest for salary variables (0.41 and 0.36). Together, these figures suggest there is a principal latent dimension in our data that reflects courts' overall institutional capacity, but also that this factor does not tell the whole story.

Loadings on the second and third factors indicate that the dimensional structure of these data is complex. The second factor also accounts for a substantial proportion of the variance in the seven indicators and has an eigenvalue of 1.81. It is postively associated with each of the clerk support and judicial salary variables. Alone, these results could plausibly support interpreting the second retained factor as a dimension indicative of courts' residual resource support that is not aligned with their docket discretion. However, the factor is strongly negatively correlated with discretion in civil, criminal, and administrative cases. This factor is, therefore, on its face a dimension about positive resource support absent discretion.

The third factor is similarly complex. Although it loads positively on judicial salaries, the third factor is negatively related to clerk support and effectively unrelated to docket discretion. Like the second factor, the third retained component in our exploratory factor analysis defies intuitive interpretation, indicating some property of court's resource base associated with judges' salaries and the inverse of their clerk support.

Overall, the EFA suggests that the dimensional structure of courts' institutional capacity is not tightly bound. There is a primary retained factor that explains just under half of the observed variance in the component indicators, but this indicates only a modest level of scale reliability and suggests the need to analyze additional dimensions of variance in the data. Subsequent retained factors, though, do not align with the concept of institutional capacity (or with the related concepts of institutionalization or professionalization) and defy reasonable substantive interpretation. This result indicates to us that the organization of the second and third retained factors are artifacts of the EFA data reduction rather than meaningful dimensions of courts' institutional development.

We therefore adopt a mixed approach to measuring courts' institutional capacity. We proceed to measure overall judicial capacity using the first retained factor from the analysis describe above. We also measure the three faces of institutional capacity separately with summary indicators of the courts' docket control, clerk support, and salaries. These are an additive index of the docket discretion indicators, the average of the number of clerks assigned to the court's chief justice and the number assigned to an individual associate justice, and, finally, the average of the chief justice's salary and an associate justice's salary. By analyzing these components separately, we obtain a clearer picture of the role of judicial elections in shaping the courts' capacity.

With these measures of judicial capacity—the summary measure, the discretion component, the staff component, and the compensation component—we assess the empirical connection between capacity and judicial selection and retention mechanisms. Our principal independent variable is *elections*. This dummy variable indicates whether a state uses elections at any stage of the judicial selection or retention process. This includes including both competitive partisan and nonpartisan elections and retention elections, taking on a value of one when any type of election is used and zero otherwise. Our theoretical arguments predict a positive relationship between *elections* and courts' institutional capacity.

We also control for several potential confounders in our analysis. Theoretically, these con-

founders fall into four categories. The first pertains to the status quo government's desire to protect itself from future governing coalitions. That is, if the present government were to de-claw the courts in order proceed with a radical agenda, it would also enable future governments' abilities to proceed with their own radical and potentially undesirable (from the present government's perspective) agendas (Landes and Posner 1975, Stephenson 2003, Vanberg 2015). To this end, we control for historical patterns of *turnover* in party control of state government, which informs the present government about its likelihood of replacement, and whether or not the present government is unified or under divided partisan control, where the expectation is that divided governments would prefer higher capacity courts, as divided governments require smaller electoral shocks to change their disposition. Following Fortunato and Turner (2018), we measure turnover with the proportion of elections resulting in a shift in the partisan control of government over the number of elections in a given state from 1970 to either 1998 or 2004, depending on the year of observation for the dependent variable. The simple proportion is then weighted so that more recent elections are ascribed greater importance with the exact weight used (0.8) determined by model fit. A value of one indicates that every election has resulted in a transition in partisan control of government, while zero indicates that there have been no transitions over that time period. Extant research would expect a positive relationship between this measure and judicial capacity.

Our second type of control variable corresponds to the degree of ideological similarity between courts and politicians. Governments would become more willing to engage in court curbing in order to protect its agenda from court meddling as the ideological distance between the court and the government grows. The variable capturing this called *ideological dissimilarity* and it is the absolute difference between the ideal point of the court's median and the median ideal point of the governor and the upper and lower chambers' medians as measured by Bonica's (2016) CF scores, which are derived from campaign finance data. Unfortunately, these data do not provide coverage for our 1998 observations, so they are only included in the 2004-specific models. Extant research would expect a negative estimate on this variable.

