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_____ _____

Katherine Vigilante Date

Deconstructing and Constructing Judicial Activism: A New Measure Applied to the Fifty State Supreme Courts

by

Katherine Vigilante
Doctor of Philosophy

Department of Political Science

_____
Micheal W. Giles, Ph.D.
Advisor

_____
Thomas G. Walker, Ph.D.
Committee Member

_____
Randall W. Strahan, Ph.D.
Committee Member

Accepted:

_____
Lisa A. Tedesco, Ph.D.
Dean of the James T. Laney School of Graduate Studies

_____
Date

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by
Katherine Vigilante
B.A. Emory University 1992
M.A. Emory University 2005

Advisor: Micheal W. Giles, Ph.D.

An abstract of a dissertation submitted to the Faculty of the Graduate School of Emory University in partial fulfillment of the requirements for the degree of Doctor of Philosophy in Political Science
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Abstract

Deconstructing and Constructing Activism: A New Measure Applied to the Fifty State Supreme Courts

by Katherine Vigilante

A primary goal of scholarly work on judicial activism is to determine the factors that generally promote and deter activism. Results have important implications for institutional design and maintenance. These analyses typically rely on case level data that force a single tool and/or issue focus in order to assess activism in multiple contexts. As the focus changes, conflicting characterizations of the same court as activist result. More seriously, conflicting results are reported when hypothesis testing is conducted, suggesting error on the dependent variable. To ameliorate these serious measurement problems, a multi-informant survey was constructed to assess perceptions of activism of the fifty state supreme courts. Survey questions were mapped to two conditions of activism: judicial policy independence and judicial policy impact. Additionally, questions were addressed to two types of court activities: those regarding the specific actions taken by courts in specific policy areas and those concerning general policy activity by a court across issues.

Varying response rates across states and variation in respondent agreement within states caused the validity of the measure to be threatened. To address this threat, high levels of respondent agreement were required and states with too few responses were omitted. Hypothesis testing yielded very little leverage on activism when both conditions of activism, independence and impact, were merged (either specifically or in general). When independence and impact were treated separately, however, analysis supported the positive relationship between general independence and the presence of an intermediate court of appeals. Results were contrary to the prediction that appointed and/or appointed and retained judges are generally more independent than their elected counterparts. Given dramatic increases in campaign spending on judicial elections, these findings may call for a closer examination of issues relating to selection and general independence of state supreme court judges.

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CHAPTER 1

The Defining and Study of Activism: A Literature Review

Judicial scholars have long been concerned with the role courts play in the American political system, and in particular, their contributions to public policy. Academic questions concerning the role of courts tend to be grounded in a broad literature on judicial policymaking and organized around the concept of judicial activism. These questions often touch directly or indirectly on the role courts can and should play in a democratic system and as such, discussions in this regard are both normative and empirical.

My dissertation focuses on the latter since I argue good explication and measurement of activism (which is currently lacking in this literature) informs normative debates concerning the appropriate role of courts in our society. However, in order to understand the alignment between judicial activism and judicial policymaking, it is necessary to examine the normative literature on the role of courts in democratic systems as well as the literature on judicial policymaking and the subset of it that deals specifically with activism. My review of this literature will demonstrate the connection between theories of judicial policymaking and judicial activism and why current approaches are flawed in important conceptual and methodological ways. These flaws significantly undermine our ability to understand in any meaningful way what judicial activism is. More importantly, they undermine our ability to assess validly the suggested determinants of activism, assessments that may have important implications with regard to institutional change, maintenance, and design.

Aligning Judicial Policymaking and Judicial Activism

The connection between activism and policymaking has its roots in normative expectations that in a democracy an un-elected judiciary is "to find and not to make law" (Glazer 1975 and 1979; McCann and Houseman 1989; Scheingold 1974; and Taylor 1992). This expectation is the essential point made by Alexander Hamilton in Federalist 78, in which he answers concerns about the potential power of the unelected Supreme Court.

> *"…[T]he judiciary, from the nature of its functions, is the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the Executive arm even for the efficacy of its judgments." (Federalist 78)*

The lack of enforcement and funding were the primary arguments that the Court would not engage in so-called "active resolution." Yet alarm over potential power aggrandizement through undemocratic means resurfaced very early in U.S. Supreme Court history. Chief Justice Marshall clarified the power of the federal judiciary in *Marbury v. Madison*, declaring, "(I)t is emphatically the province and duty of the judicial

departments to say what the law is" (1 Cranch (5 U.S.) at 137). Here Marshall establishes the Court's power to nullify legislative acts through the power of judicial review; though underutilized for decades thereafter, most view Marshall's pronouncement in *Marbury* as an assertion of the power of the Court to make and not just to find law (Bickel 1962; Snowiss 1990). In fact, he pronounces that it is the Court's exclusive province to "say what the law is." That is, according to Justice Marshall, the Court is uniquely qualified to have the last say on issues arising over the meaning of the Constitution.

The critiques of *Marbury* as the beginning point for judicial usurpation focus on this assertion that the Court had the sole authority to say what the law is, that it would be the final arbiter. The lack of authority to fund or enforce its decisions appeared to be no deterrent for the Marshall Court in making them. Accordingly, these criticisms focused on the power of nullification possessed by an undemocratic institution over democratically determined law. Consequently, activism and judicial review or constitutional policy-making through negation of the popular will became synonymous terms since, by invalidating legislation through judicial review, the U.S. Supreme Court was making new policy by negating old policy and, as an undemocratic institution, the U.S. Supreme Court was negating the will of democratic majorities.

These early characterizations of the Supreme Court as activist were entirely pejorative and focused on its deviation from the role expected of an undemocratic institution in a democratic political system. The Court, it appeared, could make policy (reserved for elected institutions) through negation of existing policy, based on its right to say what the law is on constitutional grounds. Not surprisingly, early studies of U.S.

Supreme Court activism are collectively referred to as those concerning the "imperial judiciary" (Wolfe 1990).

James Thayer, a prominent law professor and successor to Oliver Wendell Holmes at Harvard Law School, launched the first scholarly critique of Supreme Court activism in 1901. Thayer's criticism is leveled at an undemocratic body usurping the moral authority of the people to change their laws through the democratic process. Thayer's criticisms of judicial activism as an inappropriate form of policymaking in a democratic system focused on the Supreme Court's overturning of several economic regulations in the Court's Lochner era (see Thayer as quoted in Fisher, Horwitz and Reed 1993). Thayer's arguments against activism, however, have been highly influential to several notable justices, particularly Louis Brandeis and Felix Frankfurter. In more recent years his criticisms have influenced the conservative legal community critical of the Warren and Burger Courts' perceived overzealous protection of minority and individual rights (including privacy rights). The argument focuses on the Court's substitution of its judgment for the people's own consensus building and moral authority to decide what their laws should be. The Court should restrain itself from making such judgments as substitutions for democratic processes (Fisher, Horwitz and Reed 1993).

In turn, these treatments of the imperial judiciary have been criticized by those who see the Court's actions as a necessary and intended counter-balance to faction and inaction in the political process by democratic majorities. For some, judicial independence is viewed as a sign of a healthy democratic system (for an overview of this literature see Larkins 1996). In the U.S. context, judicial intervention to promote positive policymaking through the protection of minority viewpoints is heralded as a critical

balance to tyrannical majorities (this point is most famously construed in Justice Stone's U.S. Carolene Products footnote). Judicial activism is viewed by some as the savior of democratic principles threatened by recalcitrant factions (see most notably Dworkin 1977). This literature views judicial activism as a positive development in shaping social change and a necessary check to the abuses of democratic majorities who either act to block change or fail to act to bring about change. This view has been challenged by invoking the same criticism raised by Thayer that the process of social change belongs outside the judicial arena (for notable examples see Bickel 1962 and Bork 1990).

These normative debates often divide along ideological lines, with both liberal and conservative commentators crying 'activism' when they lose a court case. This mixture of ideology and political philosophy insures that the debate over the appropriate role of the Supreme Court and of courts more generally within American democracy will remain vital. This debate over the role courts ought to play in a democracy has given rise to a stream of research focusing on empirical questions about the role that courts actually play.

This line of literature was launched by Robert Dahl (1957). His empirical findings, in fact, raised serious questions about the ability of the U.S. Supreme Court (and by implication, other similarly situated courts) to act effectively as an independent policymaker. Resurrecting the lack of purse and sword argument made by Hamilton, Dahl empirically demonstrated that, in fact, the Court was unable to enforce its preferred policy positions against preferences of current democratic majorities. While Dahl's work focused on the Court in the period prior to the heyday of the Warren Court and was subsequently subject to considerable criticism (Casper 1976), the longer view underlines

that, as Dahl (1957) suggested, the frequent replacement of justices has meant that the Supreme Court can rarely sustain a policy contrary to the preferences of strong public majorities (McCloskey 1960; Barnum 1993; Martens 2007; Giles, Blackstone and Vinings 2008).

Dahl's work is echoed most notably by Gerald Rosenberg's *The Hollow Hope* (1991), named for the false hope in the author's view that the courts offer to litigants as meaningful sources of positive social change. Rosenberg concludes that the reputation of courts as the brave pioneers of the policy cycle and a source of real policy change are quite misplaced. To the contrary, his in-depth case studies suggest courts leave litigants without much hope as a source of real change, for they rely heavily on the reactions of other institutions to carry out the decisions they make. Dahl and Rosenberg's bleak conclusions reiterate Hamilton's assuaging of concerns over the judicial branch. The lack of funding and enforcement authority originally described by Hamilton as a preventative to active judicial resolutions appears to remain a substantial barrier to effective social change through courts.

These conclusions are important to the debate over judicial independence and over the counter-majoritarian difficulty posed by the Supreme Court (Martens 2007). If the Court has not been able to exercise its independence to promote and sustain its own policy preferences, this would appear to undercut of the debate surrounding its non-democratic nature. However, the conclusion of Dahl and others that the Supreme Court rarely can sustain a counter-majoritarian policy position runs counter to the apparent growth in the policy importance of courts world-wide (see Tate 1993). It is also unclear if findings concerning the policymaking of the U.S. Supreme Court can be extended to

other courts within the United States. The charges of 'imperialist' courts have been extended beyond the U.S. Supreme Court. In fact in such areas as prison reform (see Taggart 1989), educational finance reform (see Reed 1998), and gay marriage courts (see Werum and Winders 2001) mainly lower federal and state courts have had a substantial and sustained effect on public policy.

The work of Dahl and Rosenberg has also been criticized particularly with regard to the manner in which they defined judicial activism. This has much to do with the failure to define activism in a comprehensive and consistent manner. This is precisely why I believe we must define and measure judicial policymaking or activism in a meaningful way before we can determine how effective courts are as policymakers.

My endeavor begins with a central criticism of Rosenberg's conclusions that are based on critical assumptions he makes about other institutions and their ability to make policy. In fact, his argument requires unrealistic and unsupported assumptions about other institutions and their ability to bring about effective policy change (McCann 2006). That is, courts, like other institutions, operate in an institutional context that requires the same level of scrutiny in determining their effectiveness as policymakers. Rosenberg assumes other institutions are able to make policy in the same institutional space as courts, but they can do so more effectively. This may or may not be accurate. Thus, Rosenberg's assumption creates a patently biased comparative baseline against which to measure the effectiveness that many institutions might fail (McCann 2006). Specifically, Rosenberg's standards for meaningful social change assume that agenda-setting and implementation powers are necessary and sufficient conditions of effective policymaking. Therefore, since courts lack these powers they are ineffective policymakers.

Consequently, since courts lack these powers, they are predestined to fail Rosenberg's test of effective policymaking. If we do not assume courts are deficient because they apparently lack these powers we can focus instead in the ways in which courts contribute to policymaking.

The contributions of courts to policymaking have been treated in the scholarly literature. That focus typically has been on the ability of courts to utilize various tools at their disposal to contribute (or not) to public policy and framed around the concept of judicial activism. An abundance of this literature has focused on constitutional policymaking through judicial review as the primary tool especially of the U.S. Supreme Court (e.g., Halpern and Lamb 1982), to a much lesser degree on the activism of state courts (e.g., Canon and Baum 1981; Canon and Baum 1982; Fino 1987; Tarr and Porter 1988; Brace and Hall 1993; 1997; Hall 2001; Langer 2002), and in more recent years, a small bit on activism abroad (e.g., Cappelletti 1989; Holland 1991).

Despite the considerable influence of Dahl and Rosenberg's work and their negative conclusions, scholarly interest in judicial policymaking and activism has increased in recent decades, both in the American context and abroad. Such an increase parallels a greater willingness among courts to make policy (see for example Horowitz 1977; Rosenberg 1991; and Holland 1991) and an interest by scholars in the ability other courts to make policy (e.g., Canon and Baum 1981; Caldeira and McCrone 1982; Canon 1982; Fino 1987; Glick 1990; Holland 1991; Lewis 1999). Thus, literature on activism has expanded as activist behavior is recognized in courts other than the U.S. Supreme Court and as courts have adopted alternative policymaking means.

These more detailed explorations have raised several important questions: (1) how to measure judicial policymaking and activism in particular, given the number of policy tools courts have to employ; (2) how to assess the effectiveness of courts as policymakers, given the multiple tools they may have at their disposal; (3) how to assess the policymaking behavior of courts in different contexts; and lastly, (4) how to assess the causal factors associated with judicial policymaking and activism.

Existing Problems Conceptualizing and Measuring Activism

For knowledge on a subject to accumulate across studies it important that the concepts central to the subject be clearly and consistently defined. In the expansion of interest in judicial policymaking, however, an overarching trait of the literature is that scholars differ in their definitions of activism. This results because activism itself is a multifaceted, complex and evolving phenomenon (e.g., Caldeira and McCrone 1982; Canon 1982; Glick 1990; Halpern and Lamb 1982; Horowitz 1977). The resulting lack of a clear definition and approach to measuring activism has plagued this literature with two specific, major problems. First, activism as a concept has not been treated with consistency. Instead, different and often competing defining criteria are used to identify activist courts and court decisions. Second, scholars have failed to define and measure this important phenomenon comprehensively. Rather, they restrict their measures to single aspects of activism (thereby ignoring its multiple forms) and to particular issue areas (thereby ignoring other issue areas).

In the remainder of this chapter I do three things. First, I lay out these two major deficiencies in much more detail; second, I assess the implications of such deficiencies for fully understanding judicial activism; and third, I demonstrate why these deficiencies

may bias statistical relationships when hypotheses are tested on the systemic determinants of activism suggested by the literature.

Deficiencies in Measuring Judicial Activism

Studies of activism have adopted different criteria for determining when activism has and has not occurred. In general, these studies have adopted either "change" or "conflict" as the necessary defining criterion to designate a court or court decision as activist.

Judicial Activism Defined as Changes to the Current Status

Most scholars tend to define activism as a court contributing a new direction to current public policy (Horowitz 1977; Canon and Baum 1981; Canon 1982; Mendelson 1982; Schick 1982; Rosenberg 1991; Smith 1993; Tarr 1994; Lewis 1999). In Halpern and Lamb's edited volume entitled *U.S. Supreme Court Activism and Restraint* (1982), Canon refers to this alignment between activism and change as the inevitable result of the generic meaning of activism. When a court strikes down public policy or overhauls its own precedent, it is by definition changing things (Canon 1982, p. 387).

This volume, in fact, contains several contributing chapters in which scholars implicitly or explicitly align activism and change. For example, Schick (1982) defines activism as the U.S. Supreme Court's willingness to engage in jurisdictional loosening and the expansion of rights through judicial review and statutory interpretation, a perspective that conjures up notions of change and growth. Similarly, Mendelson critiques popular assumptions regarding the activism of Chief Justice John Marshall by asserting that activism is hallmarked by the innovation or creation of something. Such hallmarks certainly imply change. Interestingly, Mendelson finds that Marshall was

actually following existing legislative and executive support of judicial review, and hence he was not an activist. Mendelson was not suggesting conflict was a necessary criterion for activism in this case, rather, he requires activism be the result of judicial innovativeness and creativity. As might be expected, Mendelson's conclusions regarding Justice Marshall have been questioned. For example, Lewis (1999) defines activism as "enduring policy change." Since judicial review is still embraced and was initiated by Marshall, he concludes that Marshall was in fact an activist. These varying depictions of Marshall's activism make clear how dependent such analyses are on how activism is defined.

Other scholars also align policy change and activism. For example, Canon and Baum's work on tort law innovation in state supreme courts defines activism as sweeping judicial change (Canon and Baum 1981). Likewise, studies of more positive policymaking, in which courts create novel policies in response to new or old problems or require other policymakers to create such policy, implies change (e.g., Horowitz 1977; Canon and Baum 1981; Rosenberg 1991; Smith 1993; Tarr 1994). In this view, courts are seen as agenda-setters; they change the agenda by including a new issue. Even studies of judicial review that imply the presence of conflict meet the policy change definition of activism unless a scholar specifies, as does Dahl (1957), that the court invalidates legislation supported by current popular majorities.

The evolution of the literature on activism has accompanied the expansion of policymaking by courts in new areas, and as such, tends to align policy change with judicial activism. For example, scholars concerned with the impact of court policy tend to define activism as policy change but also require that change actually occur and last. In

The Hollow Hope (1991), for example, Rosenberg asks whether the U.S. Supreme Court has brought about meaningful social policy change (Dynamic Model) in several issue areas (civil rights, abortion, the environment, reapportionment, and criminal justice) or failed to do so given institutional and political limitations on the High Court (Constrained Model). He finds the High Court is severely constrained and unable to bring about meaningful social change without direct help from the political branches of government. As noted, his findings certainly imply the Court's ability to act alone is severely limited.

Judicial Activism as Conflict Producing Behavior

Other influential studies have seen conflict as the essential component of activism. This conflict can occur between a court and itself (through precedential revisions) and/or between the court and the larger political environment (through judicial review or statutory interpretation). Pioneering this perspective, Schubert (1965) defines activism as behavior that engenders actual conflict with legislative policymakers. He creates a "functional theory of judicial activism" that requires the Supreme Court through judicial review to negate policy supported by current popular majorities at either the federal or state level (see also Langer 2002).[1] Schubert uses his theory to classify individual cases as activist according to particular static and dynamic combinations with the U.S. Supreme Court on one side and other decision makers on the opposite side. For example, he finds Brown v. Board of Education (1954) was an activist decision, not because the Court changed national policy on school integration, but because it acted in

[1]These "other decision makers" are only those legislative majorities relevant to the individual case, so that the court's decision to strike down a state policy that the state legislature opposes having struck down is labeled activist even if the Court's decision is in agreement with national legislative majorities. The converse would be true as well

the face of a reticent President and Congress, as well as outraged state legislatures and local school boards. In contrast, scholars who argue that activism is synonymous with change would find Brown was an activist decision because the Court initiated sweeping changes to national school integration policy irrespective of whether that decision presented actual conflict (Halpern and Lamb 1982).[2]

In addition, some scholars have defined activism as conflict-producing behavior without actually specifying that this behavior creates conflict with the current status. Such behavior, if not conflict-producing, would be ignored by Schubert. For example, Caldeira and McCrone (1982) define historical periods of activism by the U.S. Supreme Court by assertions of judicial review. In so doing, they imply the court and legislature are competing players without actually requiring that they compete. At the state level, Emmert (1992) employs a similar focus on judicial review in state supreme courts, assuming the use of judicial review as a conflict-producing tool and thus a sign of activism. The exercise of judicial review clearly entails a change in public policy but that change may be consistent with the preferences of the current legislative and executive and not invoke conflict. In much the same way, Hagan (1988) assesses patterns of "conflict and activism" across six state supreme courts from 1930-1980. Yet, Hagan selects a range of activist courts based on an earlier assessment of tort law adoption by Cannon and Baum (1981), a perspective that adopts change as the central trait defining activism. In so doing, he assumes that tort law innovation as a measure of activism implies conflict between the court and other political actors without requiring that conflict actually be observed.

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[2]And Rosenberg might see not activism 'in fact' because of the failure in implementation.

The origins of the empirical literature on judicial independence are the source of a lack of specification that activism actually produce conflict. Dahl (1957) in his classic study of Supreme Court policymaking only implicitly adopts a conflict definition of activism by focusing only on instances when the Court strikes down statutes passed by the 'current' law-making majority. Dahl concludes that the Court's willingness to conflict (by negating laws on constitutional grounds) with current lawmaking majorities is rare and when it happens is short-lived. Rather, the Court's behavior as a result of the judicial selection process is generally in sync with the preferences of the democratic majority. Thus, the belief that an independent judiciary served as a protectorate of minority interests against a tyrannical majority was more myth than reality. The line of literature Dahl launched on judicial independence of the U.S. Supreme Court has been broadened to include statutory interpretation (see Henschen 1985), extended to "separation of powers context" between the Court and Congress (see Rogers 2001), and applied more recently to state judiciaries (Langer 2002). Yet, despite intense scholarly scrutiny, his basic conclusions for the U.S. Supreme Court, while refined, remain intact.

This literature has important implications for literature on activism as scholars assess the ability of courts generally to make policy. The implications of these assessments are profound especially when one considers legislative attempts to strip courts of their presumed powers. Indeed, these types of legislative responses are typically done in response to cases that clearly conflict with current legislative preferences. To assume, however, that the ability of courts to contribute to policymaking in significant ways must involve conflict-producing behavior (specified or not) misses the point. Courts can and do make substantial contributions to public policy by maintaining the current

status (in a sense, validating it through judicial determination), changing policy without opposition, or creating novel policy in the absence of institutional policy. Rather, a more expansive view of activism is required if we are going to use the concept of activism to capture the myriad contributions of courts to public policy.

Inconsistency and Its Implications

As I have noted, scholars can and do disagree about levels of activism, depending on whether they adopt a change or a conflict perspective to defining it. We can view the problematic nature of such inconsistency using practical examples as well. For example, the Kentucky Supreme Court exercised judicial review and struck down Kentucky's property tax-based funding system for public education. This was a decision widely supported by elites and was followed by the most radical reform of public education in the country. The decision resulted in change, but it did not entail or produce conflict between the preferences of the state supreme court and those of the other political institutions in the state (Smith 1993 and Bosworth 2001). A purely conflict perspective would omit such a decision as activist; while in contrast, a scholar employing change as a criterion for activism (as well as the many affected populations within Kentucky's educational system) would disagree (Bosworth 2001).

Conversely, a court can refuse to change its own precedents but in so doing bring itself into conflict with other political actors, as when the U.S. Supreme Court in the 1930s refused to alter its views of the right of workers to contract until considerable pressure mounted on the Court (Gillman, as cited in Clayton 1999). This refusal to change resulted in the Court striking down both federal and state wage hour laws and resulted in substantial political conflict. A scholar who defines activism as requiring

policy change would argue such a decision is not activist since the court did not change its position. In contrast, a scholar who employs a conflict perspective (Shubert 1974) would clearly define this as activist.

This lack of consistency in defining activism creates significant measurement problems as the same court and the same court decisions simultaneously may be labeled activist and restrainist, depending on the definition employed. In the process, while scholars wrangle about which definition is in fact appropriately labeled activist (see Schubert 1965), a central question implied by this literature continues to elude us: what role do courts play in our political system? An adequate response to that question requires a much more expansive definition and measure of activism.

Lack of a Comprehensive Measurement Approach

As noted earlier, a primary goal of studies of court activism is to determine the factors and contingent circumstances that generally promote and deter judicial activism. The emphasis is on identifying 'activist' (more activist) courts and 'non-activist' (less activist) courts and examining system level traits and conditions (e.g., type of selection, length of term, etc.) that contribute to the level of observed activism. The ability of the extant research to address this important goal has been undermined by the lack of a comprehensive approach to measurement of activism. This failure of comprehensiveness arises in two ways, a focus on one or a few of the policy tools available to courts and a focus on a narrow range of substantive policy areas.

Courts have at their disposal many tools[3] for policymaking. These include:

(1) Judicial review, in which a court overturns law on constitutional grounds.

(2) Statutory interpretation, in which a court may find a law deficient if it conflicts with an existing law or is being applied inconsistently with its intent. Additionally, how the court interprets the language of a statute may affect how broadly or narrowly it is applied.

(3) Precedential revisions/overhauls, in which the court alters, ignores, or overturns its own guiding legal principles (precedent); this can include innovative behavior in which the court creates novel policy in response to new or old problems that have yet to be dealt with through legislative or executive means.

(4) Remedial policymaking, in which the court, in finding law or policy deficient on constitutional grounds, requires that the appropriate party "remedy" the deficiency (negative) or creates a specific policy of its own to remedy that deficiency (positive).

(5) Administrative agency oversight, [4] in which the court overrules administrative agencies actions (or lack thereof) on constitutional (very rare) or statutory grounds (much more common); typically they do this on the grounds that the agency is acting inconsistently with its legislative mandate (Tarr 1994).

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[3]Since a vast majority of scholarship concerning judicial policymaking, and activism specifically, deals exclusively with appellate courts at the state and federal level, I limit my discussion to tools available to these courts. Some of these tools and other tools altogether are available to non-appellate courts (e.g., Tarr 1994, pp. 318-319, and his discussion of "cumulative policymaking" in state trial courts).

[4]Some of these tools are rather new, such as remedial policymaking and administrative oversight but have been largely ignored with the exception of a few case studies (see for example, Horowitz 1977 and Smith 1993).

(6) Studies that measure the activism of a court by focusing on only its use of one of the tools, even if accurate with regard to the court's use of that tool, may fail to appropriately classify the court more generally and relative to other courts. The problem is substitutability. Courts may simply vary in the tools that they use to pursue their desired public policies.[5]

The substantive range within which courts may make policy is arguably as large as that available to the political branches of government, and scholars have noted activism in a multitude of issue areas. At the level of U.S. Supreme Court, scholars have assessed the High Court's activity in civil law (e.g., abortion, school desegregation, privacy, etc.), criminal law (e.g., habeas reform, search and seizure, and self-incrimination) as well as economic cases (e.g., "Commerce" and "Takings" Clauses). At the level of state courts, scholars have examined several issue areas, most notably, school finance, prison, and tort reform as well as privacy rights. These issue specific studies provide an important insight into the policymaking of courts but the performance of a court in a single substantive issue area provides a slender basis for its placement on a general scale of activism.

The possibility of the substitution of policy tools and the range of substantive policy areas available to courts for activism presents a substantial hurdle to the measurement of activism and to the assessment of its causes. Scholars have typically either adopted research designs that addressed the measurement of activism problem or

[5]The choice of policy tool is itself an interesting topic for consideration. See Goldstein's (1999) analysis of the U.S. Supreme Courts' shift from constitutional to statutory interpretation in gender discrimination cases.

addressed the assessment of causes problem. None have addressed both of these problems simultaneously.

The three research designs commonly employed in past research are: (1) single case studies of one court, of one or more tools, or issue areas; (2) small comparative studies of a few courts that may examine more than one tool or issue area at one time; and (3) large-n studies of multiple courts or one court over time that examine a single tool or issue area.

In discussing the lack of comprehensiveness of studies of activism, I have organized my discussion around the these three basic approaches to studying activism, grouping single case and comparative studies together and then treating large-n studies separately.

Single Case and Small Comparative Studies

Single case studies of courts at the state and federal level are in abundance in most law libraries.[6] To a lesser degree, small comparative studies are a popular avenue of exploring judicial activism in both venues. In comparison to a handful to large-n studies, however, single case studies and small comparative studies are much more common.

Both types of studies focus a lion's share of their attention on the U.S. Supreme Court but do so in different ways. Single case studies are usually highly descriptive accounts of the U.S. Supreme Court's assertions of power over the last two centuries, most often in the form of judicial review (e.g., Fairman 1971; Haines and Sheerwood 1944 and 1957; Lewis 1999; McCloskey 1960; Murphy 1962; Swindler 1969 and 1970;

[6]A quick search of Emory University Law Library of these types of studies under "supreme court" received 1372 hits. When the search was modified to "state supreme courts," some 132 relevant studies popped up.

and Warren 1926). Small comparative studies tend to assess U.S. Supreme Court activism by comparing periods delineated by the tenure of chief justices (e.g., Canon 1982; Horowitz 1977; Halpern and Lamb 1982; Lewis 1999; Mendelson 1982; Rosenberg 1991; Schick 1982).

These types of studies have devolved to the state level as scholars have examined the policy contributions of state courts, usually state courts of last resort (herein state supreme courts). Most are highly descriptive accounts of a particular state supreme court (e.g., Morris 1975; Sheldon 1992) while others compare the policy influence and activism of a few courts at once (e.g., Canon and Baum 1981; Fino 1987; Hagan 1988; Tarr and Porter 1988; Lopeman 1999).

Both single case and comparative studies often cover multiple issue areas and multiple tools. Consequently, they offer considerable descriptive information on courts. For example, Lopeman (1999) examines the influence of "activist advocates" in 3 state supreme courts known for higher levels of activism (Indiana, West Virginia, and Ohio) over a 10-year period. He compares these courts to less active courts (Idaho, Florida, and Pennsylvania) and finds the more active courts have one feature in common: the presence of an "advocate of activism" while the less active courts do not. The case selection process allows Lopeman to control for ecological factors as well as discounting the presence of attitudinal factors in determining activism. His conclusions appear to bolster role oriented explanations of judicial activism while discounting attitudinal explanations of this behavior. His conclusions about advocacy advocates, however, are limited to the manner in which he defines activism. His research design requires that activism is defined narrowly to 'conflicts with judicial decrees by other policy actors,

including preceding courts.' As such, labeling Pennsylvania a more active court than Idaho is highly dependent on Lopeman's definition. With such a narrow definition of activism, Lopeman and others actually provide scant leverage on the causes of activism in these courts. This is because there are multiple hypotheses on the suggested causes of activism in comparison to the small number of cases available to assess them.[7] In fact, it is the presence of multiple hypotheses on the causes of activism that have forced scholars to adopt single tool and issue approaches to activism across a large number of units. I turn to this literature next.

Large N Studies of Activism: Single Tool Approaches

A small subset of scholars has assessed activism in multiple contexts, so-called large-n studies of activism. To do so, these scholars focus on one issue area or on one tool in order to assess the case level data necessary given time, personnel, and monetary constraints. These larger-n studies seemingly do provide better opportunities to test hypotheses on the causes of activism given the larger number of cases available to assess them.

This argument is made by Caldeira and McCrone (1982) who assess activism at the level of the U.S. Supreme Court across much of the Court's history. These scholars assess activism using "the number of cases in which the Supreme Court has invalidated a

[7]Among individual justices activism is assessed with respect to judicial attitudes and roles (see Segal and Spaeth 1993). These hypotheses are distinguished from determinants of activism among judicial institutions. For example, the presence of an intermediary appellate court encourages more discretion and the potential for activism among; constitutional length and changeability may contribute to the ability and sustainability of policymaking by courts; and the mechanism for the selection of justices (appointed, elected, or elected and retained, for example) and tenure (terms, life appointment, etc.) may alter judicial policymaking (see Collins, Galie, and Kincaid 1986 and Langer 2002).

state or federal legislative enactment in a particular year from 1800-1973" (1982, p. 109), and thus adopt a single tool approach to measuring activism, judicial review. These scholars argue that while "judicial activism, in the real world, manifests itself in a multitude of forms… [and] in an ideal world we would create indicators of activism that reflect all the facets of this phenomenon" (p. 111), doing so is impossible across such a time period.

Similar approaches have been used at the level of state courts. These studies assess all 50 state supreme court's use of a single tool or activity in a single issue area. For example, Emmert (1992) employs an integrated case related model to judicial decision-making but limits decision-making to judicial review. As such, he implicitly equates activism and judicial review and seeks to examine the impact of several case-related factors on the likelihood that a court overturns a legislative statute. Though he finds several case-related factors have an independent impact on instances of judicial review, his model does not explain judicial decision-making in general. Rather, he explains the use of one tool by courts to contribute to policy and thus his conclusions are limited to one facet of judicial decision-making, not judicial decision-making in general. Similarly, in a more recent study, Langer (2002) assesses theories of "judicial responsiveness" to other branches of state government through assertions of judicial review. Testing varying theories of judicial behavior, she finds separation of powers frameworks demonstrate that electoral and policy threats can in some instances severely limit judicial responsiveness. While she does not set out to measure judicial activism directly, her measure certainly informs and refines Emmert's measure. Thus, I classify her approach like Emmert's as a single tool approach.

Caldeira (1985) measures state supreme court prestige, deeming prestigious courts, and thus indirectly more active courts, as those courts who are most often cited by other state supreme courts (so-called "trend-setting courts"). His study examines the frequency of case citation among state supreme courts as an indicator of their relative reputation and probable innovation. Canon and Baum (1981) examine the influence of state supreme courts similarly to Caldeira but they use innovation in the arena of tort law specifically as their indicator of activism.

Why Lack of Comprehensiveness is a Problem

The failure to adopt a comprehensive approach to measuring court activism undermines the validity of most previous studies. Single tool studies ignore the substitutability of policy tools. Indeed, at the state level, some institutional settings may make some tools more optimal than others and cases themselves may alter the tool necessary for action in a particular case. Yet, one court's decision to use judicial review is not any more activist than another court's decision to utilize statutory interpretation to find actions invalid. For example, a court may strike down a state statue adopting 'comparative negligence' as a standard in tort litigation, while another court alters its own precedent to adopt such a standard (Canon and Baum 1981). A study conceptualizing and measuring activism solely in terms of the exercise of judicial review will identify the first court as activist but not the second (e.g., Emmert 1992 and Langer 2002). In contrast, a study focusing on judicial innovativeness will categorize the latter court as activist but not the former (e.g., Canon and Baum 1981). Both studies have a legitimate claim to measuring activism in terms of the particular policy tool they examine as well as in demonstrating that courts are making and/or modifying public policy in a particular way.

However, neither approach is sufficiently comprehensive to assess the activism of the court generally.

Similarly, single-issue studies ignore that courts may differ in the issue areas they choose or in which they have opportunity to act. Again, one court's activity in school finance does not necessarily relate to its activity in prison reform or privacy rights nor does its activity in school finance make it any more activist than another court's activity in tort reform. For example, Canon and Baum (1981) categorize courts as activist in terms of their adoption of the comparative negligence tort standard, while Smith (1993) focuses on the willingness of courts to attack inequality in public school funding. Both studies are valid in the identification of particular courts as activist within their respective issue area, but neither study is comprehensive enough to label a court as generally activist. We may rightly say court X is more active than court Y with regard to tort reform or school finance, but we cannot say X is a more activist court than court Y in general because it takes action in one issue area and another court takes action in another. Indeed, a court may not act in an issue area not because it is unwilling or deemed itself incapable but because the current policy matches the preferences of the court.

Thus, it should come as no surprise then that single tool and single issue approaches have lead to conflicting characterizations of the same court as activist. To illustrate this point, I have arrayed in Table 1.1 three existing rankings of activist state supreme courts: (1) Canon and Baum's 50-state scale of judicially active state supreme courts based on their innovation of tort reforms since 1975; (2) Caldeira's Reputational Scores and Prestige Rankings of state supreme courts based on their trend-setting ability;

and (3) Emmert's Scale of State Supreme Court Activism based on the percentage of laws declared unconstitutional per state.

Table 1.1: Scales of Activist State Supreme Courts Based on Three Different Measures of Activism

Canon & Baum: Tort Innovation	Caldeira: Prestige	Emmert: Judicial Review
New Jersey	California	Georgia
Michigan	New York	Louisiana
Kentucky	New Jersey	Colorado
California	Pennsylvania	Florida
Louisiana	Massachusetts	Illinois
Pennsylvania	Wisconsin	Arkansas
New York	Illinois	New York
Washington	Washington	Washington
Ohio	Iowa	Kansas
Minnesota	Michigan	Massachusetts
New Hampshire	Minnesota	Missouri
Connecticut	Colorado	Iowa
Illinois	Kansas	Minnesota
Oklahoma	Florida	South Carolina
Oregon	Oregon	Montana
Texas	Oklahoma	Utah
Iowa	Kentucky	Alabama
Wisconsin	Maryland	Nebraska
Colorado	Arizona	Connecticut
Indiana	North Carolina	New Hampshire
Tennessee	Ohio	West Virginia
Georgia	Nebraska	Indiana
Utah	Missouri	California
Alabama	Connecticut	Pennsylvania
Missouri	Indiana	South Dakota
Florida	Alabama	Tennessee
Delaware	Arkansas	Idaho
Arkansas	New Mexico	Maine
South Carolina	Mississippi	Wyoming
Maryland	Virginia	Kentucky
Mississippi	Utah	Rhode Island
North Dakota	Delaware	New Jersey
South Dakota	New Hampshire	Ohio
Idaho	Georgia	Michigan
Nebraska	Idaho	Nevada

Nevada	Alaska	North Dakota
Arizona	Tennessee	North Carolina
North Carolina	Texas	Mississippi
Rhode Island	Louisiana	Oregon
Kansas	Montana	Arizona
West Virginia	Maine	Oklahoma
Alaska	South Carolina	Wisconsin
Hawaii	West Virginia	Alaska
Montana	Nevada	Maryland
New Mexico	North Dakota	New Mexico
Vermont	Rhode Island	Vermont
Virginia	Vermont	Virginia
Massachusetts	Hawaii	Delaware
Wyoming	South Dakota	Hawaii
Maine	Wyoming	Texas

As you can see, these scales are at times in drastic disagreement. For example, Emmert finds the New Jersey Supreme Court utilizes judicial review much less often than the Georgia State Supreme Court; on the other hand, Georgia is toward the bottom of both Canon and Baum and Caldeira's lists. In order to assess how well these scales compared, I performed Spearman's rank order correlation. The rho coefficients and their significance level are presented in Table 1.2.

Table 1.2: Spearman's Rank Order Correlations of State Supreme Court Activism

	Canon & Baum: Tort Innovation	Caldeira: Prestige	Emmert: Judicial Review
Canon & Baum Tort Innovation		.5817** (.0000)	.2628 (.0631)
Caldeira Prestige			.2721 (.0559)

All of the scales appear modestly related. In particular, the Caldeira and Canon and Baum rankings are moderately related and to a statistically significant degree. Emmert's scale of activist courts based on judicial review correlates modestly with

Canon and Baum's scale of the most innovative courts in tort reform. Though these scales bear some resemblance, if we examine particular courts (say New Jersey or Georgia), by whose standard do we claim one court more active than another? In fact, none of these scales can claim superiority since none tells us the general level of activism exhibited by state supreme courts.

Implications of Deficient Measures: Two Important Implications

The Need for a General Theory of Judicial Activism

My review of the literature confirms that existing efforts to conceptualize and measure activism are deeply flawed. The simplest illustration of this point is that a court can play an important policy role by supporting the status quo or refusing to hear certain cases altogether. I would further argue that the focus on 'activism' in the current literature has resulted in too narrow a view of the political contributions of courts, especially as courts create new means to influence politics (Glick 1990). Indeed, courts are a part of the political context, not institutions to be treated as separate from that context. The interactions courts have with other institutions may be critical to understanding public policy more generally. Explication of the concept of activism then must include measurement of the court's relationship to other political institutions (especially its coequal branches of government), the relationship of these other political institutions to the court, and some sense of how judicial policy is treated.

Thus, we must take several important points into consideration. First, courts may alter the political agenda in multiple ways and placing primacy on one form over another makes no theoretical or practical sense. Second, the extent to which courts conflict with other political institutions is but one indication of their political engagement; it does not

necessarily capture their capacity to affect policy more broadly. Again, courts may create conflict without changing a thing just as they may change policy without conflict. Third, an assessment of the impact of courts on shaping the political agenda more generally should be included in any assessment of the political contributions of courts. This is something current studies on activism do not provide. For example, current studies, most of which rely on case level data, do not provide information about whether a court's decision was actually implemented nor do they provide us any indication of whether the court's potential reaction was considered when legislation was being created. Yet, this is precisely the kind of information that helps us understand the actual contributions of courts and their influence more generally.

While case-studies and small-n comparative case studies may provide such information as well as more in depth definitions and measures of activism, the limited number of independent variables that can be include and the limited variability on the independent variables constitute a severe constraint on the utility of such studies to assess the causes of activism. Without multiple units statistical testing of the suggested hypotheses on the determinants of activism is difficult if not impossible. Thus, what is required is an expansive definition of activism that may be applied multiple units.

Assessment of Systemic Causes of Activism Requires a New Measure

The lack of consistent and comprehensive measures of activism substantially erodes the validity of the measurements employed. That is, we cannot through existing measures and definitions of activism objectively determine whether a court is in general an activist court. Consequently, these problems lead to grave statistical problems when hypothesis testing is pursued on the systemic causes of activism. Indeed, scholars do not

qualify hypotheses on the causes of activism as conditional on particular forms of activism. Rather, the suggested determinants of activism are presumed to be *systemic* in nature. For example, scholars may examine the effect of judicial selection systems or the presence of divided government on levels of activism (irrespective of how they define activism). Yet, these are variables that vary by system. Thus, by defining and then measuring activism in limited (i.e., inconsistent and non-comprehensive) ways, scholars cannot satisfy the rigors of such hypothesis testing. This is because error is introduced on the dependent variable (activism). As a result, statistical relationships may be biased (both upwards and downwards) as a result and not surprisingly, disparate results from such hypothesis testing are present in this literature.

To illustrate the point, in Table 1.3, I present the findings of Canon and Baum, Caldeira, and Emmert's 50 state analyses of the contributing factors of their particular measure of judicial activism.

Table 1.3: Suggested Determinant of Activism Based on Three Different Measures of Activism

	Canon & Baum: Tort Innovation	Caldeira: Prestige	Emmert: Judicial Review
State demographics	Population size only	Social diversity: Population, wealth, urbanization, industrialization	Regional difference
Political characteristics of states	None	Ideology of state (liberalism)	None
Characteristics of courts	Justices from metropolitan areas	Judicial professionalism	Length of constitution (regional) Intermediate court of appeals Jurisdiction

			control (regional)
Type of issue	Not-tested	None	Lower court ruling Type of issue (salience also) Identity of litigant Number constitutional issues raised

In all 3 studies, the scholars discuss contributing factors with respect to each of their particular measures, but without the important caveat that differences are probably the result of different (but not necessarily more consistent or comprehensive) measures of activism being employed. These results are simply unreliable. While we can justify these studies in terms of limiting the definition of activism to particular issue areas or tools, we cannot make similar justifications when we assess statistical relationships between multiple suggested determinants of activism and varying measures of activism. The reason is simple: the variables are systemic in nature and not dependent on the measure of activism being employed. For example, the presence of divided government may increase or decrease a courts willingness to engage in judicial review, statutory interpretation, innovativeness, etc.; additionally, a court's decision to act in one issue area over another may be similarly affected by the presence of divided government. This can be said of the other suggested determinants as well that ought to vary despite the presence of particular forms of activism. Indeed, the literature does not presuppose these relationships are conditional; scholars apparently ignore this and unknowingly introduce measurement error in the dependent variable. Thus, the results of statistical tests are dubious as a claim about the relationship between activism and system characteristics.

Conclusion

The state of this literature leaves us with an important dilemma. Some current research adopts measures of activism that lack comprehensiveness but apply these across a large number of units to increase leverage for hypothesis testing. Yet, as I have shown such hypothesis testing is significantly flawed. In contrast, the few studies that have adopted a more comprehensive and valid measure are so resource intensive that they have focused on a limited number of units and thus only can provide limited information on the determinants of activism (Canon 1982; Glick 1990).

As a result, we need a comprehensive and consistent measure of activism that can be measured across multiple units so that we cannot not only understand the contributions of courts to public policy, but also so we can meaningfully assess the suggested determinants of activism. Such a measure and findings with regard to hypothesis testing may have important implications with regard to institutional design and maintenance.

In the next chapter I propose such a measure.

CHAPTER 2
Research Design: Measuring Judicial Activism Using an Elite Survey

In the previous chapter I identified a basic problem in the study of judicial activism and its determinants. Large-n studies provide leverage to better assess the suggested causes of activism but because of their 'thin' approach to measuring activism, focusing on a single policy tool and/or a single-issue area, the validity of their results is placed in question. Case studies and small-n comparative studies, on the other hand, typically overcome this measurement problem but provide less analytic leverage to assess the causes of activism. In the present chapter, I develop an approach to measuring judicial activism employing an elite survey that addresses this problem and makes possible a comprehensive approach to measuring activism within a large-n study. I describe the procedures employed to implement this approach to measure activism among state supreme courts in the United States.

In this chapter I will address the following: (1) the importance and advantage of focusing on state supreme court activism; (2) the strengths and weaknesses of using elite surveys to assess phenomena; and (3) the implementation of my survey of elites in measuring activism across the 50 U.S. States. In the next chapter I will discuss the crucial steps in defining and explicating the complex concept that is judicial activism and constructing the survey.

Why Focus on State Supreme Courts?

The U.S. Supreme Court has been a favorite target of scholars in assessing activism and judicial policymaking more broadly. The contributions of lower courts,

however, have received more attention in recent decades. Some of this attention concerned the adaptability of measures of U.S. Supreme Court behavior to lower courts (see for example Emmert 1992), the increasing influence of lower federal courts given changes in the size of the federal government (Glick 1990), and the growing importance of state supreme courts ability to protect individual rights threatened at the federal level through the 'new judicial federalism (see Tarr 1988). Additionally, state supreme courts in particular are a central focus of scholars interested in getting leverage on the causes of activism. That is, given the variation in the political, social and economic environments of the U.S. states, and in particular, differences in institutional and constitutional frameworks across the states, these courts offer rich comparison (see for example, Tarr and Porter 1988; Hall 2001).

In recent years, state supreme courts have had significant and growing impact in several policy areas including campaign finance and election law, worker's compensation, unemployment law, welfare law (Langer 2002, p. 10), school finance (Harrison and Tarr 1996; Swinford 1993), tort reform (Cannon and Baum 1981), gay marriage (Werum and Winder 2001), and the right to die (Glick 1990) among others. An examination of these courts in a few of these issue areas is illustrative of their impact on policymaking in their respective states.

Policymaking by State Supreme Courts

School Finance

State supreme court involvement in school finance and educational reform received considerable attention by scholars interested in the 'new judicial federalism' beginning in the 1980s (Tarr 1994). This research came in the wake of state supreme

courts as institutional targets of litigants unable to get equal educational funding through the federal courts. In some states, courts have altered, overturned, or even invalidated the entire educational funding systems of their state (Harrison and Tarr 1996). Swinford (1993) examined state supreme court activity in the area of school finance reform in the wake of the U.S. Supreme Court's *San Antonio Independent School District v. Rodriguez (1973)* decision. While litigants raised similar challenges in state arenas before *Rodriguez*, that decision opened the floodgates of educational reform cases in state courts. These courts were viewed as potentially more sympathetic to equal protection challenges of school funding schemes similar to the one upheld by the High Court in *Rodriguez*. The U.S. Supreme Court found no equal protection violation of the Texas school funding system in *Rodriguez* despite significant economic stratification by district; litigants turned to state supreme courts in determining equal protection violations on independent state constitutional grounds (Swinford 1993). After *Rodriguez*, as many as 15 states supreme courts struck down similar schemes on state and/or federal equal protection grounds (Langer 2002).

Tort Reform

In addition to overhauls in educational funding, state supreme courts have also been credited with creating new policy. In these particular policy areas, state supreme courts have decided cases in which they create new law or require other institutions to create or change existing laws. This phenomenon has been assessed as part of an overall examination of judicial 'innovation' and the application of 'diffusion theory' to the judicial realm. These studies cover many issue areas including: the right to die (Glick 1990), criminal justice (Long 1974), and state court administration (Haydel 1987). The

most extensive studies, however, have been done in the arena of tort reform and innovation by state supreme courts (see most notably Cannon and Baum 1981). In fact, some state supreme courts have been found to take a highly innovative approach to determining new rights for litigants suffering personal injury, weakening certain defenses of charges brought by these litigants, or reducing burdens of proof required by litigants in suing usually corporations, government agencies, and/or insurance companies defending corporate and government interests (Cannon and Baum 1981). In some cases, the courts created new law in the absence of law, modified existing law, or required these laws be created by the legislature.

An important consideration of this research and judicial innovation more generally concerns the degree to which judicial innovation appears different from legislative and executive innovation. That difference appears to be dependent on the necessity of litigants to bring cases in order to create opportunities for judicial innovation in the first place (Cannon and Baum 1981). The implication is that judicial innovation is thus more passive than legislative or executive innovation (Glick 1992). Of course, these sentiments echo Rosenberg's conclusions in *Hollow Hope* as a general malady of judicial policymaking. They must wait for policy opportunities to come to them. While dependent on litigant supply, however, judicial innovation in the area of tort reform has actually created multiple opportunities for litigants unable to receive remedies and protections in other arenas. That is, the relaxation of procedural and evidentiary standards in torts has meant an increase in the number of cases brought before these courts than before and consequently, a greater opportunity for courts to innovate more broadly.

Right to Die

A related and important point is that judicial innovation does not always require the court to act first. How other institutions respond and their considerations of the court's potential response may be quite relevant to the policy cycle. Glick (1992) makes this point in his examination of judicial innovation in the area of right to die cases in state supreme courts. In many of these cases, state supreme courts were asked to determine the rights of individuals to enjoin all medical interventions used toward their terminal illness. Many of these cases were brought in states that already had so-called 'living will legislation' which makes right to die originally a legislative not a judicial adoption. Yet, the courts were answering subsequent questions involving the expansion of existing legislation. Even if the legislature acts before or concomitant with the court, the court may be asked by litigants to cover new ground altogether (for example in removing nutritional supports in terminal patients) or broaden existing law to include incapacitated individuals without living wills expressing intent (Glick 1992, p. 90).

Glick's analysis uncovers a dynamic and interactive process at work in several right-to-die cases; in many instances, the legislature acted first, but the litigants asked the court to expand existing law. Moreover, even if state supreme courts act first in the absence of legislation ('true innovation' so to speak), they often have legislative/ executive actors as well as organized interest groups in opposition to their adoptions acting very quickly to circumvent them (or perhaps in other areas, ready to support them). In response, some states with great oppositional forces actually pass right to die legislation that is more expansive than they originally preferred but much less expansive than the state's high court would presumably require (Glick 1992, p. 89). This strongly

suggests anticipatory behavior by these institutions to the court's potential and probable reaction. These studies clearly demonstrate state supreme courts through innovation or dynamic responses (potential or real) to the agenda-setting process can alter the policy process in significant and meaningful ways.

Comparative Advantage of Studying State Supreme Courts

Scholarly work demonstrates that the degree and breadth of policy involvement by state supreme courts varies by issue area and by state. Moreover, state supreme court involvement across issue areas reveals these courts engage in the policy process in multiple ways, using various tools at their disposal (judicial review, innovation, statutory reform, etc.) to shape and alter policy. Their decisions may bring about deep conflict with other political institutions and organized interests or be supported by these institutions and/or interests. Moreover, they may create opportunities to shape and change policy by offering litigants a chance to engage in the policy process or engage other institutions in the process of policy evolution.

The work of state supreme courts clearly offers scholars a wealth of information in determining: the contributions of courts to policy-making, how actively courts engage in the policy process, and perhaps most importantly, an opportunity to assess fully the potential causes of this activity. With regard to causal factors of activism in particular, state supreme courts operate in varying institutional and political contexts. Such variation offers scholars a unique perspective to assess activism across issue areas and policy tools while controlling for important political, institutional, and environmental variables.

The interplay between personal and contextual variables has been explored more closely in recent years (see for example Hinch and Munger 1997). With regard to courts

in particular, scholars have been focused on the interaction between personal preferences of judges and institutional context in which these preferences operate. The assumption is that changes in either may result in changes in outcome. That is, institutional features may affect the ability and willingness of courts to act just as personal preferences of judges may increase or decrease the willingness of courts to act. (Brace, Hall, and Langer 2001). Moreover, how these two sets of variables interact becomes increasingly important in determining the influence of each. Focus on state supreme courts offers leverage on the interaction of both since these courts operate in settings that vary in both milieus. The result is a greater ability to determine when activism is more likely to occur and to what degree personal and/or institutional features affect levels of activism. Of course, assessing activism across courts in a comprehensive and consistent way presents the first hurdle in assessing causation. I turn to that issue next and why it overcomes these important obstacles.

Measuring Activism Through Multiple Informant Surveys

We must rectify the critical problem of measuring activism before we set out to determine its causes. Without a comprehensive measure of activism that can be employed with consistency across a large number of courts serious problems arise: (1) in identifying courts as generally activist; (2) in creating conflicting characterizations of the same court as activist, depending on the measure employed; (3) in omitting forms of activism typically ignored in conventional case level data analyses; and (4) in assessing the systemic causes of activism which have important implications for institutional design and maintenance.

While single case and small comparative studies can ameliorate the first three problems, the results of such studies are severely limited in their generalizability. Moreover, they cannot assess the causal effects of factors (such as judicial independence) that do not vary across or within the cases. Conversely, larger comparative studies appear to provide more leverage on hypotheses of the causes concerning activism as well as good descriptive information about changing caseloads. For practical reasons, however, they adopt 'thin' operationalizations of activism by focusing on a single attribute of activism (e.g. judicial review, innovation). Such studies may offer meaningful information about the volume of cases courts decide in particular ways, but the case level data no matter how extensively drawn cannot tell us how influential courts are in those areas. Indeed, there is a big difference between volume and influence.

The vast divergence in measures of the role, influence, and activism of courts results in conflicting findings regarding these phenomena. The result is the inaccurate assessment of activism between and among courts and a lack of a reliable assessment of its causes and potential remedies. That is, if at least some of the causes of activism are systemic (which is assumed to be the case), then existing measures are highly problematic because they create biased relationships upon statistical testing. The findings create misleading conceptions of courts and the underlying causes and so-called "remedies" of activism. Consequently, any systematic assessment of the conditions effecting judicial activism demands a comprehensive measure of activism that can be used across multiple contexts.