As discussed earlier in our theoretical argument, elections might lead to greater institutional capacity because the public will elect ideologically similar judges and politicians. Given this possibility, our ideological dissimilarity serves to control for this third causal pathway between elections and institutional capacity. If this causal pathway were true, it would imply that elected courts

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have more similar preferences to the government than appointed courts. A difference of means test, however, does not find evidence for this. While the ideological preferences of elected courts are less dissimilar to politicians than appointed courts (0.42 vs. 0.50), this difference is not statistically significant using a one-tailed test (p=0.27). Our analysis does not support this theoretical explanation.

The third type of control variables are meant to account for characteristics of states that may shape the degree to which endowing courts with capacity is possible or required. That is, some states may simply lack the resources to endow their supreme courts with potentially costly institutional parameters. Likewise, some states, with a dearth of legal activity, may lack the need for them. To account for these possibilities, we include measures of state size (*logged state population*) and wealth (*gross state product per capita* in millions of constant dollars). Extant research would expect positive estimates on these variables.

Fourth, and finally, we want to account for the tastes of the framers' of the states' constitutions and the degree to which those tastes may have changed. That is, is possible that high capacity courts and judicial elections were simply in vogue at the same point in time in American history and states that ratified or revised their constitutions around that time chose, by chance, to endow themselves with both. To proxy for the tastes of the framers, we use the only cross-sectionally and temporally comparable measure of political ideology available, Congressional common-space DW Nominate scores (Lewis et al 2018). We take the average the of each state's U.S. House and Senate contingent's first-dimension ideal point estimates at the time of the state's constitutional ratification and include this in the model to proxy for the preferences of the state's political elite at the time. We also include a cubed function of the age of the constitution from the time of our measurements. We have no theoretical expectations for these estimates.

With these data in hand, we estimate an ordinary least squares model of each of the four indicators of judicial capacity. Each indicator is estimated as a function of elections, partisan turnover in control of state government, unitary party control of government, per capita gross state product, logged state population, and the age of operant state constitutions (and polynomials of constitutional persistence). Here, in the main text, we present the results of the model in the year 2004, as missing data issues prevent the inclusion of all variables in prior years. We note, however, that while our central predictor is largely time-invariant, our dependent variable does

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change within units over that interval. It is possible that failing to model the data dynamically could bias our results; as it turns out, however, different model specifications yield the same results. In the appendix, interested readers can find the results of our model in 1998 as well as a pooled model with annual fixed effects and standard errors clustered on states.

Results

The first column in Table 2 reports ordinary least squares estimates of the factor analytic index of judicial capacity. First, the data show a positive, significant relationship between judicial elections and latent judicial capacity. On average, states with elections score 0.45 points higher on the judicial capacity dimension than states without elections. That corresponds to roughly one half of one standard deviation. This estimate is consistent with our principal hypothesis: judicial elections are associated with greater institutional capacity.

Additionally, the data indicate a significant, positive relationship between the log of states' populations and courts' institutional capacity index. This result indicates that larger states, in terms of population, provide their courts of last resort (which process larger volumes of cases) with greater overall discretion and resources. This result suggests that constitutional designers and legislatures offer courts' capacity commensurate with judiciaries' administrative responsibilities and states' resource environments. Larger states provide greater resources and discretion to courts than smaller and poorer states. The magnitude of these effects indicates that these kinds of administrative considerations structure much of the variation in state courts' development rather than ideological political or inter-branch political rivalry.

However, the model provides scant evidence of other significant, systematic patterns in latent judicial capacity. There is no significant relationship between the judicial capacity factor and turnover in party control of government or unified party control of government, although the parameters are signed in the anticipated direction. The ideological dissimilarity between a court and other branches of government is also statistically insignificant and even incorrectly signed. Further, a state's ideology at the time its constitution was adopted has no influence. The age of state constitutions seems not to have an impact, either—a joint F-test of all of the constitutional age polynomials is outside the traditional range of statistical significance. Finally, a state's wealth does not influence judicial

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Table 2: Elections and Judicial Capacity for the American States, 2004