My response to this challenge is a multi-informant survey of elites. Through a survey instrument, I rely on the *perceptions* of those who are well informed about a

particular court to assess the level of policy independence and influence that a court wields within the political context in which it acts. I contacted a diverse group of individuals who all have one thing in common: they have knowledge of a particular court and the political and institutional context in which that court operates. Respondents were drawn from among academics, journalists, political actors, and members of the practicing bar in each state. The selection of respondents is discussed in detail below.

The questionnaire assesses influence and independence as the part of a larger interaction of the court with other political institutions. The questionnaire closely examines and scrutinizes perceptions of the court's ideological position relative to other governing bodies and how often it followed its own path despite actual or potential opposition. Respondents were asked to assess their state supreme court's influence in multiple issue areas and whether independent decision-making was carried out despite opposition to the court's decisions and whether they considered the court's potential reactions when making decisions. Additionally, respondents were asked to assess their own ideological leanings relative to the court and other political institutions that interact with the court. A detailed discussion of the content of the survey and particularly of the conceptualization and measurement of judicial activism is left to the next chapter.

Elite Survey Research in Social Science

Elite perceptions have been used by scholars to examine a variety of political phenomena (Newman and McNeil 1998). Typically, this data is collected through either elite interviews or surveys of elites (or some combination thereof). Glick (1971) used elite surveys to assess state supreme court influence on legislative and executive officials through non-traditional means. While judicial decisions may signal preferences to

legislative and executive officials, case level analysis provides much less detailed information regarding the influence of less traditional signals sent by courts. In fact, cases provide little or no evidence of highly important but less formal interactions between judges and legislative officials. For example, Glick noted the New Jersey Supreme Court through its members or surrogates regularly interacted with the state legislature regarding policy positions of the court in particular areas of the law and not surprisingly, on administrative policy affecting the court.

In order to determine how widespread these types of practices were across states and the level of success achieved as a result of these practices, Glick surveyed several judicial and political elites. Specifically, he sent surveys across the 50 U.S. states to chief judges, legislative leaders, bar officials, and other surrogates to assess the frequency of these types of interactions and their success. While low response rates by legislative officials limit Glick's conclusions to judicial perceptions (where response rates were much higher) of success of these interactions, he finds that courts routinely use informal means to influence policy. That influence, however, appears to be narrowly tailored to judicial administrative concerns.

Much like the limited use of case level analysis to detect important judicial-legislative interactions and their influence on policy making, congressional scholars have determined that the oft-analyzed roll call vote is limited in the information it provides about congressional decision-making. John Kingdon's (1989) study of congressional elites through interviews supplements existing work on congressional decision-making gathered from roll-call votes. He argues, while "roll call statistics can tell us *how* legislators vote… [they] cannot tell us *why* legislators vote that way" (Jewell and

Patterson as quoted in Kingdon 1989, p. 11). While ideological measures may predict how certain legislators may vote, much more information is yielded by asking members of Congress *how* they *behave* (including, but not limited, to how they vote). Indeed, through the interview process, Kingdon demonstrates that members engage in a great deal of political activity that may be critical to decision-making (for example, getting legislation on and off the political agenda) that cannot be detected by examining roll call votes. Interviews simply provide information that roll call votes cannot provide.

Another argument in support of elite surveys entails the degree to which they overcome resource constraints present in more traditional data gathering endeavors. Surveys and/or interviews are used to measure the same phenomenon but in a much more practical way. For example, scholars have debated the effectiveness of particular justices on the U.S. Supreme Court but base those assessments on limited number of issues or biographical case studies of particular justices (the top hits for 'judicial biography" on Euclid quick search include: Bayer's 2000 judicial biography of Justice Ruth Bader Ginsburg; G. Edward White on Oliver Wendell Holmes, 2000; Carl Rowan on Thurgood Marshall, 1993; and David C. Gross Justice Brandeis, 1987). The sheer number of biographies presents scholars with a harrowing data gathering task.

In fact, a comprehensive assessment of all of the cases decided over the High Court's tenure, the papers of the justices, and the scholarly coverage of the Court is an impossible task. Additionally the analysis may be more susceptible to the subjectivity of the scholar and his or her particular manner of assessing effective judging. In response to these constraints, Bradley (1993) compiled a list of "great justices of the U.S. Supreme

Court" based on a survey of academic elites to assess their perceptions of the greatest jurists in U.S. Supreme Court history.

The designation on Bradley's final list corresponds to inter-subjective agreement among elites concerning several measures of effectiveness. As such, Bradley's survey overcomes both the resource constraints and subjective elements involved in traditional research on this subject. From this scale of "great justices," Bradley is then able to assess more confidently the determinants of greatness. His work is paralleled by similar work done in the same fashion on the greatest justices of the High Court (see for example, Asch 1971; Blaustein and Mersky 1978; Frank 1958; and most recently as part of the *Supreme Court Compendium* (Spaeth, Segal, Epstein, and Walker 1994). Like Kingdon, Bradley was able to gather much more detailed information than simply examining cases for reasoning and vote patterns.

Adding state court analysis to the literature, Miller (1995) examines court-legislative relations in three settings (Ohio, Massachusetts, and the federal courts) using semi-structured interviews with legislators. These interviews are used to gather data on these legislators and their perceptions of the policymaking roles of the high court in their state. Such a perspective is used to assess the dynamic process at work between courts and legislatures and role of these particular courts in the political regime in which they exist. The logic of Miller's approach to assessing activism is comparable to what I adopt but I extend the approach to a larger set of states by employing surveys rather than face-to-face interviews.

Interestingly and consistent with arguments made in Chapter 1, Miller's findings contradict some existing findings based on measures of court activity gained through

"harder" empirical means (such as how often are precedents borrowed by other courts as indicative of prestige, how often a court overturns acts of the legislature as indicative of power and influence, etc.). For example, Miller finds the Massachusetts Supreme Court (Supreme Judicial Court; SJC) to be a "passive" policymaker in the state. This assessment stands in marked contrast to Caldeira's (1983 and 1985) characterization of the same court as a highly prestigious based on "trend-setting behavior." Caldeira conclusions relied on the assumption that the most prestigious state supreme courts have their precedents borrowed more often by other state supreme courts in similar cases. These are considered "trend-setting" and thus prestigious courts. Compared to other states on this single measure the Massachusetts Supreme Judicial Court was ranked highly and considered a trend-setter.

Again, different measures are used to assess reputation or prestige and so disparate findings may not be surprising. However, I would argue that Miller's approach in assessing reputation, in which participants in his study had knowledge and experience with the court, is a sounder indicator of the role played by the Massachusetts's Supreme Court than that offered by Caldeira's approach. In fact, some of the most prestigious courts as measured by Caldeira are among the oldest courts. The age of an institution may enhance its reputation with other courts automatically when they consider borrowing precedent. However, this cannot be presumed as an indicator of the court's reputation within the state, particularly among non-judicial actors.

While Miller and Caldeira measure policy influence and prestige in different ways, they appear to be interested in the same bottom-line: what policy influence does court 'X' wield? Miller's measure is more sensitive than Caldeira and we may have

greater confidence in the validity of his assessment of the 'policy role' of the courts he explores, but his focus on only three states severely limits the generalizability of his conclusions. Conversely, while Caldeira's study examines many courts, offering more generalizability, his thin definition of influence and prestige raises questions regarding the validity of his statistical assessments of the determinants of prestige and influence.

Surveys and interviews are more sensitive approaches to assess the political influence and independence of courts but have not been used previously in a large-n study. By broadening the approach to include many more cases, we can bridge the gap between more comprehensive measures offered by single or small comparative case studies and more systematic measures that employ definitions of activism far too thin to gain real leverage on the factors causing activism.

Elite Surveys: Perceptions versus Reality

The use of surveys and interviews as a primary measure of a phenomenon, however, has not gone without criticism. The primary concern is that perceptions do not match reality (i.e., hard data), and therefore, we cannot be sure what we are concluding has much actual meaning. As such, data gathered from surveys needs to be couched as measuring something 'other' than real phenomena.

Certainly, perceptions are not reality, but the hope is that they are closely based on, related closely to, or even more important than reality. Additionally, if respondents have similar perceptions of the same phenomenon (and we assume those respondents 'should' know something about the phenomenon), we might have more confidence that perceptions mirror or closely match reality. Moreover, the perceptions themselves may be just as important as and even more important under certain conditions than real events.

The importance of perceptions has been a focus of social scientific research in several fields, including voting behavior, political psychology, economics, and comparative and international institutional research (Newman and McNeil 1998). For example, how voters in the U.S. context 'feel' about economic conditions may well affect how they vote in the next election. Perceptions affect behavior, so it is illustrative to examine how closely perceptions actually match reality and whether real events actually change perceptions. Niemi, Bremer, and Heel (1999) demonstrate through exit poll data that perceptions of respondents actually match state level economic indicators. They find that unemployment rates, inflation, per capita income, state tax and debt levels, and federal aid amounts accurately match voter perceptions of economic conditions. Their results also strongly suggest that citizens are able to make critical distinctions between national, state, and personal economic evaluations. Perceptions and real economic conditions appear to be very closely aligned. Measuring perceptions becomes a very useful proxy of actual conditions and perhaps more importantly, assessing why perceptions change appear directly related to real changes in economic conditions at all levels of government. The same may be extrapolated to the domain of courts. Perceptions about a court's level of activism in a state may alter the reactions or potential reactions to the court by other officials, reiterating the importance of the perceptions themselves. If courts are viewed as political players in their state by other political players, that perception may have political ramifications. For example, legislators may act strategically to avoid conflict with a court they perceive as an influential actor in state politics.

Implementing the Survey

I conducted mail surveys of similarly composed groups of elite actors in each of the fifty U.S. states to gauge their perceptions of the political contributions of their respective state court of last resort. The study of state supreme courts and particularly their political contributions has received considerable attention in recent years (e.g., Canon and Baum 1981; Fino 1987; Tarr and Porter 1988; Hall 2001; Brace and Hall 1993; 1997; Langer 2002). Cumulatively, state supreme courts have a much greater impact on the lives of Americans than all federal appellate courts combined (Glick 1990; Goldman, Brennan, and Gallen 1994). In addition, these courts offer considerable opportunities for comparison, as the conditions conducive to policymaking vary among state regimes (Langer 2002).

I sent surveys to the same eight groups of elite actors in each of the 50 U.S. states to assure that responses could be reliably compared:

(1) State House and Senate Leaders (Speaker of the House or President of the General Assembly; Minority and Majority Leaders, and if applicable, the President of the Senate and/or the President Pro Tempore)

(2) State House and Senate Judiciary Committee Members (all members of the state house and senate judiciary committee or similar committee with similar responsibilities)

(3) State and Assistant State Attorneys General (Assistants is used generically; but most often these offices were contacted to determine which personnel regularly argued in front of or had the most experience with the court; most

often, “section chief” and “deputy” titles of appellate divisions were contacted as well as their assistants).

(4) Executive Board of each State Bar Association (Current President and Vice President of the State Bar Association; in some states, Immediate Past Presidents were included)

(5) Lawyers (I contacted lawyers in each state with state appellate practices by using “the appellate search on Martindale Hubble”; additionally, litigation attorneys from the largest firms in the state with capital offices were contacted)

(6) State Democratic and Republican Party State Chairs (chairs and where listed, vice chairs of each state political party)

(7) Legal Academics (Law School Faculty were used from all law schools in state, excepting California, in which the largest law schools were contacted, and Alaska which has no law school, the Political Science faculty were contacted; faculty were selected with teaching and or research experience involving state courts generally, appellate litigation, state court procedure, and constitutional law were contacted)

(8) Journalists (Newspapers in the state were contacted in the state capitals; largest papers in the state also contacted to determine which reporters regularly covered the state supreme court; some searches were carried out on newspaper web pages to find names)

Some of the potential respondents are observers of the court, such as journalists and academics, while some may deal much more directly with the court, such as

legislators, attorneys general, and private lawyers. Some may have a stake in court decisions that have ideological components such as state political party leaders. Most of these names and addresses were found using internet resources; however, in some cases, phone calls had to be made to determine "experts" within elite groups. Appendix A shows the extensive protocol used in identifying the thousands of potential respondents used in the survey. The same protocols were used in all the states to help assure reliability.

Survey "packets" were sent out using the U.S. mail in personalized letter form per elite. These packets included a personalized cover letter on University and Department letterhead, explaining the project and naming their state supreme court, a survey tailored for their state and state supreme court, a postage paid envelope for returned surveys, and an outside University and Department envelope addressed to each respondent personally.

To ensure the survey, cover letter, and outside envelope matched, each respondent was given a separate identification number. This number appeared on the mail out label on the outside envelope, the bottom of the cover letter, and the top of the survey. Appendix A reveals how identification numbers were created. In all, 6781 surveys were sent out in the last week of February and first week of March 2003. In all, 515 surveys were completed and returned, yielding a 7.59% response rate. The overall response rate is generally within normal range for the type of survey instrument used and the type of research conducted (for an overview see Kanuk and Berenson 1975, Jobber and Saunders 1989, and Belanger, Lewis-Beck, Chiche, and Tiberi 2006). While the overall response rate is within the normal range for this type of survey, the rate varied by state and by

respondent group posing potential difficulties for the study. Response rates by group are presented in Table 2.1.

Table 2.1: Response Rates by Groups

Group	Sent	% Total Sent	Returned	% By Group	% Total Received
Academics	1526	22.5	111	7.4	21.55
Attorneys general	869	12.8	76	8.7	14.7
Bar officials	255	3.8	31	12.2	6.0
Journalists	310	4.6	21	6.8	4.1
Judiciary committee	1221	18.0	73	6.0	14.2
Lawyers	1994	29.4	178	8.9	34.6
Legislative leaders	335	5.0	12	3.6	2.3
State party leaders	271	4.0	13	4.8	2.5
Total	6781	100.0	515	7.6	100

These rates vary across the groups. For example, the response rates for lawyers is roughly twice that for political officials—legislative leaders and state party leaders. However, the variation in response rate across groups does not significantly skew the distribution of the sample compared to the population. The distribution of sample of respondents across groups differs only slightly from the overall population from which they were drawn. Across states, academics compromise 22.5 percent of the individuals receiving surveys and 21.8 percent of those responding. The largest discrepancy is for lawyers who constitute 29.4 percent of the individuals receiving surveys but 34.4 percent of those returning the survey. While the group make up of the respondent pool reasonably mirrors that of the population, the distribution of the population and hence that of the respondents is skewed across the groups. The majority of respondents are drawn from just two groups, academics, and lawyers. The representation of groups among

respondents must be kept in mind in assessing the substantive results of the survey. The perceptions of state supreme courts upon which my empirical analysis relies are predominantly those of lawyers, academics, attorneys within the state Attorney General's Office and members of the state Judiciary Committees. In Table 2.2 I have arrayed the response rates by state.

Table 2.2: Response Rates by State

State	Sent	Returned	Percentage
Alabama	155	10	6%
Alaska	115	7	8%
Arizona	142	17	12%
Arkansas	165	16	10%
California	224	3	1%
Colorado	89	5	6%
Connecticut	201	14	7%
Delaware	97	9	9%
Florida	151	12	8%
Georgia	163	11	7%
Hawaii	118	14	12%
Idaho	137	8	6%
Illinois	119	7	6%
Indiana	130	7	5%
Iowa	105	9	9%
Kansas	120	14	12%
Kentucky	181	12	7%
Louisiana	113	5	4%
Maine	67	9	13%
Maryland	243	17	7%
Massachusetts	121	8	7%
Michigan	141	9	6%
Minnesota	221	17	8%
Mississippi	140	10	7%
Missouri	105	12	11%
Montana	116	12	10%
Nebraska	201	13	6%
Nevada	114	6	5%

New Hampshire	90	13	14%
New Jersey	157	12	8%
New Mexico	154	9	6%
New York	150	2	1%
North Carolina	189	11	6%
North Dakota	79	6	8%
Ohio	182	26	14%
Oklahoma	110	8	7%
Oregon	96	13	14%
Pennsylvania	146	6	4%
Rhode Island	121	8	7%
South Carolina	159	13	8%
South Dakota	93	8	9%
Tennessee	124	12	10%
Texas	120	3	3%
Utah	137	14	10%
Vermont	104	14	13%
Virginia	149	8	5%
Washington	122	6	5%
West Virginia	138	16	12%
Wisconsin	99	5	5%
Wyoming	67	9	13%
TOTAL	6781	515	8%

Response rates vary considerably. New Hampshire and Ohio have the highest response rate at 14 percent (nearly double the overall response rate across states) while California and New York are tied for fewest returned surveys at 1 percent. In these states and others with lower response rates, I conducted a second survey wave of non-respondents via email. The total number of responses based on both waves of surveys was 515.

Several states had significantly higher response rates than the overall rate of 8 percent while others much lower. These differences may be idiosyncratic. They may also reflect the fact noted above that response rates differ among respondent groups and the states differ in the number of respondents in each group. For example, the size of the

judiciary committee in the Ohio State House is twice as large as that of several states, doubling the pool of judiciary committee members sent surveys in Ohio than in states with smaller judiciary committees. The same is true of other categories, including the number of appellate attorneys, attorneys general, journalists, and the like. These differences cannot be controlled in any meaningful way. Moreover, to be consistent across states given variation in group size by state, populations and not samples of groups were surveyed. I did this in order to maximize the number of responses in a consistent way across states.

The variation of response rates across the states does pose a challenge to the use of the elite survey to measure judicial activism. This approach becomes more convincing and reliable as the measures are derived from larger and more diverse sets of elite observers. Confidence in the average estimates regarding the position of a supreme court in state politics is greater when based on a larger number of observers drawn from across the respondent categories. In states like Texas, New York, and California where only two or three surveys were returned estimates of judicial activism based on the surveys are likely to be problematic. I will return to this issue in Chapter 5 where I focus on measuring activism on a state by state basis.

Completed and returned surveys were entered into a Microsoft Access Data base. Variables for each question were created and the access system allowed automatic conversion into spreadsheet format to be converted to the statistical software Stata for analysis. Variable names and values appear in the codebook in Appendix B.

Conclusion

The dilemma posed by the literature on judicial activism and its suggested causes is a lack of a comprehensive and consistent measure of activism that can be applied to multiple courts. Additionally, the current caseload data gathering approach (in small and large N studies alike) does not capture certain institutional dynamics between institutions related to activism. The solution I propose is an elite survey that may be used across courts and across issue areas. The perceptions of elites is not reality but in fact, may be more important that reality in assessing particular phenomena, including activism. Indeed, a multiple elite survey is the best possible pragmatic way to comprehensively and consistently examine activism across multiple courts.

If we do not turn our focus to the creation of such measures, we will continue to gather descriptive information about single courts or focus on one of many ways courts have to engage in the political process. Moreover, the costs of continuing such an approach leave us without generalizable knowledge about activism in courts and its possible determinants. Such an assessment is required before we may intelligently and confidently suggest ways to remedy or encourage activism.

The application of this survey approach to the 50 U.S. states and their respective state supreme courts is an opportunity to examine perceptions in varying milieu. State supreme courts are a burgeoning and important subject of study, particularly as these courts are often the last word in judicial politics. That said, the implementation of this particular survey to the 50 states by respondent group has not been without incident. Clearly, the response rates in particular states are quite low and in when applicable, I caution reading my analysis when response rates undermine reliability.

Additionally, the survey itself (which I explore in detail in the next chapter) is a first attempt at measuring activism as a multi-dimensional concept. While many of the questions map well to my definition of activism, some of the questions are less directly linked. In hindsight, I believe the survey could be improved to map questions with particular aspects of activism and certain follow-up questions may be added to improve this measure (particularly with respect to the state by state analysis). I take these issues up more directly in Chapters 5 and 6.

I now turn to the survey itself and my measure of activism.

CHAPTER 3

Conceptualizing and Measuring Judicial Activism

A survey of the perceptions of selected elites is the center of my approach to measuring the judicial activism of state supreme courts. Surveys can be very good instruments in assessing phenomena, but how successful they are depends on how well the questions in the survey capture the phenomena they intend to measure and do so in a comprehensive way. Related to this issue is a careful assessment of the current status of the concept in the scholarly literature. If the literature presents an inconsistent and less than comprehensive view of a concept, as is the unfortunate case for judicial activism, then the concept must be constructed or re-constructed before the survey is carried out. In the present chapter I take up the task of conceptualizing and measuring judicial activism. In the current context, measurement entails a mapping of the defining traits of the concept to the items in the survey.

Judicial Activism: Concept Construction

As illustrated in Chapter 1, judicial activism has been extensively studied and discussed. Most studies of judicial activism have paid greater attention to the issue of measurement, e.g. instances of judicial review, than to the definition of activism. In some ways this emphasis on measurement is understandable. The phenomena associated with judicial activism are often in and of themselves interesting and important. For example, from its origins judicial review has been a controversial topic within American politics (Kmiec 2004). Understanding the conditions under which judicial review occurs and whether it is, in fact, a counter majoritarian act is a compelling justification for research

(Dahl 1957). Likewise, when courts innovate in policy areas such as torts, prison administration, or public school finance, understanding the policy reforms, and the conditions stimulating court action and those favoring the success of judicial innovation reasonably motivate research. Furthermore, most scholars of the courts would probably characterize the work of the courts in each of these areas as evidence of activism.

As emphasized in Chapter 1, however, the problem comes in inferring whether a court is activist or its degree of activism from observation of its use of a single policy tool, e.g. judicial review, or its work in a single policy area, e.g. school finance. Without a clear systemization of the concept activism, we cannot appropriately evaluate these observations as fulfilling the definition of activism. I turn this endeavor in the following section.

Ontology versus Semantics

Traditionally, scholars engaged in the business of concept building rely on definitional/semantic approaches. These approaches focus on the presence of certain key characteristics (i.e., necessary and sufficient conditions) of phenomena in order to classify cases. In these terms, the concept is much like a continuum, with one end a positive pole, defined by the presence of all of the necessary attributes, and the other end a negative pole, defined by the complete absence of attributes. Between the poles are degrees of proximity to each end/pole; cases are considered as more or less part of some phenomenon based on their display of certain attributes (Sartori as quoted in Goertz 2006).

Gary Goertz (2006) examines the problems with semantic or definitional concept building as missing or mischaracterizing cases that fall within certain ‘gray-zones’

(Goertz 2006, p. 29). Important cases are often ignored or mischaracterized on the basis of too rigid a framework. Additionally, semantic concepts do not consider the interaction of phenomenon in their environment as key components of that phenomenon. These are the precise limitations offered in current conceptualization and definitions of activism. The presence or absence of a particular characteristic (for example, the use of a particular tool) is viewed as a necessary condition for activism.

As an alternative approach, Goertz suggests ontological concept building, which was first proposed by Ludwig Wittgenstein (1953). This approach focuses intensively on the underlying structural arrangement of a phenomenon rather than just in terms of 'necessary and sufficient conditions' the phenomenon displays. The structure is made up of considerations based on certain key questions about what is important about some entity or phenomenon and how it relates causally to its environment.

For Goertz, the question is not whether some essential attribute is present, but rather, why this attribute is an important part of the entity in the first place. In this way, we may ask if certain characteristics bear some resemblance (he calls this family resemblance) to certain key aspects of judicial activism. When we think about an activist court, what comes to mind? Is judicial review required? Is conflict-producing behavior required? What about changes to policy that produce no conflict but are supported by legislative and executive officials? Yet, current definitions of activism are rigid since single measures as used in larger contexts and since case level analysis as the route to examining more than one condition is too resource intensive. Perhaps more critically, causal relationships cannot be assessed under current definitions with much confidence.

A more comprehensive and consistent measure of activism is required to overcome these problems.

Ontological concepts are constructed with a strong emphasis on how that phenomenon interacts in a causal way with its environment (Goertz 2006, p. 28). That interaction is directly linked to the underlying structural arrangements that make-up this phenomenon and the attributes that are considered important to or resemble it. With regard to judicial activism, we might ask what it means when a court is an active part of a dynamic policy process. How does an activist court interact with its environment? What are the expectations of such a court? Are those expectations always the same in all circumstances, or might we regard how active a court is given how it engages itself in the policy process given particular circumstances?

The extant literature on judicial activism does provide the appropriate starting point for assessing these important questions and thus developing a systematic definition of the concept. The core of such an enterprise is the identification of the secondary traits (Goertz 2006) or dimensions of the concept. In Sartori's terms these encompass the 'intention' of the concept.

As indicated in Chapter 1, most treatments of judicial activism involve courts changing policy and/or conflict between the court and another political institution.[8] Both change and conflict require policy action by a court but the conflict condition requires that the court take a policy position contrary to that of another political institution. Clearly, the presence of conflict identifies a court that is acting in a policy area and is demonstrating a willingness to follow its preferred policy in the face of political

[8]Overruling precedent, of course, can be seen as a court in conflict with the policy of itself or at least an earlier version thereof.

opposition. The absence of conflict, however, may not signal unwillingness or an inability of the court to make policy inconsistent with the preferences of political institutions (i.e., a non-activist court). A supreme court may pursue its own policy preferences and not encounter conflict with other political institutions (but still make a significant contribution to policy) under at least two conditions. First, this will occur when the court shares the same preferences as those of the other political actors. This has been argued by Dahl (1957) as the electoral connection realized through judicial appointments. Second, the lack of conflict may indicate that the governor and/or the legislature have anticipated conflict with the supreme court and acted strategically to avoid it either by not passing their preferred legislation or by revising it in ways responsive to the preferences of the court as Glick (1992) found to be the case in right to die cases. Similarly, Martin (2001) in his examination of strategic voting by members of Congress finds members cast many votes with consideration of judicial reaction in order to maximize their ability to credit or foist blame. Vanberg (2001) examines the interplay of legislatures and constitutional courts through a game theoretic model, finding that at least where transparency exists, legislature will anticipate and respond to an adverse court. Anticipatory behavior by legislature may avert conflict, having a determination of conflict secondary to the policy influence of the court as a player to anticipate. I would argue the presence of conflict between the court and a political institution signals activism but does so under very contingent conditions, and thus, the presence of conflict should not be considered a necessary condition for activism.[9]

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[9]The issue of conflict in defining 'activism' is analogous to some extent to that encountered in defining and measuring power. According to Dahl (1957:202-03), "A has power over B to the extent that he can get B to do something that B would not otherwise

The requirement that conflict be present also ignores the agenda-setting component of policy making. Deciding the issues that will be considered by political institutions is a key step in policy making. Cox (2005) underlines the critical importance of agenda control as part of responsive governmental power, echoing a line of literature focused on the agenda-setting stage of the policy process. Agenda-control as a necessary means of political power has been explored in several areas, including women's rights (Freeman 2008), ageism and elderly concerns (Pruchno 2007), healthcare policy (Milstead 2008), political party responsiveness in U.S. Congress (Brady and McCubbins 2007), reproductive rights here and abroad (Joachim 2007), and business regulation (Dunphy 2007). In much the same way, courts can play an influential role in state politics and policy making by placing issues on the agenda (see most notably Lanier 2002 and Clayton 1999). This was obviously the case for school finance and right to die decisions in many states, as both issues produced conflict. The courts have also been the first to confront complex issues such as surrogate motherhood where the preferences of the political actors were largely unformed and, hence, while the issues were conflictual, the courts could not be in conflict with the political actors. The courts simply placed the issue on the agenda and perhaps by the manner in which they framed the question performed the role of the Republican School master, educating political actors and influencing the political debate.

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do." In a similar vein, Max Weber defines power as "the probability that one actor within a social relationship will be in a position to carry out his own will despite resistance…" (1978, 53). This 'power over' approach to defining the concept is contested by scholars who see power in terms of capacity ("power to"). For example, Lukes (2005) defines power as "a potentiality, not an actuality — indeed a potentiality that may never be actualized" (2005, 69).

While not directly seeking to define activism, Rosenberg's (1991) treatment of the role of the United States Supreme Court suggests that an activist court would not only have to be in conflict (or out of step) with other policy actors, it would also have to be successful in achieving its policy goals anyway. The failure of *Brown v. Board* to produce actual school desegregation and the failure of *Roe v. Wade* to increase the availability of abortions is critical evidence that the court cannot bring about meaningful social change. Compliance with and the impact of judicial policies are clearly important indicators of the role and influence that courts have in a political system. But, Rosenberg's criteria ignore the realities of the policy process and hold the Supreme Court and by implication other courts, to too high a standard. Indeed, the making of public policy requires a dynamism in which multiple actors are required in both the formulation and implementation stages that Rosenberg's framework ignores. While this may be true in any political system, the constitutionally mandated separation of powers insures that it is the case within the United States both at the national level and for the states. To require that a single institution, acting alone, produce social change is a test that many if not most legislative policies would fail. Similarly, legislatures and executives have their own problems of compliance within the bureaucracies necessary to implement their policies.

The dynamism of the policy process requires we update and clarify existing conceptualizations of judicial policymaking and/or activism. Considering the political context in which courts operate, I argue we must consider a court's influence in terms of its willingness to follow its own preferences in creating policy or engaging in the policy process generally and that the policy it creates has meaningful impact. As applied to state supreme courts, I argue that the best approach to conceptualizing judicial activism is in

terms of the influence that a state supreme court has in the policy making process of the state. Thus, the very idea of influence requires both independence and impact. An activist court is one that is able to pursue its own preferences irrespective of whether that pursuit is evidenced by conflict with other political institutions. Other actors will take an activist court seriously and its decisions will actually influence policy outcomes, although its preferences may not be fully realized in final policies. This definition does not have the virtue of simply defining activism as change in policy or conflict, but it does better reflect the complex reality of the policy process and complex relationships among political institutions.

Goertz (2006) argues that an important step in conceptualization is the defining of the 'negative' pole of a concept. In the present circumstance, what would be a 'non-activist' court? As an ideal type, it would be a court that did not make policy decisions or one whose policy decisions were not independent, reflecting only the preferences of other policy makers, a rubber stamp for other institutions. While policies formulated by other institutions might not squarely address the facts of every case presented to the courts, the courts would adapt the policy within the interstices of the law with an eye toward capturing the intended preferences of the creator of the policy. When confronted with a challenge to a policy of another political institution, the court would act in a restrained manner granting the democratically selected institutions the widest latitude in designing policy.[10] A court with these attributes could serve to legitimate the policies of other political actors but it would not itself be influential in the formation of policy or the

[10]This is the classic definition of 'judicial restraint,' a term often employed as the antonym for 'judicial activism."

policy process. This court would be seen not as a player of public policy but a pawn reserved for other institutions to use as needed.

Goertz (2006) also argues that in developing a conceptualization it is not sufficient to identify the defining traits of a phenomenon. One must also specify the structural relationship among those traits and connect these to the underlying concept. For example, if I require conflict as necessary defining trait of activism, I would only identify conflict producing courts as activist. Under these conditions, conflict is the single necessary and sufficient condition of activism. Alternatively, if I require change as the single defining criterion, I would only identify courts that change policy as activist and those who do not as non-activist. If I read the literature to require that both a policy change occur and that it produces conflict for a court to be activist, then change and conflict would be the defining traits and they would both be necessary and jointly sufficient for a court to be characterized as activist. If I adopt a more liberal position and am willing to accept either the presence of policy change or conflict when a court does not change its policy as defining traits, then neither trait would be necessary but either would be sufficient to label a court as activist. In the latter instance, the traits may be thought of as substitutable, just as we argue previously that the tools of policy making are substitutable.

Drawing from Goertz's explication of the 'negative' pole and relation of traits to the phenomenon, I conceptualize activism as having two necessary and sufficient conditions or actual 'traits' or 'indicators' of activism: independence and impact. Both traits must be present to consider a court to be activist. If one or both are missing, then a court is not an activist court. This is the negative pole of activism. Conversely, a court is

activist if it is making policy independently and its impact is meaningful. We can examine the ways in which courts may be thought of in terms of influence, to assess their level of activism relative to other courts. For example, a court that enjoys success in shaping policy closely to its preference in a few issues areas may be considered just as influential as a court that pursues its preferences in a larger array of issue areas but with less success. In this regard, we may place courts along a continuum of activism.

Thus, activism as I have conceptualized it is not a dichotomous concept. Activism is a continuum in which particular indicators associated with activism are treated as traits of activism, traits that are associated with the necessary and sufficient conditions of activism: independence and impact. Few courts and certainly few state supreme courts, would qualify as having all the traits indicative of a purely activist court just as few would be entirely non-activist. We may, however, treat the presence of independence and impact across indicators as a positive pole and their collective or individual absence as indicative of the negative pole of activism. Courts are placed relative to their degree of independence and impact in their state.

Conceptualizing Activism: Summing up

A central concern of my project is to compare activism among courts in a consistent and comprehensive way. To do so, requires a clear conceptualization of the core concept, judicial activism. Based on the literature on judicial activism and more broadly that on judicial policymaking, I find the efforts to define activism simply by the presence of policy change or conflict fail adequately to capture the concept. The core idea of an activist court is one that is seen as playing an important policy role in its state. Accordingly, I propose the following definition of an activist court.

Activism is influential policymaking by a court in which they follow their own policy preferences (independence) and their decisions are meaningfully treated by other relevant actors in their political context (impact).

This definition identifies two conditions for activism: independence and impact. I argue that a court must actually demonstrate both conditions to be considered fully activist (the positive pole) whereas the absence of one or both conditions moves a court further away from activist status.

In Table 3.1 are presented three indicators of each trait of activism.

Table 3.1: The Two Conditions of Activism and the Three Indicators of Each

Condition I: Independence	Condition II: Impact
1. Policy preferences	1. Policy breadth
2. Conflict engagement	2. Strategic player
3. Innovative	3. Decisions implemented

The first trait or condition of activism is independence. It requires that a court be considered as acting in accordance with its own policy preferences, that it be considered willing to conflict with other political actors when they step outside the court's preferred position, and last, be seen as an innovator, or one who will create new policy or so alter existing policy so as to make it new. The second trait or condition, impact, essentially requires that a court be considered a meaningful policy player in the state political system. What does it mean to be a 'meaningful policy player?' Specifically, a player is one who is viewed as actively engaged in a broad range of issue areas (rather than a narrow sub-set of issues). I refer to this court as having 'policy breadth.' This court is

also thought about by other political institutions (especially the legislature and the governor) when they make decisions that could be treated by the court. I refer to this court as a 'strategic player' in its political system. Lastly, this court is impactful because the decisions it renders are actually carried out by those in charge of implementing them. I refer to this kind of impact as "decisions implemented."

Though on its face, impact may look to be sufficient to label a court activist, it may be the case that these separate categorizations of impact, even taken together, may be characteristic of a court simply carrying out the wishes of the legislature. The legislature may appear to think about the court in strategic terms, but it may only be doing so for 'political cover,' by creating legislation they know the court will treat consistently with their preferences. This may occur when legislatures craft legislation sure to be upheld and thus made legitimate by the court (the KY school finance reform system is a good example of this type of policy consensus). A similar caveat may be made for breadth and implementation since the court may act in a broad set of issue areas and have their decisions carried out, but largely because their decisions are largely agreed upon by other important political actors. For this fundamental reason

In the next section I present specific questions used in my survey to examine each of these traits.

Measuring Judicial Activism

The definition of activism I have presented and its core dimensions and associated traits are general. Researchers seeking to measure court activism can adopt a variety of approaches to measuring the traits and classifying courts. For example, one might measure the breadth of a courts policymaking by an examination of its actual caseload, its

willingness to encounter conflict by its exercise of judicial review, and its policy success by comparing its decisions to actual policy outcomes. In the context of my research design operationalizing the concept of activism requires the mapping of survey questions onto the component traits. I undertake that task in the remainder of this chapter.

While I will discuss the survey items within the framework of traits presented in Table 3.1 some of the survey items capture more than one trait. As noted above, activist courts should be viewed as important policy makers by those who know them. To provide an indication of respondents overall view of the role played by their state supreme court they were asked to express their level of agreement or disagreement with the following statement:

"The (name of court) plays an important role in (name of state)."

Response ranged from 'Strong Agreement' to 'Strong Disagreement.' Courts thought to play an important policy role (where respondents "Strongly Agree" and "Agree" with this statement) are considered to be more activist than courts in which respondents feel they do not play an important role in the state (where respondents "Disagree" or "Strongly Disagree" with this statement).

Measuring Independence

Policy Preferences: Courts that behave independently follow their own political preferences rather than those of other political bodies. In order to assess the general view of respondents of the political independence of their state supreme court, respondents were asked how much they agree or disagree with the following statement: (answer choice ranged ordinally from strongly agree, agree, disagree, strongly disagree).

'The (name of court)'s decisions are influenced by the political preferences of its members'

Respondents were also asked a related question which taps into independence as it relates to statutory interpretation. Often assessments of judicial independence focus on judicial review on constitutional grounds. Such focus omits a large body of cases making up a considerable amount of the agenda of a court. When courts interpret statues, they have the opportunity to alter and in some instances create law. I argue a court perceived to defer to legislative intent is less independent than a court perceived as less likely to defer. This is because concerns with legislative intent assume the court is not acting in accord with its own preferences; their preferences may be conditioned on the legislative intent. In contrast, the court making independent decisions in interpreting statutes (for example two conflicting statutes or a vague statute) is more concerned with the policy itself and its own preferences than deferring to what the legislature intended. This court focuses on its own interpretation of the statute and its meaning (which one assumes is the point of interpreting statutes that may be in conflict with other statutes or vague, etc.). Legislative intent may be considered but is not the primary concern of an independent court.

Respondents were asked their degree of agreement or disagreement with the following statement:

'The justices of (name of court) make a good faith effort to follow the intent of the legislature in interpreting statutes.'

Strong agreement or agreement with this statement indicates a less independent court than strong disagreement or disagreement with this statement.

Conflict: Similarly, activist courts are not fearful of conflict with other political actors; they act according to their own wishes. Again, respondents were asked their level of agreement with the following statement (answer choices ranged from strong agreement to strong disagreement).

The state supreme court generally tries to avoid conflict with the state legislature or legislative branch.

Responses with strong agreement or agreement with either statements above, indicates a more activist court than general or strong disagreement with either or certainly both of their statements.

To move beyond general perceptions about the court to more specific assessments regarding the court's greatest areas of influence respondents were asked to cite the issue areas in which their courts had been the most, second most, and third most influential in their state. Respondents were then asked to respond "yes" or "no" to the following questions regarding each of the mentioned issue areas.

(1) *In your judgment, was the court's decision(s) consistent with the preferences of a majority of the legislature?*

In your judgment, was the court's decision(s) consistent with the preferences of the governor?

Affirmative responses to these questions indicate the court tends to makes its most influential decisions in line with the preferences of other political institutions; its independence is not as great as courts operating in opposition.

Whether or not the court acts in conflict with other political actors, however, needs to be considered with regard to the court's general ideological position relative to

the other institutions. To assess this respondents were asked to assign an ideological score of 0 to 100 (ranging from very liberal to very conservative) to the current court, legislature and governor in their state. If the court's decisions in the most influential areas are in agreement with the legislature and/or governor when the court is ideologically distant from both branches, the court's actual independence is diminished. If the court acts in disagreement with these bodies (i.e., accepts conflict), however, and is also ideologically distant to them, then its independence is greater.

Innovative: Courts that have an impact in their political environment tend to be creative; these are the courts willing to make new policies, to innovate, or so alter existing policy as to make it new. A court's willingness to create new policy (usually through its own precedents) in response to new or old problems is an impactful court; or put another way, such a court has increased the opportunity to have impact and influence in a state. In a series of follow-up question, respondents were probed about those areas in which they felt their state supreme courts demonstrated the greatest influence. In those areas, I was able to discern how innovative a court actually was by asking the following questions regarding the policy areas in which they felt their respective court showed the greatest influence. Respondents were asked to answer yes or no to the following questions for these important issue areas.

Was this an issue that the legislature had addressed before the court became involved?

Has the Legislature addressed it in the last year?

If the answer to question #1 is no, then the court has acted first in the policy area. If the answer is no, then the court has not acted first. If the answer to the first question is

yes, but the answer to the second question is yes, it suggests the legislature has acted in response to the court or at least close to when the court has acted and both the court and legislature are participants in the policy. If the answer to the first question is no and the answer to the second question is yes then it suggests the court is both innovative and a participant in the policy. If the answers to both questions are yes, it suggests the court is a participant in policy but it is not leading its direction necessarily.

Measuring Impact

Policy Breadth: An important indicator of the policy impact of a Court is the breadth of issue areas in which it is active. That is, I argue a court is more likely to have impact if it acts in more issue areas. I concede a reasonable challenge to this assumption that certain courts may be incredibly influential in a handful of issue areas and are deemed relevant and important as a result. However, I would argue a court that acts across issue areas has the opportunity to affect more policy than a court that does not act in as many areas. Therefore, the sheer number of policy areas in which a court acts is related to the opportunity it has to demonstrate leadership and have impact. We may argue that courts may be examined relatively in this regard. Those courts acting in more areas are more impactful than courts acting in fewer issue areas.

I refer to this indicator as issue-breadth. Based on the literature concerning state supreme courts more broadly and empirical analyses of their workloads by issue (see Kagan et al. 1977 and update and Kritzer et al. 2007), a list of 32 issue areas were provided for respondents to ‘check’ if they felt their courts played an ‘active role’ (see page 1 of the survey in Appendix C). Additional space was given to respondents to ‘write in’ issue areas not include in the list, but in which they felt their supreme court had

played an active role. Based on the assessment of all the "write-in" issues areas identified by respondents, 12 new issue areas were created resulting in a total of 44 issue areas.

Policy breadth requires that a court be active but also influential in the decisions it renders in those areas. As a result, across states and in individual states I compare how many issue areas respondents also reported this issue in the follow-up questions regarding areas of most, second most, and third most influence. If respondents agreed their courts were active and influential in the same areas, then I am more confident that policy breadth is a meaningful indicator of policy influence/impact.

Strategic Player: Influential courts are looked to by other political actors before those actors create policies. If a court wields influence (i.e., it has impact) then other policy makers would consider carefully consider the likely reaction of the court before making their own decisions. An important policy player, a meaningful policy player, is one that other players consider and anticipate the reaction of. In this sense, courts are viewed as strategic players in the policy game. To assess how strategic a court is in their state, respondents are asked their level of agreement or disagreement with the following statement:

> *'Legislative and executive officials take into account the potential reaction of the (name of court) when they create public policy.'*

This is a direct measure of strategic influence. If respondents answer either "Strongly Agree" or "Agree" that indicates the court's reactions are considered before the court acts. This is a significant sign of policy impact if that is the case. Moreover, if a court is considered before other actors make policy, I assume that anticipation is the consequence of potential conflict with the court. For this reason, it is also important to

assess whether these courts are also thought of by respondents as following their own policy preferences and does not avoid conflict with the legislature or governor. Again, potential reactions of a court that does not act according to their political preferences or avoids conflict with the legislature may just signal that the court is a rubber stamp for the legislature (and thus the anticipation may be to tailor policy to assure the court's affirmation). Additionally, the potential reactions that indicate influence should be associated with courts that have their policies carried out and left unmodified when the legislature and governor disagree with the court.

Decisions Implemented: Policy that is impactful is also policy that is carried out. A court may change policy course, conflict with other political actors, but if its decisions are not carried out then their impact is diminished. In areas in which the court finds itself in conflict with other political bodies and in areas in which the court is demonstrating its greatest influence among all of the issue areas it involves itself, its decisions need to be carried out in order to consider the court as having meaningful influence.

In order to assess whether or not decisions were implemented, I asked respondents if the decisions their supreme court carried out were in conflict with the preferences of the governor of legislature or both, were modified or avoided by the legislature. These questions were asked in reference to issue areas in which the court exerts the most influence in the state. The questions were specific in the sense they required conflict to exist to really determine if the legislature and/or governor would actually carry out the decisions they did not agree with. Specifically, the questions are:

If the decision(s) was in conflict with the preferences of the legislature and or governor, did the legislature or governor attempt to modify the decision (for example, rewrite the statute)?

If the decision(s) was in conflict with the preferences of the legislature and or governor, did the legislature or governor attempt to avoid or delay implementation?

Answer choices were coded (1) yes; (0) no; and missing for N/A. If the legislature and/or governor modified the decision, then the court's original policy has been altered to suit the legislature/governor's wishes, wishes which conflict with the court's preferences. If the legislature and or governor avoid implementing a decision they disagree with, the court's ability to have its policies carried out has been placed in jeopardy. If this is the case, its ability to create and to have policy carried out are not reconciled. Both are required to have meaningful influence.

Conclusion

My survey of elites is designed to assess the perceived independence and impact of each of the 50 state courts of last resort. The survey questions are based on a comprehensive and consistent conceptualization of judicial activism. My definition of activism relies on the extensive literature on judicial policy making and activism, a literature that underlines the multiple tools and areas courts have acted as policy players. I do not require, however, that courts adopt particular tools or act in particular issue areas to be considered activist. Rather I recognize that activist courts are independent and have impact in their political environs. A court is not activist simply because it engages in judicial review or decides to create new policy. Instead, a court is independent because it

makes decisions in a manner that is in line with its own preferences, perhaps in a new area of the law, despite the conflict such decision-making might produce. Additionally, a court has impact if its independence is recognized as meaningful. That is, when it makes its decisions, it acts across multiple issues, and those decisions are considered influential; in addition, despite conflict, those decisions are left unmodified and are not avoided by the political actors required to implement them. In fact, those same actors consider the court carefully when they make their own policies.

I now turn to the results of the survey across states.

CHAPTER 4

State Supreme Courts in the Eyes of Elites:

An Aggregate Assessment

The purpose of my survey of state elites is to provide a measure of the activism of the state supreme court of each state. As a by-product, the survey provides a unique glimpse of how elite observers perceive state supreme courts within the context of state politics and policymaking. In this chapter I provide an overview of the responses to my survey aggregated across states. The responses to the survey items, of course, are respondents' perceptions of the supreme court in their state. The results presented, thus, will reflect the number of respondents in given states. Conditions in states such as California, New York, and Texas with only three respondents in the sample will contribute little to the results of this chapter compared to states like Ohio that has twenty-six respondents. With this caveat in mind the aggregate results presented in this chapter can provide a useful overview and framework for better understanding the state by state results that are the focus of the next chapter.

In addition to items measuring the central concept of the project the survey also included a screening item assessing respondents' attentiveness to their state supreme court. I purposively selected respondents as members of groups expected to be attentive to and knowledgeable about their state supreme court, but there is no guarantee that membership within the groups will assure these traits. To determine the level of attentiveness among respondents I asked:

"How Closely Do You Follow The Decisions of Your State Supreme Court?"

Respondents were given five options to describe how closely they follow the decisions of their state supreme court: (1) 'very closely'; (2) 'somewhat closely'; (3) 'modestly'; (4) 'very little'; or (5) 'not at all'. The frequencies are presented in Table 4.1.

Table 4.1: Attentiveness of Respondents to Their Respective State Supreme Court

	Frequency	Percent	Cumulative Percent
Very closely	162	31.58	31.58
Somewhat closely	183	35.67	67.25
Modestly	127	24.76	92.01
Very little	38	7.41	99.42
Not at all	3	0.58	100.00
Total	513	100.00	

Sixty-seven percent (67%) of respondents follow the decisions of their state supreme court either very closely or somewhat closely. An additional twenty-five percent (25%) indicate that they pay at least modest attention to the court. Only a small fraction of the respondents (7%) appear to be inattentive to the court. From these results, I feel confident that the strategy of selecting respondents by groups expected to be attentive to their state supreme court was successful in yielding respondents likely to be knowledgeable of the court of their state. Thus, while variation in the response rate across states raises caution in the conclusions to be drawn from the aggregate analysis in this chapter, the minimum condition of the research approach appears to have been met. The respondents are informed elite.

In the discussion that follows I examine the respondents' aggregate perceptions of the activism of their state supreme courts. Before proceeding to a detailed analysis,

I begin with responses to an item that asks respondents for a summary assessment of the activism of their state supreme court:

"The (name of court) plays an important role in (name of state)."

Responses to the item are presented in Figure 4.2. Forty percent (40%) of the respondents "strongly agreed" with this statement and 88 percent (88%) either "strongly agreed" or "agreed." Clearly, the overwhelming majority of elite respondents when queried in this general manner saw their supreme courts as policy players in their states. From this result one might assume that all 50 state supreme courts are perceived as activist. Fortunately, I am able to examine how well this overall assessment holds up when the various components of judicial activism are examined individually in the analysis to follow. For consistency this discussion will generally follow the organization of the traits of activism developed in the previous chapter.

Condition One: Perceptions of Judicial Policy Independence

Indicator One: Independent Policy Preference Seeking

If courts are to have influence on public policy they need to have a stake in the direction of that policy. That is, they must actually reach decisions that are consistent with their own policy preferences as opposed to making decisions in deference to the preferences of other political actors. The latter would be more aptly characterized as a court serving as a "rubber stamp" or "legitimator" of the preferences of another institutional actor. To address how preferences inform judicial decision-making, I asked respondents how much they agree or disagree with the following statement:

'The (name of court)'s decisions are influenced by the political preferences of its members'

The answer choices range ordinally and are coded as: 1 = strongly agree; 2 = agree; 3 = disagree; 4 = strongly disagree and 5 = don't know. I present these data in Table 4.2.

Table 4.2: Respondent Agreement That High Court in Their State Follows its Own Political Preferences in Making Decisions

	Frequency	Percent	Cumulative Percent
Strongly agree	110	22.31	22.31
Agree	201	40.77	63.08
Disagree	118	23.94	87.02
Strongly disagree	28	5.68	92.70
Don't know	36	7.30	100.00
Total	493	100.00	

Most respondents "agree" (40%) that their state supreme court follows its own political preferences when it makes its decisions. Additionally, when I combine the "strongly agree" (22.31%) and "agree" categories, nearly two-thirds of respondents (63.08%) agree with this statement compared to a third (28%) who disagree or strongly disagree with this statement. In general, respondents see their state supreme courts as following their own preferences. Of course the preference seeking behavior of these courts may simply be a reflection of the courts' policy agreement with other political actors in the states. I cannot assess this possibility until I examine the data by state in the following chapter. For now, it appears a majority of respondents, when asked directly, perceive their supreme courts as seeking their own preferences in making their decisions.

Additionally, respondents who disagreed with the statement may reflect a view that the court was following the law and/or conforming to other actors.

As a complement to the general assessment of preference seeking embodied in the previous section, I asked respondents an alternative question designed to asses another facet of independent preference seeking. Respondents were asked their level of agreement with the following question regarding statutory interpretation

'The justices of (name of court) make a good faith effort to follow the intent of the legislature in interpreting statutes.'

A court making independent decisions in interpreting statutes (for example two conflicting statutes or a vague statute) is more concerned with its own preferences than deferring to what the legislature intended. Such a court focuses on its own interpretation of the statute and its meaning first. Legislative intent may be considered but is not the primary concern of an independent court. These data appear in Table 4.3.

Table 4.3: Respondent Agreement That High Court Makes Good Faith Effort to Follow Legislative Intent in Making Decisions

	Frequency	Percent	Cumulative Percent
Strongly agree	78	15.79	15.79
Agree	307	62.15	77.94
Disagree	67	13.56	91.50
Strongly disagree	31	6.28	97.77
Don't know	11	2.23	100.00
Total	494	100.00	

A sizable majority (77.94%) of respondents either "agrees" or "strongly agrees" that their state supreme court makes a good-faith effort to follow the intent of the legislature in its review of statutes. That is, a majority of the respondents took the less

independent view of their state supreme court on this item, perceiving the court as responsive to the preferences of the legislature in their interpretation of statutes.

There appears to be some conflict between the responses to the two items measuring whether state supreme courts follow their preferences. Put another way, how does a court defer to the legislative intent and follow its own preferences? Is this possible? Table 4.4 presents a cross-tabulation of respondent perceptions of court decisions that follow political preference and whether they defer to legislative intent (both are collapsed to dichotomous variables in which 'strong agreement + agreement = Yes' and 'disagreement + strong disagreement = No' and all others dropped).

Table 4.4: Cross Tabulation of Respondent Views on Policy Preference Seeking (Collapsed) and Deference to Legislative Intent (Collapsed)

	Yes--Intent	No--Intent	Total
Yes-Preference	223 49.89	82 18.34	305 68.23
No--Preference	129 28.86	13 2.91	142 31.77
Total	352 78.75	95 21.25	447 100.00

Approximately half of the respondents (49.89) provide apparently conflicting responses that courts follow their own preferences and defer to legislative intent. A third of respondents (28.86) provide a consistent response in terms of their court deferring to legislative intent and not following its own preferences. Slightly less (18.34) gave apparently consistent responses to their courts as both willing to follow their own preferences but unwilling to make a good-faith effort to follow legislative intent.

Since half of the respondents felt their court followed legislative intent most of the time and their own preferences at a similar rate perhaps respondents view independent policy preference seeking as still possible despite deference to legislative intent. A future study may want to parse this more carefully by asking respondents to ask in what ways courts may be able to defer to legislative intent and still seek their own preferences. Additionally, since deference to legislative intent involves a subset of cases (those involving statutory interpretation) courts more generally may act in good faith in such cases while their preferences are more influential in cases involving other tools such as judicial review. Respondents may have both characterizations in mind when they make what appear to be inconsistent responses to these questions. It may also reflect different realities on the ground. The respondents may be accurately portraying differences across state courts with some courts activist, some restraintest, and some mixed. This possibility can be more closely examined in the next chapter.

Indicator Two: Conflict (Do Courts Avoid It?)