Predictor (Expected Sign)	Factor-Analytic Index	Discretion Index	Clerk Average	Salary Average
Elections (+)	0.45*	1.58*	-0.06	0.24
	(0.20)	(0.87)	(0.41)	(0.17)
Turnover (+)	0.55	1.21	0.67	-0.33
	(0.50)	(1.33)	(0.60)	(0.30)
Unified (-)	0.05	0.17	0.12	-0.12
	(0.22)	(0.66)	(0.33)	(0.12)
GDP PC (+)	11.50	56.45	12.08	-23.62
	(16.61)	(54.35)	(24.46)	(12.69)
Log Population (+)	0.59*	0.91*	0.47*	0.20*
	(0.12)	(0.29)	(0.18)	(0.06)
Ideological Dissimilarity (-)	0.11	1.31	-0.34	-0.13
	(0.31)	(0.87)	(0.50)	(0.19)
CS at Adoption (+/-)	-0.11	0.10	-0.18	-0.13
	(0.37)	(1.23)	(0.47)	(0.26)
Age of Constitution (+/-)	-0.03	-0.09	0.02	-0.01
	(0.02)	(0.08)	(0.03)	(0.02)
Age of Constitution^2 (+/-)	0.00	0.00	0.00	0.00
	(0.00)	(0.00)	(0.00)	(0.00)
Age of Constitution^3 (+/-)	0.00	0.00	0.00	0.00
	(0.00)	(0.00)	(0.00)	(0.00)
Constant (+/-)	-9.07*	-9.86*	-5.74*	1.53
	(2.38)	(4.81)	(3.68)	(1.23)
Adjusted R^2	0.51	0.36	0.28	0.31

Note: Cell entries are OLS coefficients with robust standard errors in parentheses.

*$p \leq 0.05$ for one-tailed tests used where possible. N=100.

capacity. These null results together suggest that the degree of political volatility in party control of state government, the ideological similarity between courts and politicians, and historical factors are not systematically associated with state courts' general capacity.

The second column in Table 2 reports ordinary least squares estimates of the additive index of docket discretion, which ranges from two to nine. Once again, the data show a positive, significant association between elections and courts' discretion in case selection. States with elections at any stage of the judicial selection or retention process have a discretion index that is 1.58 units higher, on average, than states without judicial elections. Substantively, this roughly translates to an elected court having total discretionary control over its docket in an area of law in which it would be forced to hear all cases in the absence of judicial elections. Within the context of the sample, elected judges have about 0.68 standard deviations greater docket discretion than strictly appointed or selected courts. This result is also consistent with our principal hypothesis that judicial elections are associated with greater judicial capacity.

The data also show significant, positive relationships between the log of states' populations and docket discretion. This indicates that larger states provide their courts with somewhat more discretion in selecting cases to hear. This predicted effects of population and economic development are consistent with results from the first model. There are some differences between the first and the second models, however. Like the first model, the second model also shows no significant relationship between docket discretion and turnover in party control of government, the degree of unified party control of government, ideological dissimilarity, gdp per capita, and historical factors.

The third and fourth columns in Table 2 report ordinary least squares estimates for models of the additive index of clerk support, which ranges from one to six and a half, and the average of chief and associate justices' salaries. In each of these models, the estimated effect of elections for judicial selection is insignificant and, in the model of clerk support, wrongly signed. There is no evidence of a positive relationship between the use of elections in judicial selection and either judges' clerk support or judicial salaries. These null results are inconsistent with our theory.

These models, though, do indicate that clerk support and salaries are influenced by courts' administrative demands reflected by state population. Clerk support is significantly, positively associated with logged state population. An increase of one unit in a state's logged population predicts justices on a state court of last resort will be assisted by about one-half additional clerk

(0.47), which is roughly a one half standard deviation increase in clerk support. Similarly, each point increase in a state's logged population predicts that judges' salaries will increase by 22.6% of the state's median salary. Finally, once again, these final two models show little evidence for systematic effects from the other variables included.

Discussion and Conclusions

At first glance, the model estimates indicate mixed support for our theory of electoral foundations of judicial capacity in the American states. On the one hand, the data show significant positive relationships between judicial elections and both latent judicial capacity and courts of last resort docket discretion. This pair of results is consistent with our argument that judicial elections promote judicial capacity by supporting greater legitimacy for courts and greater transparency in courts' political environments. On the other hand, there is little evidence of a systematic association between elections and either clerk support or judicial salaries. These results indicate that elections are not associated with two prominent sets of indicators of courts' institutional capacity.

We interpret these distinct results together in light of factor analytic decomposition of the constituent measures. We found that a single retained factor explained about half of the observed variance among indicators of docket discretion, clerk support, and salary, but we also observed substantial variance in the loadings of each set of indicators on the retained factors. Again, this result indicates to us that both latent judicial capacity and each dimension of courts' institutional capacity—docket discretion, staff support, and compensation—have substantively important unique variance and should be analyzed separately.

We conclude that courts staffed by judges answerable to ordinary voters exhibit greater overall capacity than courts staffed by appointed judges and that this heightened capacity is predominantly manifest in the observed indicators of docket discretion rather than indicators of clerk support or salary. We suspect that this result follows from elections amplifying aspects of judicial process providing judges with greater discretion in their decision-making, choosing which cases to hear and how to decide them. This finding is consistent with research showing a connection between public support for the U.S. Supreme Court and the Court's willingness to invalidate federal laws (Clark 2009; Merrill, Conway, and Ura 2017). However, elections have little or no influence over

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the staffing and financial resources available to support judges and the operations of courts.