Judicial policy independence is also indicated by the degree to which courts are willing to conflict with other political actors. Courts that avoid conflict are more deferential policy actors than courts who ignore or even engage directly in conflict with other policy actors. That is, courts that do not shy away from conflict are more independent than courts that avoid it. To assess supreme courts adverseness to conflict, I asked respondents to specify their level of agreement with the following statement:

> *The state supreme court generally tries to avoid conflict with the state legislature or legislative branch.*

Responses were coded 1 = strong agreement; 2 = agreement; 3 = disagreement; 4 = strong disagreement; 5 = don't know. I present the results in Table 4.5. Strong disagreement or disagreement with this statement indicates a more independent court than agreement or strong agreement with this statement.

Table 4.5: Respondent Agreement That High Court Avoids Conflict with the Legislative and Executive Branches in Making Decisions

	Frequency	Percent	Cumulative Percent
Strongly agree	45	9.09	9.09
Agree	201	40.61	49.70
Disagree	167	33.74	83.43
Strongly disagree	51	10.30	93.74
Don't know	31	6.26	100.00
Total	495	100.00	

Across state supreme courts respondents appear to be divided on whether or not their state supreme courts generally attempt to avoid conflict (are conflict averse) to other political actors. Collapsing the strongly agree and agree and strongly disagree and disagree responses, respondents agree slightly more (49.70%) than disagree (44.04%) that courts avoid conflict with other branches. In addition, as would be expected, responses to this item are somewhat related (gamma = .5452) with responses to the previous item concerning whether the supreme courts follow legislative intent. Respondents who saw their state supreme courts as following legislative intent in statutory interpretation were also likely to see them as avoiding conflict.[11]

[11]By inference courts that want to avoid conflict follow leg intent as a means to do so. See Appendix D for crosstab.

Conflict Explored

A different perspective on the willingness of supreme courts to act contrary to the preferences of other state political actors is gained by moving from the general to the specific. In this regard, I asked respondents to identify up to three issue areas in which their state supreme court had exerted the most, second most and third most influence in their state. They were then asked for each issue area,

In your judgment, was the court's decision(s) consistent with the preferences of a majority of the legislature?

and

In your judgment, was the court's decision(s) consistent with the preferences of the governor?

To assess conflict in these areas of most influence, I created indices of agreement in the area of most, second most and third most influence by courts. Each sphere of influence by courts (ranked 1 through 3) is considered in terms of legislative and/or executive agreement or disagreement with the courts' decisions in each area ("Both Agree" = Legislative and Executive Agreement; "Leg Agrees" = Legislative Agreement but not Executive Agreement; "Gov Agrees" = Executive but not Legislature Agreement; and "Neither Agree" = Neither the Executive or Legislative Branches are in agreement). Results are presented in Table 4.6. Column frequencies are given in raw numbers and by percent.

Table 4.6: Legislative and/or Executive Agreement with High Court Decisions across State by Most, Second Most, and Third Most Influential Areas of Court Decisions

(N = 515)	Most Important	Second Most Important	Third Most Important
Both agree	85 (27.42)	92 (38.02)	71 (38.80)
Leg. agrees	33 (10.65)	14 (5.79)	8 (4.37)
Gov. agrees	44 (14.19)	31 (12.81)	19 (10.38)
Neither agree	148 (47.74)	105 (43.39)	85 (46.45)
Total responses	310 (100.00)	242 (100.00)	183 (100.00)
Missing	205	273	332

Most respondents reported an area of most influence in their state (77.5 percent) and nearly two-thirds (60.2 percent) of respondents answered the follow-up questions I asked about whether the court's decisions was in line with the preferences of legislature and the governor. Nearly two-thirds of respondents (65.8 percent) identified an area of second most influence while nearly half of respondents (46.99) reported whether the legislature and the governor agreed with the court's decision. In the area of third most influence, a majority of respondents reported an issue area (50.8 percent) and more than a third of all respondents (33.5 percent) answered the follow-up question regarding executive and legislative preferences.

Taking into account the decreasing number of respondents who reported in more than one area of most influence, respondents reported similar rates of disagreement between both the legislative and executive branches nearly half the time (45.9 percent). Respondents also reported similar levels of agreement that the legislature and governor both agreed with the courts decisions across the three areas of most influence.

In contrast to the results in Table 4.5 in which almost half of respondents generally agree that their court avoids conflict with the other branches of government (49.7 percent), when the focus is on specific issue areas where the courts are viewed as influential, nearly half viewed both the legislature and executive branches in disagreement with the court. Respondents indicate much more conflict over court decisions than they had when asked generally about the state supreme court as avoiding conflict. It should be noted that when asked whether the issue in question was an important policy issue in the state, the respondents uniformly responded in the affirmative.[12]

As another approach to identifying the potential for conflict with the court and other political actors, respondents were asked to assign an ideological score of 0 to 100 (ranging from very liberal to very conservative) to their state supreme court, their legislature and their governor. The condition for conflict among the court, governor, and legislature may depend upon their relative ideological positions. A court that is perceived to be close ideologically to both the governor and the legislature may not engage in conflict because it does not have the opportunity. That is, its preferences coincide with those of the other political actors and so when they exert their preferences, they do not find themselves in conflict. The absence of conflict in this situation provides limited evidence on the question of the independence of the court.[13] Conversely, when a court is ideologically distant from other political actors the opportunity provided for conflict allows greater leverage in discerning perceptions of truly independent behavior. These

[12]Would you consider this to be an important policy issue in your state? Ninety-six percent responded 'yes'.

[13]Such a court may be perceived by respondents as deferring to legislative intent when it in fact simply agrees with the position of the legislature on an issue.

differences will become particularly important as I look at states individually in the next chapter.

As a starting point, I averaged the ideological score assigned by respondents to courts, legislatures, and governors in their state. Respondents were given a continuum ranging from 0 to 100 with 0 equaling "extremely liberal" and 100 equaling "extremely conservative."

When I average the ideological scores across states, respondents assign state supreme courts ideological scores of 64.9 percent, legislatures 47.7 percent, and governors (59.1 percent). On average courts are assigned ideological scores to the right of both legislature and governors. This average, however, is not very informative as to the potential for conflict since these averages do not give us a sense of what institutional differences are perceived to be within each state. In fact, I note wide dispersion, when I look at average ideological scores by institution across states; that is the variation around the average score across states per institution varies significantly.[14] Since I am examining the potential for conflict as part of an indication for meaningful conflict to take place, it is useful to break down states into groups according to the average ideological score of respondents per institution per state. That is, I assessed whether the average score per institution by state had the state supreme court assigned to the ideological left, right or middle (median) by respondents for each state. How respondents by state perceive their court to be ideologically in the middle, to the left, or to the right of their respective legislature or governor gives us a general sense of the potential for conflict by state. This

[14]Variation (Var) and Standard. Deviation (Std. Dev.) were calculated for ideological scores by institution across states: Court Var=464.00, Std. Dev=21.54; Governor Var=547.30, Std. Dev=23.39; Leg Var=449.08, Std. Dev 21.19.

type of analysis I conduct in the next chapter by state at length, but Table 4.7 does provide a grouping by state of the average ideological scores by state respondents assigned to their state supreme court, legislature, and governor.

Table 4.7: Based on Average Ideological Given by Respondents per State per Institution (Groups Indicate High Court Placement to Each Institution)

Court Left N = 5	Court Median N = 19	Court Right N = 26
Alabama	Arkansas	Alaska
California	Colorado	Arizona
Connecticut	Florida	Delaware
Maine	Georgia	Idaho
Rhode Island	Hawaii	Indiana
	Illinois	Iowa
	Louisiana	Kansas
	Maryland	Kentucky
	Massachusetts	Mississippi
	Michigan	Missouri
	Minnesota	Nevada
	Montana	New Jersey
	Nebraska	New Mexico
	New Hampshire	North Dakota
	New York	Ohio
	North Carolina	Oklahoma
	South Carolina	Oregon
	Texas	Pennsylvania
	Vermont	South Dakota
		Tennessee
		Utah
		Virginia
		Washington
		West Virginia
		Wisconsin
		Wyoming

In 19 states, the average ideological score given by respondents in that state for each institution in that state indicates that courts are ideologically between the legislator and governor. This middle or median position should make conflict less plausible for one

of two reasons: (1) the court is ideologically close to both institutions though its score falls between them; or (2) even if the court finds itself ideologically in conflict with one branch its median placement should provide it ideological "cover" from the other branches. While the Court may act sincerely and pursue its own preferences when positioned in this manner, its preferences are also likely to be consistent generally speaking with those in the "lawmaking majority." This will make parsing out some of the indicators of independence and impact more difficult in the next chapter (though fortunately not all of the indicators of each). In fact, for certain issue areas the court may be more ideologically out of sync than it is in general with these actors.

In a majority of states, ideological scores assigned by respondents place the court either to the ideological left (5 states) or the ideological right (26 states) of both the legislature and the governor. This places the court relative to the other branches out of the ideological "safe zone" and places it, generally speaking, at risk for more conflict with these institutions. The courts under these circumstances should demonstrate less preference seeking and more strategic deference to other actors. If the court does act in pursuit of its preferences, its ideological difference creates a greater opportunity for conflict. Courts that seek their own preferences and avoid legislative deference can be treated as more independent than courts similarly situated that do not preference seek and defer to legislative intent.

Indicator Three: Innovativeness

Innovative courts are willing to create novel policies or so alter existing policies as to make them new. They are independent in this regard since they are acting on their own to create a novel policy. To determine the degree to which state supreme courts are

innovative, I asked respondents questions designed to assess how often their respective court acted *before* the legislature on a policy issue and whether the legislature had acted in the issue area within the last year (presumably in response to the court). The timeline of legislative action is an attempt to see if the court was a first-mover or agenda setter on an issue, and to determine if the legislature responded to the court's recent decision. The latter would suggest that the court and legislature are both engaging as participants in the same policy cycle though the court has acted first.

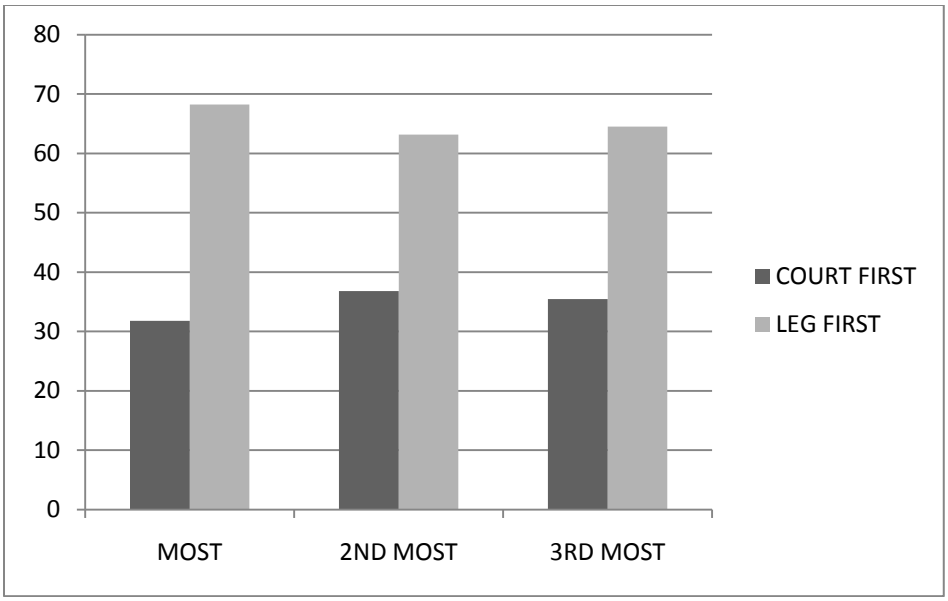
Specifically the following two questions were asked as follow-up questions to respondents regarding issue areas in which their courts exerted the Most, Second Most, and Third Most Influence:

Was this an issue that the legislature had addressed before the court became involved?

and

Has the legislature addressed the issue in the last year?

To determine whether the court had set the agenda, I examine responses to the first question: *Was this an issue that the legislature had addressed before the court became involved?* Responses are coded as yes (1) or no (0) for each area of influence, no indicating the court acted first. In Figure 4.1, I present the percent of respondents who said the legislature had not addressed the issue before and those who said they had.



(N = 365) (N = 296) (N = 234)

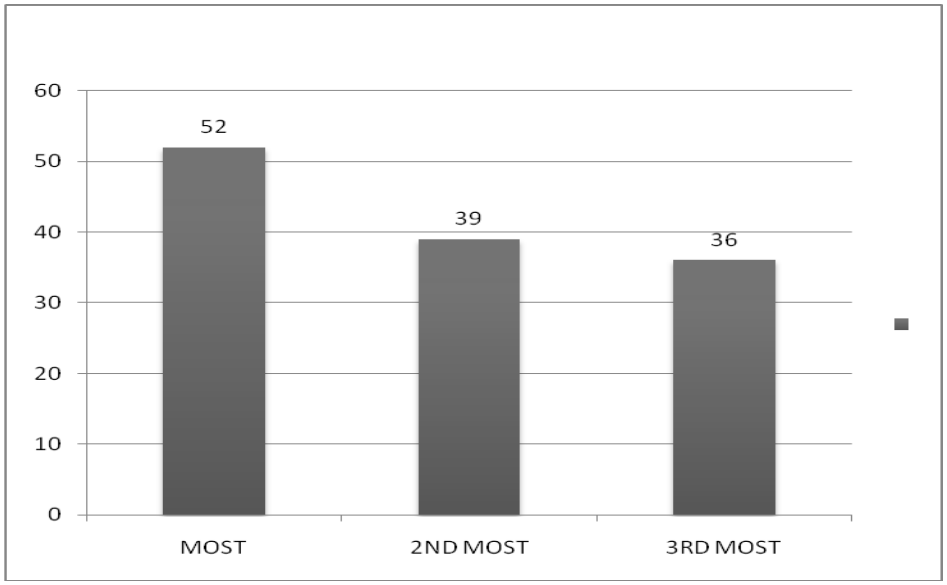
Figure 4.1: Court or Legislative Innovation: Who Acted First in the Areas of Most Influence across States (by Percent Respondents)?

While responses vary slightly by area of most, second most, and third most influence, between 30-40 percent of respondents who offered a response indicated that their state supreme court took the lead in the making policy in the areas in which they exerted the most influence. These results will be parsed and examined in more detail at the state level in the next chapter, but clearly a significant number of respondents see their state supreme court as acting first, innovating, in the areas of greatest influence.

Innovative behavior in its own right is important, however, we cannot assume that just because a court makes the first move in a policy area that they have the final say. To make such an assumption is to ignore the likely dynamism between institutions (here the court and the legislature) that underline the making of policy. Courts may have placed the issue and their policy regarding it on the policy agenda first, but the legislature (and/or executive) will often respond accordingly. This could result in the legislature correcting the court or accepting the court's policy direction. My point regarding policy

independence is that either way, the court makes its own contribution the policy, which is separate from the legislative response.

The assumption underlying innovation as indicative of independence underlines the dynamic process of policymaking. Courts are independent actors in particular if they act first, but how and whether their actions meet with response also suggests something about their independence. In Figure 4.2, I present the percentage of respondents who indicated that the legislature addressed the issue in the last year and thus likely in response to the court's decision.



(N = 361) (N = 290) (N = 226)

Figure 4.2: Percent Respondents Indicating Legislative Response within a Year of the Court's Decisions in Areas of Most Influence

Across areas in which courts have exerted the most influence, legislatures and courts are viewed as working on issues in close proximity by respondents. Legislatures are viewed as acting on issues the court has taken up recently a significant amount of the time. Specifically, in areas the courts are viewed as most influential, legislative response within the year is viewed as happening by 52 percent of respondents; the area of second

most influence among 39 percent of respondents, and among the areas of third most influence along 36 percent of respondents. Taken together, approximately 40 percent of respondents view the legislature as acting in and around the same agenda space as the court, suggesting the court and the legislature are individually contributing to the direction of a policy.

To explore innovativeness further, I examined how often these decisions remained the final word in the policy process. I cross-tabulated the two items measuring policymaking interactions between the legislature and the court when the court acted first in areas of most influence. I present the results graphically in Figure 4.3.

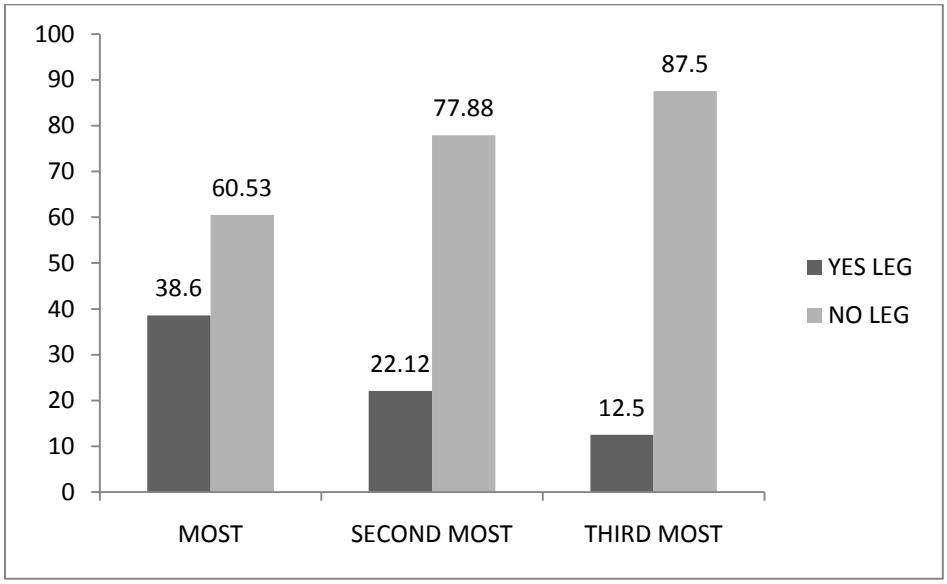
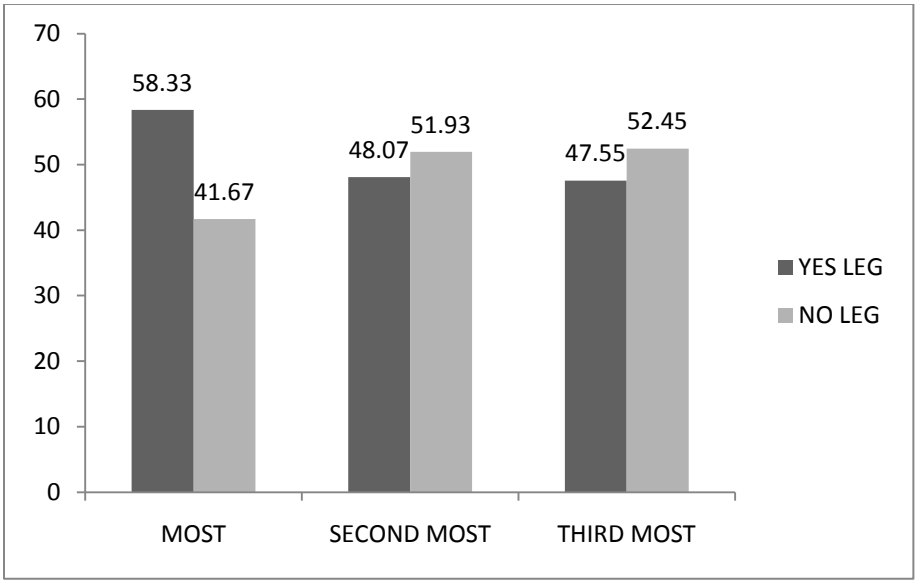


Figure 4.3: Percent of Respondents Indicating Legislative Response to Areas Where the Court Acted First

A significant majority of respondents (60-87 percent) identified a policy area in which courts acted first and had been influential and in which the legislature did not

respond, leaving the court with the last word in the area.[15] A comparatively smaller percent of the respondents (12-38 percent) identified issue areas in which courts have been influential and appear to have placed the issue on the state agenda but whose decision met with legislative response within the year. The responses indicate that the court acted first on the issue but the legislature did address the issue subsequent to the court's involvement.

Next I examine the issue areas of most influence where the legislature acted first, and then either responded or did not to the court's subsequent decision. A cross-tabulation of legislative initiated decisions in areas in which courts are recognized as most influential are presented graphically in Figure 4.4.



(N = 240) (N = 181) (N = 143)

Figure 4.4: Percent of Respondents Indicating Legislative Response to Areas Where the Court Did Not Act First

[15]The denominator used for each area of influence is derived from fraction of respondents reporting the court acted first and whether the legislature acted first. The percentage of respondents in the area of most influence is 31.2 (N=114/365), second most influence 35.1 percent ((N=104/296) and third most influence 34.2 percent (N=80/234).

Between 47 and 58 percent of the respondents identified issues in which the legislature had acted prior to the court, the court became involved and the legislature revisited the issue subsequent to the court's involvement. Remembering that these are issue areas that respondents considered as areas of most influence by the court, these results suggests that many courts are clearly perceived to contribute to the formulation of policy; that their decisions trigger legislative response, when they acted first (innovative) or second.

When courts act first in a policy area they are setting the agenda; when they act second, they are contributing to policy. With respect to independent behavior, however, legislative response needs to be considered from the point of view of legislative preferences. That is, the fact that a court acting first or second in a policy arena meets with no legislative response may be the result of legislative agreement with the court's decision (as opposed to simply deference to the court). On the other hand, if the legislature is in disagreement and does not respond, this suggests a court less constrained by legislative action and thus more independent. In looking at the areas in which courts are viewed as having the most influence, I cross-tabulated legislative responses with legislative agreement. I present the results in Table 4.8.

Table 4.8: Legislative Response in First Year to Court Decision in Area of Most Influence by Legislative Agreement

	Legislative Disagreement	Legislative Agreement	Total (N = 515)
No Legislative Response	81 (39.51)	72 (57.14)	153 (46.08)
Yes Legislative Response	124 (60.49)	54 (42.86)	178 (53.61)
Total Responses	205 (100.00)	126 (100.00)	331 (100.00)

In the areas of most influence by state supreme courts, when the legislative body is in disagreement with the court's decisions respondents report more legislative responses than non-responses within a year of the court's decisions (60-40 percent). On the other hand, if the legislature agrees, respondents report fewer legislative responses (57-43 percent). While legislative response is more likely to occur if the legislature disagrees with the court, there are still a significant minority of respondents who reported a lack of legislative response to decisions the legislature was in disagreement. With respect to innovative behavior, however, in which the court acts first, I ran the same cross tabulation but sorted responses in terms of whether the court acted first or second. The results suggest a complex and dynamic relationship among courts and legislatures, one perhaps conditioned on whether the court acts first or not. I present these results in Table 4.9 and 4.10.

Table 4.9: (Court First) Legislative Response in First Year to Court Decision in Area of Most Influence by Legislative Agreement

	Legislative Disagreement	Legislative Agreement	Total
No Legislative Response	29 (55.77)	29 (63.04)	58 (58.59)
Yes Legislative Response	23 (44.23))	17 (36.96	40 (40.40)
Total Responses	52 (100.00)	46 (100.00)	99 (100.00)
Lambda = .0244	$Chi^{2 =}$ 99.5401 Pr = 0.000		

Table 4.10: (Legislature First) Legislative Response in First Year to Court Decision in Area of Most Influence by Legislative Agreement

	Legislative Disagreement	Legislative Agreement	Total (N = 515)
No Legislative Response	52 (34.44)	42 (54.55)	94 (41.23)
Yes Legislative Response	99 (65.56)	35 (45.45)	134 (58.77)
Total Responses	151 (100.00)	77 (100.00)	228 (100.00)
Lambda = 0.0745	Chi^2 = 8.5099 Pr = 0.004		

In looking at the results from Tables 4.9 and 4.10 there is a difference in response by legislatures to court decisions in which the legislature both acted first and disagreed with the court's decision (66-34 percent) when compared to responses when courts acted first but the legislature disagreed (45-55 percent). Comparing the asymmetric lambda scores, when the court acted first (Table 4.9) predicting legislative response is improved by nearly 12 percent by knowing the whether the legislature agrees with the decision. The Chi-Square is statistically significant allowing us to reject the null that legislative agreement and legislative response are not related.

On the other hand, given the reported lambda in Table 4.10 in which the legislature acted before the court, the proportional reduction in error in predicting legislative responses is helped minimally by knowing legislative agreement. Chi-Square is significant, however, allowing us to reject the null of no relationship between legislative responses and legislative agreement. While these descriptive results indicate that when courts innovate policy their decisions are reported as more likely to be undisturbed even when the legislative body disagrees, this might result from the court deciding cases it knows the legislature to be in agreement. I cannot know whether the

general patterns reveal more or less true legislative discord until I examine this data at the state level.

For now, the data may suggest a greater degree of policy independence by courts in terms of agenda setting and policy formulation when they create the policy than when the legislature does. On the other hand, when the legislative body acts first they are more likely to respond to decisions in which they disagree. More legislative deference is reported when courts act first than when they act second. Again, without a more detailed inspection at the state level it is hard to know, but there does appear to be more policy control by the actors who set the agenda.

Perceived differences between legislative responses based on legislative agreement and agenda setting suggests dynamism at work in policy-making between courts and legislature. These interactions underline the relationship between judicial independence and impact. That is, a court that acted first in an area it was deemed to have the most influence (despite legislative disagreement) and had the last word acted independently. By implication, it also acted with more independence and impact than a court that acted second to the legislature (in disagreement) and the legislature responded within the first year.

In the next chapter I will investigate these connections between innovation and judicial impact at the state level to assess court contributions to the policy agenda process in more detail. In the next section, I turn to the second necessary condition of activism, judicial impact.

Condition Two: Perceptions of Judicial Policy Impact

Courts are independent to the extent that they make decisions based on their own preferences, willingly engage in conflict with other policy players, and create and/or contribute to the policy. Judicial independence, however, is necessary but not sufficient to define a court as activist. Judicial impact is required as well since judicial impact considers the court's success in making independent contributions to policy.

Activist courts are not merely independent; the decisions they make are considered impactful/meaningful. Courts are viewed as political players in the policy process when they make decisions across a broad set of issue areas, are taken into consideration by other political actors when those actors make their own decisions, and the decisions activist courts make are actually carried out, that is, implemented. To consider courts as independent without considering how meaningful that independence is in the policymaking context ignores a critical assumption of political engagement and power by any institution we are assessing as engaged or activist. Indeed, power and engagement assume non-tentative results; criticisms or compliments of independent behavior by courts assumes that courts are capable of and do achieve the end for which they are being applauded or derided. Yet, we cannot assume these exertions of independence and willing engagement are impactful; rather we must investigate these assumptions empirically. I turn to empirical assessments of impact in the next section.

Indicator One: Policy Breadth

The breadth of issue areas in which a supreme court is actively engaged is one indicator of impact. Breadth requires that a court be viewed as active across a set of issues not just in one or a few issue areas. This does not mean that courts may not have

impact in a narrow subset of issues, but rather that they have the potential to have more impact if they act across a wide swath of issues.

As a first step in assessing issue breadth, I asked respondents to identify those issues areas in which they felt their supreme court played an 'active' role from 1998-2002.[16] Respondents identified a total of 44 such issue areas. I calculated the average number of issues in which respondents felt their court played an active role in their state. The arithmetic mean is 8.18 for the total across all states is larger than the median score of 7, indicating positive skewness in the distribution. A skew test reveals significant skew (0.00), suggesting that the median is the more appropriate measure of central tendency. Thus, on average, respondents indicated 7 issue areas in which they felt their state supreme court had played an active role.[17]

The types of issues in which courts were perceived to be active are presented in Table 4.11. Issue areas are ranked in descending order by issue area. The frequencies indicate the number of respondents identifying the issue area as an area of activity for their state supreme court in their state. The percent column indicates the total responses per issue area divided by the total number of respondents (N = 515).

[16]The description of the survey given to respondents asks them to assess the role of their respective state supreme court in the political system of their state from 1998 to the present. Since final survey results were collected in 2002, I use the range '1998-2002' to cover the basic period under assessment.

[17]Respondents ranged from 0 per state to 27.

Table 4.11: Issue Activity by State Supreme Courts 1999 to 2002 (Frequency and Percentages of Respondents Flagging These Issues of Total Number of Responses across States)

Issue Area	Frequency	Percent
TORTS	316	61%
CRIMINAL SENTENCING	289	56%
INSURANCE	233	45%
CHILD ADOPT/ CUSTODY	222	43%
EDUCATION	217	42%
SEARCH AND SEIZURE	212	41%
PROPERTY RIGHTS	210	41%
DEATH PENALTY	202	39%
BUSINESS REGULATION	180	35%
DIVORCE	171	33%
TAXATION	164	32%
CONTRACTS	161	31%
ENVIRONMENT	135	26%
JUVENILE JUSTICE	132	26%
FREEDOM OF THE PRESS	122	24%
FREEDOM OF SPEECH	93	18%
DOMESTIC VIOLENCE	91	18%
GAY RIGHTS	87	17%
PATERNITY RIGHTS	86	17%
GAMBLING	86	17%
PRISONS	79	15%
AGRICULTURE INTERESTS	64	12%
ABORTION RIGHTS	62	12%
ELECTIONS	55	11%
HABEAS CORPUS	52	10%
RACIAL DISCRIMINATION	51	10%
WELFARE POLICY	43	8%
GOVERNMENT OVERSIGHT	42	8%

GOVERNMENT CORRUPTION	41	8%
RELIGIOUS ESTABLISHMENT	40	8%
OBSCENITY	38	7%
RELIGIOUS FREEDOM	32	6%
CRIMINAL PROCEDURE/EVIDENCE	30	6%
RIGHT TO DIE	28	5%
CIVIL PROCEDURE	27	5%
LABOR/EMPLOYMENT	27	5%
AFFIRMATIVE ACTION	19	4%
PROFESSIONAL CONDUCT	15	3%
CIVIL RIGHTS	15	3%
LAND USE/ZONING	11	2%
SOP	11	2%
NATIVE AMERICAN SOV.	10	2%
STATE CONSTITUTIONAL LAW	9	2%
STATUTORY INT/CONS.	5	1%

Of the 44 issues respondents across the states flagged as areas in which they felt their state supreme court was active, 10 issues capture a majority of the total responses provided by respondents: (1) torts, (2) criminal sentencing, (3) insurance, (4) child adoption and custody, (5) education, (6) search and seizure, (7) property rights, (8) the death penalty, (9) business regulation, and (10) divorce law. Thought of another way, of the 515 respondent surveys assessed for this study, some 316 of respondents indicated torts was a policy area in which their state supreme court was active (316/515, 66 percent of respondents). Similarly, 56 percent said criminal sentencing was an area of activity as did 45 percent view insurance law, 43 percent child custody and adoption issues, 41 percent education and so on.

Some of these areas have been treated in the scholarly literature, most notably torts and educational reform, but others have received very little attention including

criminal sentencing, child adoption, and property rights (for an exception see Kagan et al. 1977 and Kritzer et al. 2007). Conversely, some issue areas that have received considerable attention from scholars (and certainly the media), like abortion and gay rights, are viewed by a relatively low percentage, 12 percent and 17 percent respectively of respondents as areas in which state supreme courts have been most active. Right to die has received attention as well, yet only 5 percent of respondents identify it as an area courts are active in across states.

This disjuncture between the views of informed respondents about issue areas of prominent activity by courts and the issue areas that have received scholarly and media attention, highlights the differences between activity and potential influence on the one hand and controversy on the other. For example, when the Georgia State Supreme Court overturned the states' little enforced sodomy law, or when the Massachusetts high court upheld civil unions, or more recently, the California Supreme Court found the state ban on gay marriage was unconstitutional on state constitutional grounds, these decisions were publicized far and wide as active and compelling (both negatively and positively). As such they have drawn scholarly attention but relatively few state supreme courts during the study period appear to have made decisions on these issues.

Respondents who are knowledgeable about courts appear to view activity less in terms of controversy and more in terms of policy breadth. This does not mean, however, that all issues are created equal. Issue areas perceived by a high percentage of respondents as areas of activity by a state supreme court may be relatively low in visibility and narrow in scope resulting in little perceived policy impact and little reaction from other political actors (and thus their observers including academics and the media).

In contrast, a decision by a state supreme court in a single controversial and visible issue area like gay rights or abortion, while avoided by most state supreme courts, may be viewed as having broader political and policy impact because it is controversial.

To measure breadth as an important component of impact, however, we need to consider these highly visible decisions within the broader context of issues in which courts are actively involved. If we do not, we cannot discriminate between impactful judicial behavior and that which is merely controversial and thus assumed to be impactful. To do this, I examined respondent perceptions of issue of activity and issue influence by courts

Since torts, for example, are viewed by nearly 61 percent of respondents as an area in which courts are active, a related question is what percentage of those respondents also view torts as an area in which the court exerts the most, second most, or third most influence? Including an issue in any of the rankings suggests that respondents believe these issues are important in their state and the court has played an active and influential role in them. As such, I combined the most, second, and third most influential issue areas into one category that I label as 'greatest influence.' In Table 4.12, I present the total number of responses given per issue in all 3 categories of influence (most, second most, and third most influence, N = 947). In the second column, I report the percentage of total respondents who indicated the area as one of influence (N = 515). Last, I present the responses per issue by the total number of respondents who provided a response to at least one of the 3 categories of influence since again these are presumed to be areas of activity additionally flagged as areas of most, second most, or third most influence.

Table 4.12: Areas of Greatest Influence by Courts as Indicated by Respondents across States

Most Influence All Three	Frequency	Percent	Percent (combined)
TORTS	134	26%	42%
EDUCATION	129	25%	41%
DEATH PENALTY	87	17%	28%
ELECTIONS	68	13%	22%
INSURANCE	47	9%	15%
CRIMINAL SENTENCING	40	8%	13%
CRIMINAL PROCEDURE	38	7%	12%
SEARCH & SEIZURE	36	7%	11%
BUSINESS REGULATION	31	6%	10%
TAXATION	31	6%	10%
CHILD ADOPT/CUSTODY	30	6%	9%
PROPERTY RIGHTS	23	4%	7%
GOVERNMENT OVERSIGHT	22	4%	7%
CONTRACTS	18	3%	6%
GAMBLING	18	3%	6%
ENVIRONMENT	17	3%	5%
PROFESSIONAL CONDUCT	16	3%	5%
ABORTION	15	3%	5%
CIVIL PROCEDURE	14	3%	4%
SEPARATION OF POWERS	14	3%	4%
CIVIL RIGHTS	13	3%	4%
FREE SPEECH	13	3%	4%
DIVORCE	11	2%	3%
STATE CON LAW	8	2%	3%
LABOR & EMPLOYMENT	7	1%	2%
REL. ESTABLISHMENT	7	1%	2%
FREE PRESS	6	1%	2%
JUVENILE JUSTICE	6	1%	2%
GOVERNMENT CORRUPTION	5	1%	2%
DOMESTIC VIOLENCE	5	1%	2%

PATERNITY RIGHTS	5	1%	2%
WELFARE	5	1%	2%
LAND USE/ZONING	5	1%	2%
AGRIC. INTERESTS	4	1%	1%
PRISON REFORM	4	1%	1%
STAT. INTER/CONSTRUCT	4	1%	1%
NATIVE AMERICAN SOV.	4	1%	1%
RIGHT TO DIE	3	1%	1%
OBSCENITY	2	0%	1%
AFFIRMATIVE ACTION	1	0%	0%
HABEAS CORPUS	1	0%	0%
TOTAL	947	184%	300%

Torts and education come up most frequently (134 and 129 responses) and rank highest among total respondents 26 and 25 percent, respectively. In addition, among those respondents who tagged areas of activity as influential (316), torts, and education came up 42 and 40 percent of the time, respectively. The death penalty and elections come up as well though less frequently over all (17 and 13 percent) and 27 and 21 percent among respondents who tagged these issues as influential.

Since the most influential issue areas are selected from the list of issue areas respondents have already declared courts as active, considering how similar breadth and influence are is worth examining. In Table 4.13, I compare those issues that received the most mention by respondents as areas of greatest activity by courts to issues in which courts demonstrated the greatest influence.

Table 4.13: Comparison of Respondent Perceptions of Activity to Influence by Issue Area across States

Activity Level by Issue	Influence Level by Issue

Torts	Torts
Criminal Sentencing	Education
Insurance	Death Penalty
Child Adopt/Custody	Elections
Education	Insurance
Search and Seizure	Criminal Sentencing
Property Rights	Criminal Procedure
Death Penalty	Search & Seizure
Business Regulation	Business Regulation
Divorce	Taxation
Taxation	Child Adopt/Custody
Contracts	Property Rights
Environment	Government Oversight
Juvenile Justice	Contracts
Free Press	Gambling
Free Speech	Environment
Domestic Violence	Professional Conduct
Gay Rights	Abortion
Paternity Rights	Civil Procedure
Gambling	Separation of Powers
Prisons	Civil Rights
Agriculture Interests	Free Speech
Abortion Rights	Divorce
Elections	State Con Law
Habeas Corpus	Labor & Employment
Racial Discrimination	Religious Establishment
Welfare Policy	Free Press
Government Oversight	Juvenile Justice
Government Corruption	Government Corruption
Religious Establishment	Domestic Violence
Obscenity	Paternity Rights
Religious Freedom	Welfare
Criminal Procedure	Land Use/Zoning
Right to Die	Agricultural Interests
Civil Procedure	Prison Reform

Labor/Employment	Stat. Inter/Construct
Affirmative Action	Native American Sov.
Professional Conduct	Right to Die
Civil Rights	Obscenity
Land Use/Zoning	Affirmative Action
SOP	Habeas Corpus
Native American Sov.	
State Constitutional Law	
Statutory Int/Cons.	

Many of the issues that are reported more often as areas of activity are also mentioned by respondents more often as areas in which courts have had more influence. In examining the top ten issues of activity versus the top ten issues of influence flagged by respondents, seven of the ten issues that respondents felt their court was active they also felt their court exerted the greatest influence. Of those three issues not included in the area of most influence top-ten list (Divorce, Child Custody, and Property Rights) only Divorce Law is reported much less often as an area of influence by respondents (number 23 in list). In contrast, child custody and property rights are nearly make the top-ten, listed as issue numbers eleven and twelve in the most-influence mention list. Thus, in all but one issue of most activity, respondents are likely to report the same issue more often as an area of most influence. These parallels suggest that respondents tend to tag issues they view courts as active as also having impact/influence.

In examining the list in total, however, there are areas in which courts are perceived by a relatively high percentage of respondents as playing an active role that are not perceived by a high percentage of respondents as areas in which courts exerted the most influence. As mentioned, Divorce law falls in this category, as do several other issue areas of activity, for example, Juvenile Justice, Gay Rights, and Labor &

Employment. Similarly, there are other issue areas in which courts are viewed as most influential but receive much less mention as areas in which courts are most active much of the time (Abortion and Elections for example).

These latter issues, and in particular gay rights, may indicate that some areas of controversy though not acted upon in a large percentage of cases, are issue areas in which courts are assumed to be influential. That said, in comparing all issues across all states in terms of activity and influence, these differences appear more the exception than the rule. In fact, the areas in which courts are viewed as most actively involved are also most often regarded as areas of influence. Since this chapter is intended to examine general trends from aggregated data, the possible disjuncture between perceptions of activity and perceptions of court influence may be more relevant for analyses at the state level in the following chapter. Indeed, while few supreme courts are active in controversial areas like gay rights, and this is captured by the smaller percentage of respondents noting this as an area of activity, respondents from the states where courts have acted in these areas may uniformly list this area as among those in which the court has been quite active and influential.

Respondent Perceptions versus Caseload Data

My approach relies on the perceptions of knowledgeable observers to determine the issue areas in which state supreme courts have been active and influential, an alternative approach to assessing levels of activity is to examine the caseload data for state supreme courts by issue area. In this section I compare the most systematic scholarly assessments of state supreme courts caseloads to determine similarities and differences between caseload data and respondent perceptions of the issues state supreme

courts spend most of their time. As a caveat, the perception data I present and the caseload data I examine are taken from slightly different periods and by design, my approach is employed to move beyond the limitations of examining caseload data across multiple cases. As a result, the comparisons I make between my perception data and caseload data I use to demonstrate the benefit of my approach to assess judicial activism across courts.

The first and most definitive work done on the caseloads of state supreme courts is Kagan, Cartwright, Friedman, and Wheeler's "The Business of State Supreme Courts 1870-1970" (1977). The Kagan et al. study is based on a sample of 5,904 cases decided in 16 State Supreme Courts between 1870-1970 looking at three times periods: (1) 1870-1900; (2) 1905-1935; and (3) 1940-1970. The cases examined detailed the size and focus of the workload of these courts and the potential reasons for changes in issue focus over the time periods. The courts chosen were based on a clustering technique that resulted in a regional sampling of 16 of 48 state supreme courts, omitting Hawaii and Alaska because of their later statehood status (1977, p. 25). Their findings demonstrate that state supreme courts varied over time in the types of issues they heard.

Kagan et al.'s work was revisited and updated by Kritzer, Brace, Hall, and Boneau (2007). They used the "State Supreme Court Data Project" to examine caseloads from 1994-1997, a time period relatively proximate to that of my study. They find significant differences in the types of cases being treated by the courts since the conclusion of the study period for Kagan et al. (1977). In fact, Kritzer et al. (2007) find that while debt collections and real property cases continue to decline and criminal law continues to increase as an overall percentage of the docket of these courts, other patterns

of change found by Kagan et al. have either reversed or halted. “Specifically, neither torts nor family cases have continued to increase; torts have stabilized and family cases, rather than increasing, have declined. The most surprising shift is the sharp increase in "other contract," which had no particular pattern in the earlier data, but that represented 5 percent or less of the courts' business; in the 1990s, "other contracts" had grown to a level approaching that of public law, and exceeding real property and family and estate cases (2007 at 427).

To assess whether and the extent to which elites’ perceptions about state supreme court issue activity and influence differ from the representation of issue areas in the actual caseload. I adopt the scheme used by both Kagan et al. (1997) and Kritzer et al. (2007) to classify issue areas. This requires me to assign the 44 issue areas that respondents to the survey identified as areas of supreme court activity to the 9 broad categories of the Kagan/Kritzer scheme. Given the prominence of education as an issue area identified by my respondents I have kept it separate.

In Table 4.14 I have arrayed the Kagan/Kritzer issue categories based on the percentages they tallied of the total state supreme court caseloads between 1994 and 1997. Next to these and using their categorizations, I assign my list of activity level and then influence using the Kagan/Kritzer issue categorizations; I place my issues in order of activity and then influence.[18]

[18]For example, I assigned the issue areas of Insurance and Contracts to the Kagan/Kritzer category Debt and Contract. 44.8 percent of respondents identified Insurance as an areas of activity when surveyed as did 31.02 for Contracts. The average is 38 percent.

Table 4.14: Issue Activity by Kagan/Kritzer Categories Using Perception Data across the Fifty United States

Kritzer Rankings (Caseload)	Activity Rankings (Perceptions)	Influence Rankings (Perceptions)
Criminal	Education	Criminal
Torts	Debt & Contract	Public Law
Public Law	Corps & Partnerships	Con Law
Corps & Partnerships	Torts	Torts
Family & Estates	Family & Estates	Education
Debt & Contract	Criminal	Debt & Contract
Real Property	Public Law	Family & Estates
	Real Property	Real Property

A comparison of the results from my survey with the results of Kritzer et al. (2007), provides interesting similarities and differences that I believe are directly related to the difference in approach. According to Kritzer et al. (2007), criminal law continued to dominate virtually all other areas in terms of caseload activity by state supreme courts. Torts came in second followed by Public Law and Corporations & Partnerships. Torts and Criminal Law were also issue areas in which respondents to my survey saw the courts as active. In contrast to the caseload data, the survey data indicate that Debt and Contracts, Corporations and Partnerships, and Family Law are issue areas in which state supreme courts have been active. The responses to the survey question regarding issue areas in which the supreme court has been active clearly does not merely reflect the actual distribution of the courts' caseload.

The differences observed between the results of analyses of caseloads and the perceptions of knowledgeable elites reflect an important distinction between workload and activity. I asked respondents to identify 'only' those issues on the list provided in

which they felt their state supreme was ‘active’ or write in additional areas they wanted to include. Certainly, actual caseload, particularly large caseloads in one area, should correspond to perceptions of activity (and they appear to), but where differences between perceptions and caseload data are relevant is the degree to which respondents view courts as ‘active” or engaged as opposed to just occupying large shares of their workload. This distinction is particularly important since the underlying assumption of both the Kagan and Kritzer studies is that the issues occupying the greatest amount of workload for courts are concomitantly areas in which they are influential.

In this regard, caseload data are useful for describing the issue areas on which courts spend the greatest amount of their time. However, caseload data does not tell us if the court is actually having a meaningful impact in that policy area, rather, the assumption is made that it surely must be. Caseload studies assume activity reflects impact because assessing the court’s actual impact in these thousands of cases over time (for example by determining whether the decisions were reached independently by the court and/or were implemented by other political actors, etc.) is an impractical task. This is a particular weakness of case level data approaches in general. My survey provides perception data of respondents who know a particular court well and can speak to these questions of impact across multiple issues. Consequently, my approach in providing an alternative lens to assess court activity speaks to the underlying assumption of activity as impact.

Condition Three: Strategic Influence

If the supreme court in a state is an important actor in defining public policy, then other actors, such as the legislature and governor, are expected to consider the court’s

responses when they create policy. If a court wields influence (i.e., it has impact) then other policy makers should consider carefully the likely reaction of the court before making their own decisions. The presence of this type of strategy by other actors may indicate a court is politically engaged in the state at least when it comes to the policy agenda stage.

To assess this category of impact, I asked respondents how much they agreed or disagreed with the following statement:

'Legislative and executive officials take into account the potential reaction of the (name of court) when they create public policy.'

Respondents were given choices scored as (1) for 'strongly agree'; (2) 'agree'; (3) 'disagree' (4) 'strongly disagree'; and (5) 'don't know.' I examined the overall level of agreement with this statement while omitting missing responses. The overall distribution of respondents on this item is presented in Figure 4.5.

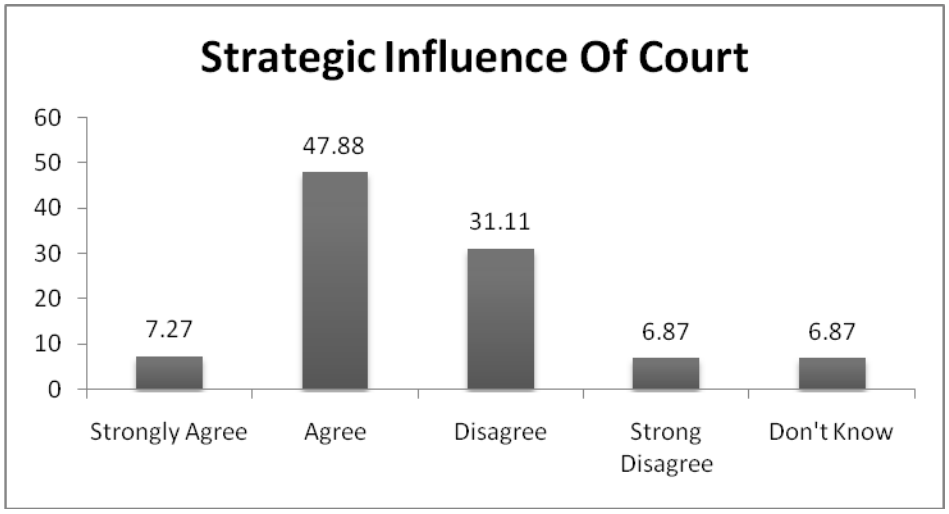


Figure 4.5: Respondent Perceptions of Whether the Legislature and Governor Take Into Account the Court's Potential Reaction to Their Decisions

Over 50 percent of respondents either strongly agree or more often agree with this statement indicating that a clear majority of the respondents see their supreme court as effecting the agenda and policymaking of other institutions in the political system. The percentages of those disagreeing with the statement (37 percent), is not insignificant, underlining that many respondents do not view their court as being taken into account when legislative and executive officials make policy. These courts would be seen as having less impact as a consequence.

These responses provide a complex view of the role of state supreme courts in the state political system. Earlier we noted that a majority of the respondents perceived that their supreme court made a good faith effort to follow legislative intent when interpreting statutes. A cross-tabulation of responses to that item and the item concerning strategic anticipation of the court by the legislature finds that almost half of the respondents (47 percent) agreed that both the supreme court is sensitive to legislative preferences (intent) in interpreting statutes and that the legislature is sensitive potential supreme court reactions as they make their decisions. In short, reading the responses to these two questions together indicates that a majority of respondents see actors in both institutions, the court and the legislature, as aware of and sensitive to the preferences of the those in the other. While judicial deference suggests less independence by the court, legislative and executive deference to the court's potential reaction indicates impact. At the state level, a collaborative policy making environment may explain some of these apparent inconsistencies.

Indicator One: Implementation

Impact as a condition of activism is also indicated by whether or not court decisions are carried out by other political actors. That is, if courts are to have a policy impact in their state that impact is through the decisions they reach, but only if those decisions are actually carried out. This is particularly true when courts are thought of as being influential in a particular area since to actually have influence, the decision they reach should be carried out even if it is in conflict with the wishes of other political actors in charge of implementing it. Decisions that courts reach which appear to conflict with other actors in charge of funding and/or enforcing them provide a critical test of the scope of the actual independent influence and impact a court has made with that decision.

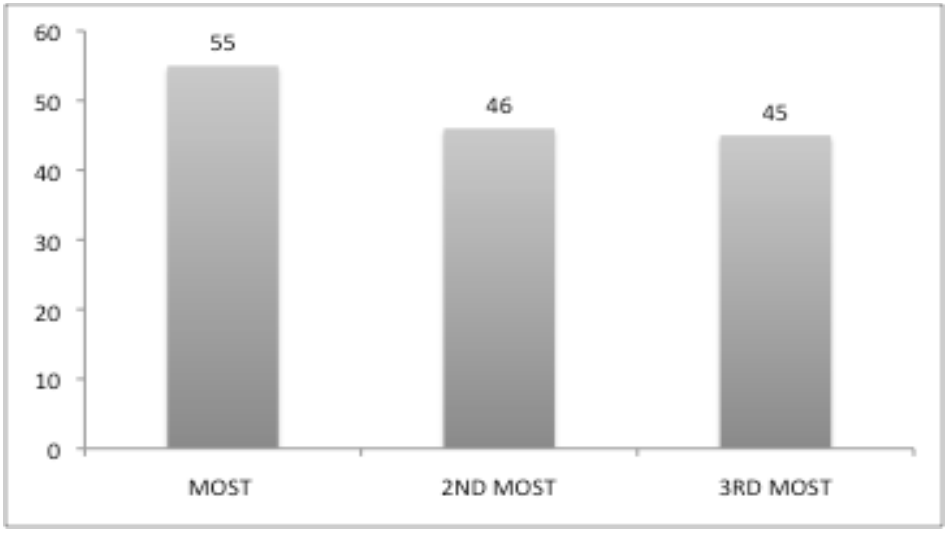
As indicated previously, for each of the three issue areas that respondents identified as ones in which the supreme court had exerted influence a majority of respondents perceived that the decisions reached by state supreme courts were in conflict with the preferences of the governor, legislature, or both. Given this conflict were the decisions implemented anyway? I asked respondents to answer yes or no to the following questions involving implementation of court decisions in these areas of Most, Second Most, and Third Most Influence:

If the decision(s) was in conflict with the preferences of the legislature and or governor, did the legislature or governor attempt to modify the decision (for example, rewrite the statute)?

and

If the decision(s) was in conflict with the preferences of the legislature and or governor, did the legislature or governor attempt to avoid or delay implementation?

Modification is a slightly less punitive response to the court's decision than avoidance since modification should see the court's decision carried out in some form. Avoidance suggests much more foot-dragging and institutional retreat from a decision. In Figure 4.6, I present the percent of respondents who reported the preference of governor or legislative modification to each of these 3 areas.



(N = 250) (N = 173) (N = 133)

Figure 4.6: Respondent Perceptions of Legislative and Executive Modification to Influential and Conflictual Decisions by State Supreme Courts

A near majority of respondents identified influential decisions of their state supreme court that were in conflict with preferences of the legislature and/or the governor and subsequently were modified, for example, through the rewriting of a statute. This suggests that in the issue areas recognized by respondents as the ones in which courts have exerted the most influence, that court decisions ultimately may not be implemented in line with the court's original preferences. Instead, they have been modified in some way presumably to better match the preferences of the governor, legislature, or both. On the other hand, about half of the respondents saw conflictual decisions by the courts were,

in fact, implemented and left untouched. This pattern of responses suggest that state supreme courts do make and successfully implement decisions contrary to the preferences of other political actors in the state but like the other political institutions in the state they experience constraints and are not always successful.

I previously found that, when courts act first, even when the decision was in conflict with legislative preferences, respondents reported that the legislature was less likely to respond to the court than if the legislature set the policy agenda and the court altered in a way it did not like. To examine if a similar pattern appeared for policy modification, I cross-tabulated modification with the agenda-setting player in the area of most influence. The results are presented in Table 4.15.

Table 4.15: Perceptions of Respondents of Legislative or Executive Modification of the Most Influential Decisions by Agenda Setting Actor

	Court First	Legislature First	Total
No Modification	46 (63.89)	65 (37.14)	111 (44.94)
Yes Modification	26 (36.11)	110 (62.86)	136 (55.06)
Total Responses	72 (100.00)	175 (100.00)	247 (100.00)
Missing	31	48	79
	Lambda = 0.1802	Chi^{2} = 14.7477 Pr = 0.000	

When courts create policy (innovate) and those decisions conflict with the legislature or governor (or both), respondents reported that their decisions remained unmodified nearly two-thirds of the time (63.89 percent). In contrast, when the legislature set the policy agenda and the court responded with a decision in conflict with either institution (or both), respondents reported the legislative modification occurred two-thirds

of the time (62.86 percent) of the time. The asymmetric lambda indicates an 18 percent reduction in predicting legislative modification when the agenda-setting actor is specified. The Chi-Square measure of independence is statistically significant at Pr = 0.000 allowing me to reject the null hypothesis that who sets the agenda does not affect modification.