This conclusion has implications for institutional designers and policymakers and indicates new directions for scholarly research. First, these findings can inform the ongoing normative debate over judicial elections. In particular, our results suggest that there would be important unintended consequences associated with rolling back judicial elections. Replacing elected judges with appointed judges would detach courts from a powerful legitimizing institution and reduce the transparency in courts' political environments. Together, these changes could create political climates in which citizens were less loyal to courts and elected legislators and executives were less constrained in undermining judicial capacity. Our analysis suggests that any potential gains from eliminating elections may be offset by greater pressure from elsewhere in the political system. More specifically, eliminating elections may create an environment in which the legislative and executive branches feel empowered to chip away at the judiciary's institutional capacity—to strip the courts of the ability to determine their own docket and therefore insulate components of their policy agenda from judicial review. This result may be a worthwhile tradeoff, but it is nevertheless a tradeoff, and discourse about the future of judicial elections should be informed by the positive relationship between judicial capacity and judicial elections evident in our data.

Our analysis also indicates that it would be worthwhile for scholars to revisit research on state courts' institutional capacity that proceed on analysis of single-factor indicators of latent judicial capacity, professionalism, institutionalization, or similar concepts. To the extent that these approaches have utilized low order interval-level indicators in their underlying factor analyses, such as counts of law clerks, canonical factor analytic methods may overstate the strength of the association between indicators and early retained factors. This approach may obscure important relationships between individual components (or subsets of components) of these factor analytic scales and other theoretically interesting variables.

This conclusion echoes a similar finding in research on American state legislatures. A recent re-decomposition of the "industry-standard" measure of professionalization—the Squire Index (Squire 2008)—revealed that the measure's components have robust, directionally different influence on legislative behavior (Fortunato and Provins 2017), just as we have found that elections were strong, positive predictors of judicial discretion, but were negatively (though insignificantly) correlated with staff and compensations. Revisiting questions about the causes and consequences of judicial

institutionalization, professionalization, and similar concepts with renewed attention to various components or faces of those concepts considered separately may yield additional valuable insights into the politics of courts' institutional development.

Finally, our results have important implications for understanding the priorities of judges. Our principal theoretical claim is that elections' positive influence on court's legitimacy and the transparency of courts' political environments should constrain legislatures' and executives' ability to undermine courts' institutional capacity and, instead, support greater allocations of resources and discretion to courts and their judges. Yet, the data show the clearest link between elections and courts' docket discretion rather than judges' salaries or clerk support. In other words, the data show that the presence of an institutional arrangement that heightens public support for courts and increases voters' ability to observe other policymakers' actions towards the judiciary leads courts and their judges to attract or extract first additional discretion to choose which cases to decide rather than higher pay or more clerks.

These results suggest that judges are more interested in their ability to shape law on their own terms and in their own time than in their purse or personal influence in the legal community. These empirical relationships are *at odds* with previous findings drawing inferences about the motivations for entering legislative service and therefore the *type* of people who will select into legislatures. Fiorina (1994) argues increasing state legislative professionalization makes holding legislative office relatively more attractive to Democratic candidates and less attractive to Republican candidates since full-time work in government requires leaving another career, and potential Democratic candidates tend to have lower paying employment than potential Republican candidates. We show that elections contribute to courts institutional capacity in ways that relate to judges' independence and ability to shape law rather than judicial salaries. Together, Fiorina's work and our analysis suggest that people who become judges have different kinds of motivations (at least at the margins) than people who become legislators.

However, our findings are *consistent* with previous research showing that federal judges' work is shaped by the interaction between the hierarchical structure of the American legal system and judges' complex preferences over policy goals, professional ambition, autonomy in their work, leisure, and other factors (Epstein, Landes, and Posner 2013). Our findings suggest a similarly complex relationship between courts' institutional designs, judges (and potential judges) preferences,

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and the market for legal expertise in the states. Future research should explore the relationship between state courts' institutional capacities and the preferences, personalities, and decisions of those who serve on the bench.

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1 Appendix

Tables 3 and 4 contain the results of the models in 1998 and the pooled model of 1998 and 2004, respectively. Neither model controls for the ideological dissimilarity between the court of last resort and the government, but the pooled model controls for annual fixed effects. As one can see, the results hardly change from the ones presented in the main text. In both tables, elections is positive and statistically significant for the factor-analytic index and the discretion index. Their coefficients are also quite similar. In the clerk support and salary models, elections are statistically insignificant and close to zero. Likewise, logged population is a positive, statistically significant predictor in seven of the eight models.