To concentrate on the most conflictual environment, I repeated the same cross-tabulation but only included responses in which both the legislative and executive branch were perceived in conflict with the court's decision to see whether the modification rates increased. I present the results in Table 4.16.

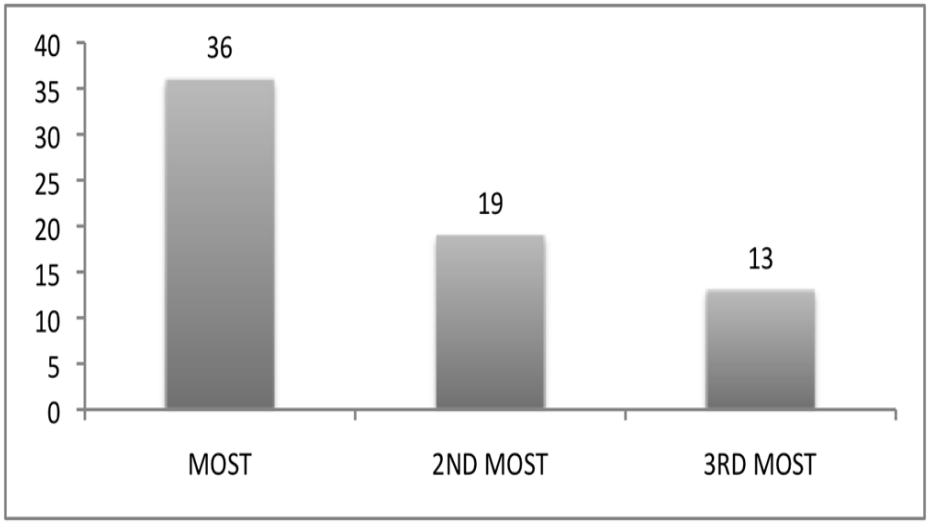
Table 4.16: Perceptions of Respondents of Legislative or Executive Modification of the Most Influential Decisions by Agenda Setting Actor if Neither Agree with the Court

N = 515	Court First	Legislature First	Total
No Modification	13 (46.43)	24 (24.00)	37 (28.91)
Yes Modification	15 (53.57)	76 (76.00)	91 (64.08)
Total Responses	28 (100.00)	100 (100.00)	142 (100.00)
Missing	*4*	*10*	*14*
Lamda = 0.00 Somersd = .224285 P>|z| = 0.032	*Chi^2 = 5.5662*	*Pr = 0.062*	

When both the legislature and governor are perceived to be in conflict with the court's decision, modification is reported more often in general (from 55 percent to 64 percent). Modification also increases when court's created the policy (from 36 percent to 53 percent) and is reported at a much higher rate when the legislature created the policy

(from 62 percent to 76 percent). Nevertheless, when the court innovates the policy and it is in reported conflict with both the legislature and the governor, 37 percent of the time, its decision remains unmodified. In contrast, a lack of modification is reported by only 24 percent of respondents when the legislature set the agenda. The Chi Square is statistically significant but the lambda is zero, suggesting that knowing the legislature and governor are both in conflict with a decision improves our ability to predict legislative modification. However, a symmetrical Somers-d coefficient of .22, suggests a moderately positive relationship between modification and legislative agenda setting (when both the governor and legislature are reported to be in disagreement with the decision). These results require further assessment but do suggest that courts are at least as successful in having their policy unchanged when they created the policy as are legislative bodies. Are they more successful than the legislature or the governor? My data do not allow me to respond to that question.

In addition to confronting state supreme court decisions directly the governor and/or the legislature can take more dramatic steps to delay or avoid decisions with which they disagree. In Figure 4.8, I present the percent of respondents who reported agreement that the governor and/or legislature avoided the decision in the area of most influence.



(N = 241) (N = 162) (N = 117)

Figure 4.7: Respondent Perceptions of Legislative and Executive Avoidance of Influential and Conflictual Decisions by State Supreme Courts

With regard to avoidance of decisions in conflict with the legislature, governor, or both, a much smaller percentage of respondents find that court decisions in conflict with the preferences of these institutions were avoided or delayed than were modified. This is consistent with the general literature on compliance with court decisions that while avoidance and non-compliance do occur, they are not the norm.

Additionally, I examined avoidance and agenda-setting to determine if avoidance was conditioned on whether the court or legislature acted first. In Table 4.17 I present my results.

Table 4.17: Perceptions of Respondents of Legislative or Executive Avoidance of the Most Influential Decisions by Agenda-Setting Actor

	Court First	Legislature First	Total
No Avoidance	42 (68.85)	98 (62.82)	140 (64.51)
Avoidance	19 (31.15)	58 (37.18)	77 (35.48)
Total Responses	61 (100.00)	156 (100.00)	217 (100.00)
Missing	34	46	80
Lambda = 0.0000 Somersd = .0603195 P>|z| = 0.398	Chi^2 = 0.6970 Pr = 0.404		

While respondents who reported that most decisions in the area of most influence were not avoided by the legislature and or governor in general (even when these decisions conflicted with either or both institutions), avoidance occurred less often among policies initiated by courts than by legislatures (31 to 37 percent). The Chi-Square is not statistically significant and the Somersd is weak and also not significant (which I again used given the vulnerability of asymmetric lambda split case cells). Consequently, I cannot reject the null that avoidance is related to agenda-setting.

Again, I repeated the analysis but for responses indicating that both the legislature and governor disagreed with the court's decision (when conflict is greatest). These results are presented in Table 4.18.

Table 4.18: Perceptions of Respondents of Legislative or Executive Avoidance of the Most Influential Decisions by Agenda Setting Actor When Neither Agree With the Decision

	Court First	Legislature First	Total
No Avoidance	11 (45.83)	47 (55.22)	58 (50.88)
Avoidance	13 (54.17)	43 (47.78)	56 (49.12)
Total Responses	24 (100.00)	90 (100.00)	114 (100.00)
Missing	4	8	12
Lambda = 0.0357	*Chi^2 = 0.3095* *Pr = 0.578*		

Reports of avoidance increased in general from 35 to 49 percent. For judicially and legislatively created policy, respondents report an increase in avoidance (from 31 to 54 percent) and for legislatively created policy (37 to 47 percent). The null cannot be rejected, however that the presence of specified conflict with both institutions increases avoidance given the statistically insignificant Chi-square coefficient.

In general, when courts make decisions they are likely to be carried out. They are more likely to be modified than avoided. Modification is reported more often when the court and the legislature disagree over a policy begun by the legislature than by the court and increase when the legislature and governor are both in conflict with the decision. These aggregate results suggest deference by legislative bodies to courts when courts make policy (innovate) than when they are contributors to the policy cycle. Rarely are court decisions avoided irrespective of policy origin.

Ideological Differences and Implementation

In addition to who sets the agenda, the ideological position of the court relative to that of the legislature and governor may increase or decrease the possibility of modification and/or avoidance since the potential for conflict between institutions is altered. For example, when the court is to the left or right of both institutions the likelihood of observing conflict increases and thus the opportunity for modification and/or avoidance should increase. In some part this reflects the fact that when the court is positioned ideologically between the legislature and the governor a movement away from the court's preferred outcome in an issue area is also a movement away from the preferred outcome for the legislature or the governor, depending on the direction of the shift. So we would expect modification (and/or avoidance) of the court's decision to be more likely when it is perceived to be in conflict with both the legislature and the governor than when in conflict with only one. I examined modification from the point of view of legislative conflict, executive conflict, and conflict with both institutions in Table 4.19.

Table 4.19: Perceptions of Respondents of Ideological Conflict by Institutions and Modification of the Most Influential Decisions Made by State Supreme Courts

	Both Agree	Legislature Conflicts (Only)	Governor Conflicts (Only)	Both Conflict	Total
No Modification	18 (75.00)	21 (55.26)	17 (68.00)	35 (26.06)	91 (43.54)
Modification	6 (25.00)	17 (44.74)	8 (32.00)	87 (64.08)	118 (56.46)
Total Responses	24 (100.00)	38 (100.00)	25 (100.00)	122 (100.00)	209 (100.00)
Lambda 0.2747	$Chi^2 = 28.8179$	Pr = 0.000			

When respondents perceive that the court's decision is in conflict with the preferences of both the legislature and the governor they indicate that the modification occurs 64 percent of the time. When the court's decision is in conflict with the legislature but not the governor, modification is reported to occur 44 percent of the time. When it conflicts with only the governor but not the legislature, modification occurs 32 percent of the time. Chi-Square is statistically significant and Lambda reduces error in predicting modification by 27 percent when the source of conflict is known.

Thus, the perceived ability of the court to implement a decision in an influential issue area appears conditioned by whether that decision is consistent with the preferences of other state actors and particularly if the decision is consistent with both actors. But while the likelihood of success appears to decrease with opposition, at least based on the perceptions of respondents, state supreme courts appear to be able to implement important policies (without modification) according to a majority of respondents when opposed by either institution alone, and while a third agree when it is opposed by both.

In Table 4.20, I examined respondent reporting of avoidance by legislative and/or executive branches to decisions in conflict with just the legislature, the governor, or both institutions. Again, avoidance occurs less often in general, but the likelihood for avoidance should increase as the potential for conflict increases. When the court conflicts with both institutions, avoidance should be more likely then when it is just in conflict with one or the other.

Table 4.20: Perceptions of Respondents of Ideological Conflict by Institutions and Avoidance of the Most Influential Decisions Made by State Supreme Courts

	Both Agree	Legislature Conflicts (Only)	Governor Conflicts (Only)	Both Conflict	Total
No Avoidance	19 (86.36)	26 (72.22)	19 (82.61)	58 (50.88)	122 (62.56)
Avoidance	3 (13.64)	10 (27.78)	4 (17.39)	56 (49.12)	73 (37.44)
Total Responses	22 (100.00)	36 (100.00)	23 (100.00)	114 (100.00)	195 (100.00)
Lambda = 0.0000	Somersd = .2477993 P>|z| = 0.000	Chi^2 = 17.3477 Pr = 0.000			

In fact, avoidance is reported more often when both the legislature and the governor are in conflict with the court (49 percent) than when the court is in conflict with just the legislature (27 percent) or the governor (17 percent). These findings still confirm the compliance literature that avoidance is not a regular occurrence, however, respondents also report that certain ideological conditions that place the court in greater conflict with both institutions increase the chance of avoidance. Moreover, the Chi-square is statistically significant and while lambda cannot be relied on for proportional reduction in error, the Somers-d coefficient for avoidance suggests that as conflict increases respondents report more avoidance (24 percent of the time).

Issue Differences and Implementation

While certain conditions may promote more conflict and thus likely implementation problems, some issues areas may be more prone to produce conflict than others. This may vary by state, but I examined general patterns among issue areas in which the court is reported to be most, second most and third most influential to see if

certain issues were more likely to be modified and/or avoided in general. What are the issues that generate modifying and avoiding behavior by the legislature and/or governor? In Appendix D, I present modification and avoidance reported by respondents by issues of most, second, and third most influence. While respondents cited a broad set of issues where modification had occurred, three issues were most prominent across states-education, torts, and elections. Across all 3 categories of most influence, education constituted 27 percent of all instances in which respondents indicated that the legislature and/or governor had modified the court's decision. Torts constituted 17 percent and elections 9 percent of the modifications. No other issue area constituted more than 5 percent of the total[19].

A different perspective is provided by taking the number of respondents citing a court's decision in an issue area as producing a modifying response by the legislature and/or governor as a percentage of the respondents mentioning the issue area as an area in which the court exerted influence. Nearly 60 percent of the respondents noted education as an area of influential policymaking by the supreme court also indicated that the court's decision had been subjected to modification by the legislature and/or governor (75 indicated modification/129 cited education as most, second most or third most area of court influence). Approximately 35 percent of respondents noting Torts and Elections as issue areas of court influence indicated that the courts decisions in those areas had been modified. For comparison, the death penalty was also among the ten most frequently cited areas of influence (Table 4.12), but only about 13 percent of the respondents citing

[19]A total of 278 modifications were reported across issues of most, second most, and third most influence. Of these issues, education was reported to be modified 75 times, torts 48 modifications, and elections 23 modifications, yielding 27, 17, and 9 percent overall modifications.

the death penalty as an area of court influence indicated that the court's decision had been modified.[20]

Education decisions were even more prominent among issues the respondents saw the legislature and/or governor avoiding. Education cases constituted fully 50 percent of all the instances of avoidance identified by the respondents. The next highest group, elections, amounted to only 10 percent. Elections and taxation decisions constituted roughly 5 percent each[21].

These results suggest that in general respondents see state supreme courts as having been able to make and implement policy in conflict with the preferences of other political actors in the state in issue areas of importance to the state. The data also suggest that the courts when they have made decisions contrary to the preferences of other political actors, have had those decisions modified and in some instances avoided. The instances of modification and avoidance within the study period were disproportionately concentrated in a few issue areas. Are these aggregate responses driven by the sub-set of states where these issues were prominent and so cited more often? I will turn to that question in the next chapter.

Conclusion

The analysis in this chapter has assessed perceptions of knowledgeable respondents of the general level of independence and impact of state supreme courts in the 50 U.S. states. Independence is indicated by a courts willingness to make decisions

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[20] Since the death penalty rests on constitutional grounds, however, the ability of the legislature to modify the decision is limited since it requires constitutional change.

[21] Among total of 134 instances of avoidance, 67 or 50 percent were education, and 8 or 6 percent were torts.

according to its own preferences, do so irrespective of the conflict those decisions create, and set (and preferably maintain) the policy agenda in areas it is perceived as influential in the state.

Aggregate results provide a glimpse into the differences among this diverse set of institutions with respect to perceived independence and impact. In general, with regard to preference seeking, 60 percent of respondents agree that supreme courts follow their own political preferences. On the other hand, 80 percent of respondents also report that their state supreme court makes a good faith effort to follow legislative intent when interpreting statutes. Such deference appears to undermine independent preference seeking and many respondents are perfectly happy to report both preference seeking judicial deference (63 percent).

Among respondents who do not agree that courts defer to legislative intent, however, 86 percent report that their court follows its own preferences. In addition, nearly 63 percent of respondents also reported that if their court deferred to legislative intent they also avoided conflict with the legislature. These would appear more consistent responses. Until I examine this data at the state level, I cannot determine whether preference seeking and an unwillingness to defer to legislative intent is indicative a particular courts?

Independence is also indicated by the degree to which respondents agree their court is willing to engage in conflict with other political actors in their state. While a majority agree (53 percent) their court avoids conflict, a plurality disagree that these same courts are more willing to avoid conflict with other political actors than to engage in conflict with them. These seem slightly contradictory in considering independent judicial

behavior as free preference seeking by an institution without regard to potential conflict with other political actors. Apparently, some courts avoid conflict but still attempt to follow their own preferences. Many of these same respondents indicated courts are often willing to defer to legislative intent, underlining that in a certain subset of cases (involving statutory interpretation), the court is deferential to the legislature and so avoids conflict. Among issues in which the courts are viewed as influential respondents reported much more conflict over court decisions than they had when asked generally about the state supreme court as avoiding conflict. I will know more at the level of the state where the connection between conflict aversion and preference seeking can be assessed. In particular, ideological differences reported by respondents may also affect the potential for conflict. In several states courts are in general ideologically distant from both the executive and legislative branches and aggregate results indicate that conflict increases under these circumstances more often than when the court is ideologically close to one or both legislature or governor.

The last indicator of independence, innovation, was assessed as the whether the legislature acted first in the areas of most influence and then whether they acted presumably in response to the court's decision in the last year. With regard to judicial innovation as the court behaving first, respondents agreed this happened in areas of most influence on average 34 percent of the time. This suggests a moderate level of innovativeness in these areas of greatest influence. As innovative behavior is related to independence it is through the agenda setting process. Legislative response is triggered by disagreement with the decisions, but conditioned on who set the agenda. The legislature is reported to be more deferential (unresponsive) to policy created by the court

than it is to legislative policy contributed to by the court. This suggests more deference for innovative policy by legislatures.

Judicial independence is a necessary condition for activism but it is not sufficient since contributions to policy making by courts need to be impactful. Impact requires that courts act meaningfully across a broad set of issue areas, are considered by other policy actors when they themselves make policy, and whose decisions are implemented by other actors, irrespective of conflict with those decisions. On average, courts were reported as active in 10 of 44 issue areas. This overall pattern is interesting and requires a more detailed assessment by state where clearly the maximum and minimum derivations of breadth show considerable differences between states. Additionally, probing the confines of breadth, I examined the important distinction between activity and influence, finding some differences in perceived areas of activity and perceived areas of influence. The overall patterns of activity suggest scholarship in some areas may be focused on areas of controversy rather than areas of both influence and activity. Additionally, my perception data in comparison to caseload data seems to find some commonality though differences may be related to contrasts between workload and activity as well as workload and activity and influence.

The second indicator of impact, strategic influence, across courts I found respondents generally agreed that state supreme courts played an important policy role in their states and perhaps more importantly with regard to the strategic influence of courts. I found respondents generally agreed that other policy actors consider the court's potential reaction to their decisions before they act. Nearly the same number of respondents suggested courts make a good faith effort to defer to legislative preferences.

At the state level these findings need to be explored to determine the degree of policy collaboration that occurs and under what circumstances.

With regard to the third indicator of impact, implementation, I also found that when the court did act in areas it is viewed as influential that the decisions they render produce conflict with the legislature and/or governor over half the time and despite that conflict, the legislature and/or governor only attempted to modify the decision about a 30% of the time and avoid it less than 20% of the time. This suggests that respondents general agree that where courts have influence and produce conflict their decisions are implemented most of the time. However, modification and to less a degree avoidance are conditioned on whether the court or the legislature created the policy. Again, when the court creates the agenda (acts first), modification (and avoidance as well) is much less likely even when it reaches decisions with which the legislature disagrees. In contrast, legislative policy is much more likely to be modified when the court acts second and in conflict with the court. In addition to agenda setting I also examined whether respondents noted increases in modification and avoidance in issue areas of influence when the court was in conflict with one or both the legislature and governor. Confirming the separation of power literature, when courts are at odds with both institutions, modification is much more likely than when it is in conflict with one or the other. Last, certain issues seemed to come up more often as producing modification or avoidance across areas of influence, notably education, torts, and elections.

These findings need to be explored more critically at the state level an endeavor I turn to next.

CHAPTER 5

State Supreme Courts in the Eyes of Elites: State Level Assessment of Independence

In this chapter I analyze respondent perceptions of their state supreme court's policy independence. I further parse responses on general inclinations of court's to exert independence and their proclivities to do so in specific areas regarded as most active and influential by respondents. I then rank each state supreme court on general and specific independence. I use the same approach in Chapter 6 but with respect to general and specific impact. In Chapter 7, I merge both general and both specific measures of independence and impact to measure activism in these courts as well as its suggested determinants.

Employing Survey Responses to Assess Activism: Reliability Explored

Achieving a sufficient number of responses is a major challenge to the survey method I have adopted for assessing judicial activism. The unit of analysis in this chapter is the state. As was indicated in Chapter 4 the number of respondents varied by state from a low of 2 in New York to a high of 26 in Ohio. Obviously, sample sizes closer to that for Ohio are preferable than those from New York. The reliability of measures of the independence and impact of state supreme courts based on a relatively small number of respondents is problematic. One approach to address this problem is to select a minimum number of respondents required for a state to be included in the analysis. The adoption of such a threshold creates a tradeoff. Selecting a low threshold for inclusion in the study allows the activism of more state supreme courts to be assessed but with less certainty.

Selecting a higher threshold for inclusion increases confidence in the measurement of activism but reduces the number of states that are covered by the study.

I address this problem in two specific ways. First, I exclude all states with fewer than 5 total respondents. Using this criterion three states, New York, California and Texas, are omitted from the analysis that follows. Second, I explore the impact of imposing a higher threshold by focusing at a later point in the analysis only on states with ten or more respondents.[22]

An additional issue involves how to conceptualize variation in responses to a survey item among the respondents in a state. If the respondents in a state are conceptualized as an error-free homogeneous set of observers, then the expectation would be that responses to a survey item about the independence or impact of the supreme court would be uniform across respondents; there would be no within state variation. If the 'error free' assumption is relaxed, then variation would reflect the unreliability of the indicator as a measure of the underlying concept (e.g. preference seeking). Following this approach, if half of the respondents in a state indicated that the justices on their state supreme court pursued their own preferences and half indicated that they did not, then the survey item would be judged an unreliable indicator of preference seeking in the state court. Some level of agreement among the respondents in a state (e.g. 60 percent, 70 percent, etc.) should be required to accept the measure as reliable and include it in a measure of the activism of the court.[23]

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[22]Ten is the median number of respondents per state.

[23]This is analogous to the idea of inter-coder agreement as an indication of reliability of measurement.

Alternatively, the respondents in a state can be conceptualized as both observing with error and heterogeneous. In addition to having been drawn from different respondent groups (i.e., lawyers, law professors, state legislators, etc.), the respondents may base their assessments on different sets of observations of the behavior of the state supreme court and its justices. Rather than observing the 'whole' set of state supreme court actions, the respondents in a state view the court through multiple lenses and from different perspectives. Variation in response then reflects respondent differences. In some states, however, the actions of the court may be so consistent and have such high visibility that regardless of the perspectives and experiences of the various respondents, high agreement exists about the court. In other states the actions of the court may be less visible and vary across the range of its jurisdiction resulting in respondents who interact with the court in different ways accurately perceiving the court but responding differently to the survey items. In this instance, if 50 percent of the respondents in a state see the justices as preference seeking and 50 percent do not, then rather than concluding that the measure of preference seeking is unreliable, we would conclude that the court is inconsistent in its preference seeking behavior. This would constitute a valid indicator and the state would be included in that portion of the analysis.

In the analysis that follows I employ and explore both conceptualizations. Within state variation in responses to items regarding a state supreme court is initially presented as an indication of variation in the actual behavior of the court and not simply an indication of error in measurement. This approach allows an assessment of the activism of more state supreme courts. However, I also discuss thresholds of respondent agreement with each indicator of independence and impact. As such, in constructing

summary measures of independence and impact I adopt one approach that does not employ reliability thresholds and one that does.

The plan of analysis in this chapter differs from that for the aggregate analysis in Chapter 4 based on both response rates to particular items and with respect to general versus specific indicators of independence and impact. Response rates to the areas of first, second and third most influence require I focus on the first of these items. Indeed, while 77 percent of respondents answered the question requesting that they indicate the issue areas in which their supreme court had the first most important influence, the response rates for second and third area of most influence are significantly lower.[24] This substantially reduces the sample size for the subsequent items focused on measuring independence and impact that are based on responses to this question. Thus, combining these specific items with the more general items in an activism index per court exacerbates the problem of low numbers of respondents in many states.

From the aggregate analysis it is also apparent that the connection between respondents' general assessments of their court and their assessment of their court with regard to specific issue areas often differ. For example, nearly 73 percent of all respondents agreed either that the legislature, governor, or both actors conflicted with the court's most influential decisions. Moreover, nearly 48 percent of respondents agreed that the court's most influential decisions were in conflict with both branches. In contrast when asked more generally whether their court avoided conflict 53 percent of the respondents indicate that their court avoided conflict. In short, more respondents reported

[24]For the area of second most influence the response rate is 66 percent and for the area of third most influence it drops much lower to 51 percent.

conflict about specific (but important) decisions than when asked generally about conflict avoidance by their supreme court.

In addition to this empirical disjuncture, conceptually these questions are rooted in different approaches to assessing activism. The general questions provide an overview of the political status of the court vis-à-vis other political institutions, whereas the specific items focus on issue areas and allow courts to be defined as activist (or not) based on respondent perceptions of specific activity. The "specific" approach to assessing activism has its roots in studies like Canon and Baum (1981) that define courts' activism in terms of a single issue area. A principal critique of this approach is that courts may be activist in one issue area (e.g. tort reform) but not on another (e.g. educational finance), resulting in varying conclusions about a court's level of activism depending on the issue area examined. Hence, the specific issue approach as previously applied does not provide a sound basis for comprehensively assessing court activism. In contrast, the structure of my survey overcomes this problem by allowing activism to be assessed in terms of multiple issues that vary across states and respondents.

To deal with both these empirical and conceptual issues I will examine activism based on the general and specific survey items separately. A weakness of this approach is that all the indicators of independence and activism are not measured at both the general and specific levels. To compensate for this shortcoming I examine the relationship between the conclusions drawn using the two approaches and also construct a composite index.

An Overview: The Role of the Court?

As in the aggregate analysis, I preface the detailed analysis of state supreme court activism with a general assessment of respondent's views of the importance of the court in their state by asking:

"The (name of court) plays an important role in (name of state)"

For simplification, I collapsed strong agreement and agreement into one category "yes" and strong disagreement and disagreement into one category "no." The state results underline the aggregate findings that most respondents feel their state supreme court plays an important role in their state. Only 11 percent of respondents over all disagreed with this statement and in no state did a majority of respondents disagree. Indeed, in 40 percent of the states every respondent agreed that their supreme court played an important role.

If I had limited my analysis to this single question, I might conclude that in all the states in the study period, a majority of respondents agreed their court was activist. In terms of assessing correlates of activism using this single question is very problematic since variation at the state level is too modest to provide interpretive value. Most importantly, asking respondents whether their supreme court plays an important role in their state is merely a summary assessment of activism. It does not help discern the extent to which the respondents answering this question are supported by consistent responses to the major conditions for activism, independence, and impact. I turn to this exploration in the remainder of this chapter.

Perceptions of Judicial Policy Independence

Activist courts make independent contributions to public policy by reaching decisions according to their own policy preferences, willingly engage in conflict with other policy players (the governor and/or legislature in their state), and set the policy agenda through innovation or policy creation irrespective of the conflict they may produce by doing so.

As indicated above I will discuss these indicators first in terms of survey items directed toward the respondents' state supreme courts generally and then survey items focused on specific issue areas in which the respondents indicated that their court had been most influential.

General Measures of Independence

Indicator One: General Policy Preference Seeking

Two items on the survey provide measures of the general level of preference seeking. The first asks directly about preference seeking by the court and the second about deference toward the legislature by the court.

As a direct measure about preference seeking of their respective state supreme court respondents were asked:

"The (name of the court)'s decisions are influenced by the political preferences of its members"

In Table 5.1 I present the state-by-state responses to this question. For simplification, responses were collapsed from the original ordinal responses of strong agreement and agreement into "yes" and strong disagreement and disagreement into

"no." An affirmative response suggests independent preference seeking while a negative response suggests the opposite.