There are a smattering of results that are different. In both tables, transitions to unified government lead to smaller judicial salaries than otherwise. Legislators and executives with unified control of their government seem to value the salaries of their judicial counterparts. Additionally, both tables show that increases in the GDP per capita lead to increases in the amount of discretion granted to courts. Richer states likely have higher levels of legal activity and, because of this, have larger demands on their judicial system. In turn, this would prompt courts to desire a discretionary docket that legislatures then grant them. In both instances, it is unclear whether these results are driven from a failure to control for ideological dissimilarity between courts and other branches of government or a difference between the years 1998 and 2004. Interestingly, the year fixed effect is not statistically significant in three of the four pooled models.

Table 3: Elections and Judicial Capacity for the American States, 1998

Predictor (Expected Sign)	Factor-Analytic Index	Discretion Index	Clerk Average	Salary Average
Elections (+)	0.44*	1.68*	-0.14	-0.27
	(0.23)	(0.76)	(0.36)	(0.12)
Turnover (+)	0.52	2.41	-0.37	-0.28
	(0.56)	(1.65)	(0.68)	(0.30)
Unified (-)	-0.24	-0.07	-0.23	-0.25*
	(0.19)	(0.62)	(0.21)	(0.10)
GDP PC (+)	24.69	137.63*	3.92	-39.92
	(17.41)	(59.07)	(19.26)	(18.55)
Log Population (+)	0.56*	0.90*	0.34	0.25*
	(0.12)	(0.26)	(0.21)	(0.06)
CS at Adoption (+/-)	-0.19	-1.13	-0.18	0.08
	(0.37)	(1.18)	(0.36)	(0.23)
Age of Constitution (+/-)	-0.03	-0.10	0.00	-0.01
	(0.02)	(0.07)	(0.02)	(0.01)
Age of Constitution^2 (+/-)	0.00	0.00	0.00	0.00
	(0.00)	(0.00)	(0.00)	(0.00)
Age of Constitution^3 (+/-)	0.00	0.00	0.00	0.00
	(0.00)	(0.00)	(0.00)	(0.00)
Constant (+/-)	-8.54*	-11.09*	-2.71*	1.12
	(2.13)	(4.46)	(3.30)	(0.77)
Adjusted R^2	0.55	0.45	0.23	0.36

Note: Cell entries are OLS coefficients with robust standard errors in parentheses.

*$p \leq 0.05$ for one-tailed tests used where possible. N=100.

Table 4: Elections and Judicial Capacity for the American States, 1998 and 2004

Predictor (Expected Sign)	Factor-Analytic Index	Discretion Index	Clerk Average	Salary Average
Elections (+)	0.46*	1.78*	-0.02	-0.13
	(0.18)	(0.72)	(0.37)	(0.14)
Turnover (+)	0.49	1.46	0.31	-0.31
	(0.36)	(1.09)	(0.38)	(0.18)
Unified (-)	-0.09	-0.03	-0.03	-0.16*
	(0.15)	(0.42)	(0.17)	(0.08)
GDP PC (+)	15.54	84.18*	8.84	-30.20
	(14.15)	(45.97)	(19.53)	(13.23)
Log Population (+)	0.58*	0.89*	0.42*	0.23*
	(0.11)	(0.23)	(0.19)	(0.5)
CS at Adoption (+/-)	-0.17	-0.52	-0.04	-0.03
	(0.31)	(1.23)	(0.39)	(0.21)
Age of Constitution (+/-)	-0.03	-0.10	0.01	-0.01
	(0.02)	(0.07)	(0.03)	(0.01)
Age of Constitution^2 (+/-)	0.00	0.00	0.00	0.00
	(0.00)	(0.00)	(0.00)	(0.00)
Age of Constitution^3 (+/-)	0.00	0.00	0.00	0.00
	(0.00)	(0.00)	(0.00)	(0.00)
Year==2004 (+/-)	-0.06	-0.61	0.14	0.20*
	(0.11)	(0.33)	(0.16)	(0.10)
Constant (+/-)	-8.78*	-9.08*	-4.84*	1.15
	(2.04)	(3.99)	(3.36)	(0.75)
Adjusted R^2	0.53	0.37	0.24	0.36

Note: Cell entries are OLS coefficients with standard errors clustered on states in parentheses.
*$p \leq 0.05$ for one-tailed tests used where possible. N=100.