Table 5.1: Percent of Respondents in Agreement Their Court Followed its Own Political Preferences in Making Decisions

State Supreme Court	Political Preference Seeking Court	Total Responses
Louisiana	100.00	5
Michigan	100.00	7
Alabama	100.00	10
West Virginia	100.00	16
Georgia	100.00	11
Mississippi	100.00	9
Pennsylvania	100.00	5
Ohio	95.83	24
Montana	91.67	12
Idaho	87.50	8
Rhode Island	83.33	6
North Carolina	80.00	10
Nevada	80.00	5
Wisconsin	80.00	5
Hawaii	78.57	14
New Mexico	77.78	9
Florida	75.00	12
Iowa	75.00	4
New Jersey	75.00	12
Illinois	75.00	4
Alaska	71.23	10
Arizona	71.23	14
Missouri	70.00	10
Utah	69.23	13
Connecticut	66.67	12
North Dakota	66.67	6
Minnesota	64.29	14
Vermont	63.85	13
South Carolina	63.64	11
Wyoming	62.50	8
Kentucky	54.55	11
Arkansas	53.33	15
Nebraska	50.00	12
Oregon	50.00	12
Kansas	45.45	11

Delaware	44.44	9
Maine	44.44	9
Maryland	41.61	12
Virginia	37.50	8
Tennessee	36.36	11
Massachusetts	28.57	7
South Dakota	25.00	8
New Hampshire	20.00	10
TOTAL	67.27	452

Respondents' perceptions of the preference seeking of their court varied considerably across states. In seven states, respondents agreed unanimously that their court pursued its own preferences. In an additional fourteen states 70 to 90 percent of respondents agreed their court pursued its own preferences. In contrast, in only three states did more than 70 percent of the respondents agree (i.e., 30 percent disagree with the statement as worded) that their state supreme court's decisions were not influenced by the justices' preference (Massachusetts, South Dakota, and New Hampshire). Clearly, even if a relatively high threshold of agreement (e.g. 70 percent) is applied to the responses to this item, a significant number of state supreme courts would meet this independence criterion for activism. A few would also clearly not meet this standard and fall toward the negative pole of activism (i.e., restraint).

Deference to the policy preferences of democratically elected actors is a core element of judicial restraint, the negative pole of activism. State supreme courts that respondents perceive as not deferring to legislative intent are more independent (more directed by their own preferences) than state supreme courts that respondents see as deferring. To discern their perceptions of state supreme court deference to legislative intent, I asked respondents to state their level of agreement with the following statement:

"The justices of (the name of the court) make a good faith effort to follow the intent of the legislature in interpreting statutes."

I collapsed strong agreement and agreement into "yes" and strong disagreement and disagreement into "no." The results are presented from high to low disagreement that their court defers to the legislature in Table 5.1A.

Table 5.1A: Percent of Respondents in Disagreement That Their Court Deferred to Legislative Intent When Interpreting Statutes

State Supreme Court	No Deference	Total Responses
West Virginia	62.50	16
Ohio	60.87	23
New Mexico	55.56	9
Montana	50.00	12
Illinois	50.00	6
Michigan	42.86	7
Hawaii	42.86	14
New Jersey	36.36	11
Wyoming	33.33	9
Alabama	30.00	10
Alaska	28.57	7
North Carolina	27.27	11
Kansas	23.08	13
Nebraska	23.08	13
Mississippi	22.22	9
Vermont	21.43	14
Colorado	20.00	5
Wisconsin	20.00	5
South Carolina	18.18	11
North Dakota	16.67	6
Oklahoma	16.67	6
Nevada	16.67	6
Arkansas	13.33	15
Maryland	12.50	16
Virginia	12.50	8
Georgia	9.09	11
Florida	9.09	11
Idaho	9.09	11
Kentucky	9.09	11

Oregon	8.33	12
Arizona	7.69	13
New Hampshire	7.69	13
Utah	7.14	14
Minnesota	6.25	16
Connecticut	0.00	13
Delaware	0.00	8
Iowa	0.00	7
Maine	0.00	9
Massachusetts	0.00	6
Rhode Island	0.00	8
South Dakota	0.00	8
Indiana	0.00	6
Missouri	0.00	10
Pennsylvania	0.00	6
Tennessee	0.00	3
Washington	0.00	6
TOTAL	18.51	469

The responses to this item stand in marked contrast to those for preference seeking and the pattern parallels the findings at the aggregate level. In only five states (West Virginia, New Mexico, Ohio, Montana, and Illinois) did at least 50 percent of respondents disagree that their court deferred to legislative intent when it interpreted statutes and no state exceeded the 70 percent threshold. In 38 states, 70 percent of respondents perceived that their court deferred to the legislature. In 16 states respondents were unanimous in seeing their court as deferential.

Deference in this particular question refers to statutory cases in isolation. In contrast, the preference-seeking question previously examined is a general question in reference to all decisions. Consequently, respondents appeared in several states to view supreme court justices as independently pursuing their preferences in general while in a subset of statutory cases to have acted in deference to the legislature's intent. The refusal

to defer to the legislature appears to constitute a 'hard' test for independence and it is one that respondents in only a few states perceive that their courts pass.

Indicator Two: General Conflict (Do Courts Avoid It?)

While preference-seeking generally may be reconciled with deference in specific cases, independence as a condition of activism is not sufficiently measured by assessing preference seeking. In fact, a possibility exists that in most instances where preference seeking was perceived by respondents, the courts were not in conflict with legislative intent so as to leave the impression of deference. Had the court's preferences been in conflict with the intent of the legislature, they may not have deferred. At a minimum the willingness to pursue preferences when the result is in conflict with the political branches is a more demanding standard for activism than pursuit of preferences absent conflict or where it is perceived as unlikely. As Dahl would argue a court can pursue its preferences and defer to the law-making majority when it shares the policy preferences of the law-making majority. This is the key insight of the 'conflict' approaches to assessing activism (e.g. Schubert 1965) discussed in Chapter 2. Pursuit of preferences in the presence of conflict provides an unambiguous and, perhaps, high threshold for independence.

I examine this indicator using two sets of questions from the survey. The first asks respondents directly to assess conflict avoidance by their court and the second measures the potential for conflict by examining the ideological placement of the court relative to the political branches of state government.

Measuring Conflict Directly

As a direct measure of respondents' perception of their state supreme court's willingness to accept conflict, I asked respondents to report their agreement or disagreement with the following statement:

"The (name of court) generally tries to avoid conflict with the state's legislature or legislative branch?"

Answer choices are collapsed from strong agreement and agreement to "yes" and strong disagreement and disagreement into "no." Obviously, negative responses suggest respondents perceived the court in their state as willing to engage in conflict or at least not to avoid it. In Table 5.2, I present the percent of respondents in each state perceiving their court in the more independent (activist) terms (i.e., not avoiding conflict).

Table 5.2: Percent Respondent Agreement That Their Court Did Not Avoid Conflict with the Legislative Branch Ranked From High to Low

State Supreme Court	Do Not Avoid Conflict	Total Responses
West Virginia	93.33	15
Montana	90.91	11
Ohio	88.00	25
New Jersey	81.82	11
Alabama	80.00	10
Pennsylvania	80.00	5
Wisconsin	80.00	5
Colorado	75.00	4
New Mexico	66.67	6
Illinois	66.67	6
Washington	66.67	6
Louisiana	60.00	5
North Carolina	60.00	10
Florida	58.33	12
Nebraska	58.33	12
Vermont	58.33	12
Alaska	57.14	7
Arizona	57.14	14

Iowa	57.14	7
Michigan	57.14	7
Hawaii	57.14	14
Oregon	54.45	11
South Carolina	54.45	11
New Hampshire	53.85	13
Maryland	50.00	14
Arkansas	46.67	15
Kansas	46.15	13
Mississippi	42.86	7
Idaho	37.50	8
Virginia	37.50	8
Connecticut	33.33	12
Kentucky	33.33	12
Massachusetts	33.33	6
Tennessee	30.00	10
Wyoming	25.00	8
Utah	23.08	13
Missouri	20.00	10
Georgia	18.18	11
Maine	12.50	8
Rhode Island	12.50	8
South Dakota	12.50	8
Delaware	11.11	9
Minnesota	6.67	15
North Dakota	0.00	6
Oklahoma	0.00	6
Indiana	0.00	6
Nevada	0.00	4
TOTAL	46.98	461

There is considerable variation among the states in terms of respondents' perceptions of conflict avoidance. In roughly half of the states, a majority of respondents indicated that their court did not avoid conflict and in the other half of states a majority indicated that they did. At the extremes 70 percent or more respondents in 8 states agreed that their state supreme court did not avoid conflict with the legislature. Conversely, 70 percent or more respondents in 14 states agreed that their state supreme court did avoid conflict.

Moreover, the direct measure of conflict is positively correlated with both preference seeking and lack of deference toward the legislative intent. State supreme courts that are seen as willing to be in conflict with the legislative branch are also seen as more likely to pursue their preferences in decision making and less likely to make a good faith effort to follow legislative intent. The correlation between preference seeking and conflict avoidance is modest ($r = .35$) but that between preference seeking and deference and conflict avoidance and deference are somewhat higher ($r = .53$ and $r = .58$ respectively).

Measuring Conflict Indirectly

To examine the potential risk of conflict for state supreme courts I examined the ideological placement of the court relative to the legislature and the governor in each state. These placement designations were based on the average respondent assignment of each institution in their state on a liberal to conservative continuum (0-100 point scale). Chapter 4 contains a summary of the courts in each ideological category: the median (the court's placement between both the legislature and the governor), left (the court's placement to the ideological left of both institutions), and right (the placement of the court to the right of both branches).

Courts placed to the left or right of both the legislature or governor in their state are considered in "unsafe" ideological positions. Pursuit of their preferred policy outcomes will place their decision in conflict with the preferences of both political branches in the state. In contrast, courts that are perceived to be in ideological safety (the median) between the governor and the legislature are free to pursue their political preferences. In part this may reflect the fact that the justices' preferences on these courts

are generally congruent with those of the governor and legislature. In part, it may also reflect that courts placed ideologically between the governor and the legislature are able to balance strategically off the preferences of each against the other.

Independent courts, however, should pursue their preferences in the face of the potential for conflict. Courts in safe ideological states may be willing to engage in conflict but do not do so because of the lack of need. Given that the boundaries of the 'safe zone' are not measured with certainty and some state supreme courts lie just outside of the boundary and others at some distance, I have also included a measure of the distance each court is positioned outside of the safe zone. State supreme courts within the zone receive a zero on this measure. I also calculated how far each court was ideologically from the mean ideological positions of the governor and legislature in the state. This measure captures more clearly a supreme court's departure from the political mainstream. The information on the ideological position of state supreme courts relative to that of the political branches of government in their state are presented in Table 5.2A.

Table 5.2A: State Supreme Courts by Ideological Status

State Supreme Court	Safe/Unsafe	Unsafe Distance	Distance From Mean
Alabama	Unsafe	2.43	12.83
Alaska	Unsafe	49.28	52.71
Arizona	Safe	0.00	2.64
Arkansas	Unsafe	23.62	27.75
Colorado	Unsafe	28.00	30.50
Connecticut	Safe	0.00	4.42
Delaware	Unsafe	0.18	5.49
Florida	Unsafe	35.45	36.14
Georgia	Unsafe	19.09	25.23
Hawaii	Unsafe	1.77	20.35
Idaho	Unsafe	5.50	12.75
Illinois	Unsafe	3.33	7.50
Indiana	Safe	0.00	6.50
Iowa	Safe	0.00	8.22

Kansas	Safe	0.00	5.62
Kentucky	Safe	0.00	2.83
Louisiana	Unsafe	22.00	24.00
Maine	Unsafe	8.00	9.78
Maryland	Unsafe	2.62	21.98
Massachusetts	Unsafe	18.76	29.07
Michigan	Unsafe	13.57	30.00
Minnesota	Unsafe	15.37	24.68
Mississippi	Safe	0.00	2.85
Missouri	Safe	0.00	5.00
Montana	Unsafe	53.63	60.63
Nebraska	Unsafe	30.00	35.00
Nevada	Safe	0.00	0.75
New Hampshire	Unsafe	27.70	30.59
New Jersey	Unsafe	3.75	7.24
New Mexico	Unsafe	2.41	3.84
North Carolina	Unsafe	12.73	20.00
North Dakota	Unsafe	11.00	22.50
Ohio	Unsafe	22.07	29.68
Oklahoma	Safe	0.00	2.13
Oregon	Safe	0.00	15.31
Pennsylvania	Safe	0.00	6.67
Rhode Island	Safe	0.00	2.26
South Carolina	Unsafe	27.80	30.37
South Dakota	Unsafe	14.00	15.79
Tennessee	Unsafe	2.50	10.84
Utah	Unsafe	11.86	22.36
Vermont	Unsafe	21.43	28.57
Virginia	Safe	0.00	2.81
W. Virginia	Unsafe	16.57	25.47
Washington	Safe	0.00	5.00
Wisconsin	Safe	0.00	3.50
Wyoming	Safe	0.00	12.49

The majority of states are classified as ‘unsafe” and, hence are potentially in conflict with both political branches of government in their state. The distance measure suggests that the degree to which the court is seen as outside the political safe zone varies substantially. For example, Montana is perceived to be 50 points outside the zone whereas Illinois is only 3 points outside. From a purely strategic view once the court is

ideologically outside the safe zone, the distance does not matter. A court with policy preferences far from the mainstream yet willing to pursue its own preferences would appear to be more activist.

It is worth noting that these three measures of the ideological distance between the court and the other political institutions in a state are positively correlated with the direct measure of conflict between the court and the legislature. Courts perceived to be ideologically distant from the political mainstream are perceived to be less likely to avoid conflict.[25] The correlation, however, is relatively weak (r = .30). The low correlation may reflect relatively high measurement error associated with the respondents' estimates of the ideological locations of the court and the political institutions in their state. Alternatively, some courts (for reasons to be explored in the next chapter) may respond to their ideological distance and constrain their pursuit of preferences while others do not.

Indicator Three: General Innovation

The survey contained no general items that measure innovation of the state supreme courts. One question asked respondents about the 'trend setting' status of their court:

> *The _____ State Supreme Court is a trend-setter among other state supreme courts, creating precedents that are borrowed by other courts in similar cases.*

On reflection, this item focuses not on the degree to which a state supreme court is perceived to be innovative in its approach to policy within the state but rather its

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[25]The three ideology measures are strongly correlated with each other, making it impossible to choose between simply distance from the political mainstream and the distance outside the strategic safe zone.

impact on law and policy in other states. As such, it is not a good indication of general policy innovation by state supreme courts and I do not include it as a part of my analysis.

Specific Measures of Independence

Not all cases that courts decide are equal in terms of policy significance. Some decisions are viewed by respondents as more consequential and important. The respondents were asked to identify the issue areas in which their state supreme court had the first, second and third most influence. This provides a means to narrow the consideration of independence and place it in a more concrete context than provided by the general questions. Because fewer respondents provided a second and third issue area of influence, however, the analysis in this section concentrates only on responses to the issue area of 'first most' influence.

Indicator One: Preference-Seeking in Specific Cases

The survey does not contain any question or item to provide a direct measure of preference seeking in specific cases. The only item that resembles a specific assessment might involve deference by the court to the legislature in statutory cases. These are a sub-group of cases and thus might be treated as a more specific assessment of preference seeking. In this particular part of the analysis, however, it is not a direct specific measure of activism and therefore I continue to view it among the general items assessing preference seeking and deference. I do examine deference and other general indicators with specific indicators at the end of this chapter.

Indicator Two: Conflict in Specific Cases

Two questions provide insight into the willingness of the state supreme court to take policy positions that are in conflict with the political branches of their state

government. Focusing on the issue area in which the court had the most influence, respondents were asked:

> *"In your judgment, was the court's decision(s) consistent with the preferences of a majority of the legislature?"*
>
> and
>
> *"In your judgment, was the court's decision(s) consistent with the preferences of the governor?"*

I combined responses to these questions and created one variable with three categories. The first category includes respondents who perceived no conflict between the supreme court and either political branch. The second category includes respondents who perceived conflict between their court's decision and either the governor or the legislature. The third category includes respondents who saw their courts making a decision inconsistent with the preferences of both the governor and the legislature. These categories reflect an increasing willingness of the court to accept conflict and opposition to its policy making. Following strategic logic, a court in conflict with both of the political branches in its state is in a substantially more perilous position for retaliation than a court in conflict with a single political institution. In the later case the court has an ally to provide protection against efforts to circumvent or override its policy. In Table 5.3, state supreme courts are listed in descending order in terms of the percent of respondents placing them in conflict with both institutions.

Table 5.3: Percent of Respondents in Agreement That Their Court's Most Influential Decision(s) Conflicted With Both the Legislature and the Governor

State Supreme Court	Both Conflicted	One Conflicted	Neither Conflicted	Total Responses
Louisiana	100.00	0.00	0.00	1
Montana	100.00	0.00	0.00	9
Nevada	100.00	0.00	0.00	1
Wyoming	100.00	0.00	0.00	8
Ohio	95.45	4.55	0.00	22
New Hampshire	91.67	8.33	0.00	12
Utah	85.71	0.00	14.29	7
Florida	72.73	0.00	27.27	11
Nebraska	71.43	0.00	28.57	7
Maryland	71.43	28.57	0.00	7
Colorado	66.67	0.00	33.33	3
Pennsylvania	66.67	0.00	33.33	3
Arkansas	63.64	27.27	9.09	11
Tennessee	62.50	12.50	25.00	8
Indiana	60.00	20.00	20.00	5
Connecticut	57.14	28.57	14.29	7
West Virginia	55.56	22.22	22.22	9
Arizona	55.56	33.33	11.11	9
New Jersey	55.56	33.33	11.11	9
Iowa	50.00	0.00	50.00	2
Illinois	50.00	25.00	25.00	4
Mississippi	50.00	25.00	25.00	4
North Carolina	50.00	25.00	25.00	4
Alaska	50.00	50.00	0.00	4
South Dakota	50.00	50.00	0.00	2
Wisconsin	40.00	0.00	60.00	5
Minnesota	40.00	20.00	40.00	5
Hawaii	33.33	33.34	33.33	9
Oklahoma	33.33	33.34	33.33	3
Massachusetts	33.33	66.67	0.00	3
South Carolina	28.57	42.86	28.57	7
New Mexico	28.57	71.43	0.00	7
Rhode Island	25.00	75.00	0.00	4
Idaho	20.00	20.00	60.00	5
Kansas	20.00	20.00	60.00	10
Virginia	16.67	50.00	33.33	6

Vermont	15.38	23.08	61.54	13
Missouri	14.29	42.85	42.86	7
Alabama	11.11	33.33	55.56	9
Georgia	11.11	77.78	11.11	9
Delaware	0.00	0.00	100.00	5
Michigan	0.00	0.00	100.00	3
Kentucky	0.00	33.33	66.67	6
Maine	0.00	33.33	66.67	3
North Dakota	0.00	33.33	66.67	3
Oregon	0.00	42.86	57.14	7
Washington	0.00	66.67	33.33	3

In ten states 70 percent or more of the respondents characterized their court as making decisions contrary to the preferences of both the governor and the legislature. In six of these states respondent agreement was greater than ninety percent although in two of those states only one respondent answered this question. At the other pole of the continuum, in nine states at least 60 percent of respondents perceived that in the issue area of most influence their supreme courts' decisions did not conflict with either political branch. In two of these states the respondents were unanimous. Stated differently, in a majority of states (26 of 48) at least 70 percent of respondents saw their supreme court as in conflict with one or both branches. In fourteen states the center of gravity is against conflict. In these states 70 percent of respondents saw their state supreme courts as in conflict with neither political branch or with only one. In the remaining states the respondents were less consistent in their perceptions of conflict. These data indicate that when courts are perceived as having influence in a policy area that influence is perceived to be associated with conflict with one or more political branches. Some courts are judged to have been influential, however, while generating limited or no potential conflict.

Indicator Three: Innovativeness in Specific Cases

An indication of judicial independence is that courts create novel policies or so alter existing policies as to make them new. Thus, innovation can take two forms: agenda setting and/or altering a policy initiated by another institution. The innovation of a policy by a court is clearly a stronger expression of independent policymaking than modifying existing policy created by others. Although in both instances the court is participating in policymaking.

In the policy area respondents regarded their supreme court as having been the most influential I asked respondents whether the legislature or court acted first.

"Was this an issue the legislature had addressed before the court became involved?"

As an indication of policy innovation at the state level, I examined responses to this item by state. A "No" response indicates the court and not the legislature was the first to act in the policy area. If a court is reported to have acted first in an issue area in which it is considered influential by respondents, I consider this court was innovative in creating policy. In Table 5.4, I present the percentage of respondents by state who disagreed that the legislature acted in the area before the court (i.e., who saw their court as innovative).

Table 5.4: Percent of Respondents Reporting Their State Legislature Did Not Act Before the Court in the Area of Most Influence

State Supreme Court	Court Innovated	Total Responses
Mississippi	100.00	5
Vermont	78.57	14
Colorado	75.00	4
Minnesota	71.43	7
West Virginia	69.23	13
Kentucky	62.50	8

New Mexico	57.14	7
Indiana	50.00	6
Missouri	50.00	8
Alabama	44.44	9
Georgia	44.44	9
Connecticut	42.86	7
New Jersey	40.00	10
Tennessee	36.36	11
Oregon	33.33	9
Hawaii	33.33	12
Maryland	30.00	10
Virginia	28.57	7
Alaska	25.00	4
Iowa	25.00	4
Michigan	25.00	4
Ohio	25.00	24
Rhode Island	25.00	4
Utah	22.22	9
Arkansas	20.00	15
Delaware	16.67	6
Florida	16.67	11
Arizona	15.38	13
Montana	11.11	9
Nebraska	11.11	9
Kansas	8.33	12
New Hampshire	0.00	12
North Carolina	0.00	10
North Dakota	0.00	4
South Carolina	0.00	7
Nevada	0.00	3
Pennsylvania	0.00	3
Washington	0.00	3
Wyoming	0.00	9
TOTAL	30.61	331

The pattern of these results suggests that policy innovation is a relatively rare activity for state supreme courts. In only 4 states do 70 percent or more of the respondents agree that their court was the first-mover in the issue area in which it was considered most influential. In contrast in 23 states 70 percent or more respondents agree

that the court was not the innovator of policy in the area of its greatest influence. Indeed, in 8 states all of the respondents agree that their court was not the innovator.

State supreme courts may be innovative in areas of the law important to litigants and legal scholars but of lesser general policy importance. Such activity would not be identified by this series of questions. In terms of issue areas of recognized influence, however, the data suggest that very few courts play an innovative policy role in their political system. Of course, when they do the results are likely to yield high visibility. The converse of the previous statement is that in the areas of most influence state supreme courts typically respond to issues already placed on the agenda by the political branches of government.

Summary: Measuring the Independence of State Supreme Courts

Some courts were reported to have been particularly independent on an indicator while other courts were less independent on that indicator. Some were perceived as highly independent on multiple indicators. If a threshold of agreement is applied, some states passed that threshold on one indicator and others on more than one indicator. Some passed the threshold on the positive pole on one indicator and the negative pole on others. In this section I take two approaches to summarize this information and provide an ordering(s) of the states on the dimension of independence.

My first approach is simply to accept the levels of agreement on each measure of the indicators (preference seeking, conflict, and innovation), treat the indicators as multiple indicators of independence and average across the measures. I then rank the state supreme courts according to the average responses. My second approach addresses the concern raised earlier that variation among respondents in a state may reflect unreliability

(rather than variation in the degree of independence observed). As such, I convert the observed percent agreement on each measure for a state into a measure of whether it exceeds a 70 percent threshold of agreement. I do this for both polls of the measure. I then aggregate across the indicators for independence.

Summary Measure of Independence: General

Adopting the first approach outlined above I simply averaged the percentage of respondents agreeing that their state court was a preference seeking body, did not defer to the legislature, and did not avoid conflict with the legislature. I omit the indirect measures of ideological conflict given the lower correlations between these measures of independence and the other indicators and the preference for the direct measure of conflict. The results of this analysis are presented in Table 5.5A.

Table 5.5A: Rank Ordering of State Supreme Courts on General Levels of Independence

Rank	Rank on All General Items	Rank	Rank With Defer to Legislature Omitted
1.0	West Virginia	1.0	West Virginia
2.0	Ohio	2.0	Ohio
3.0	Montana	3.0	Montana
4.0	Alabama	4.5	Alabama
5.5	New Mexico	4.5	Pennsylvania
5.5	Michigan	6.0	Wisconsin
7.0	New Jersey	7.0	Michigan
8.0	Illinois	8.0	New Jersey
10.0	Louisiana	9.0	New Mexico
10.0	Pennsylvania	10.0	Mississippi
10.0	Wisconsin	11.0	Illinois
12.0	Hawaii	12.5	Louisiana
13.0	North Carolina	12.5	North Carolina
14.0	Mississippi	14.0	Hawaii
15.0	Alaska	15.0	Florida
16.0	Idaho	16.0	Iowa
17.0	Florida	17.5	Alaska

18.5	South Carolina	17.5	Arizona
18.5	Arizona	19.0	Washington
20.0	Colorado	20.0	Idaho
21.0	Vermont	21.0	Georgia
22.0	Iowa	22.0	South Carolina
23.0	Nebraska	23.0	Colorado
24.5	Georgia	24.0	Vermont
24.5	Washington	25.0	Nebraska
26.0	Wyoming	26.0	Oregon
27.0	Kansas	27.5	Arkansas
28.0	Arkansas	27.5	Connecticut
29.0	Oregon	29.0	Rhode Island
30.0	Maryland	30.0	Utah
31.0	Connecticut	31.0	Maryland
32.0	Utah	32.0	Kansas
33.0	Kentucky	33.0	Missouri
34.0	Nevada	34.0	Kentucky
35.0	Rhode Island	35.0	Wyoming
36.0	Missouri	36.0	Nevada
37.0	Virginia	37.0	Virginia
38.5	North Dakota	38.0	New Hampshire
38.5	Oklahoma	39.0	Minnesota
40.0	New Hampshire	40.5	North Dakota
41.0	Minnesota	40.5	Oklahoma
42.0	Tennessee	42.0	Tennessee
43.0	Massachusetts	43.0	Massachusetts
44.0	Maine	44.0	Maine
45.0	Delaware	45.0	Delaware
46.0	Indiana	46.0	Indiana
47.0	South Dakota	47.0	South Dakota

In the first column the states are rank ordered from high to low based on the average percentage agreeing with all three of the general items measuring independence. States with a high percentage of respondents indicating that their state supreme court pursued the preferences of its members, did not make a good faith effort to follow legislative intent and who did not avoid conflict with the legislature ranked highly. These states (e.g., West Virginia, Montana, Ohio, Alabama, etc.) are toward the independent

end of the continuum. Those states where the percentage of respondents taking these positions were relatively low (e.g., Maine, Delaware, Indiana, South Dakota, etc.) define the negative or non-independent end of the continuum.

Recall that in only a few states did even a majority of the respondents perceive that the court did not make a good faith effort to follow legislative intent. As such, I was concerned that the inclusion of this item might not simply lower the average percentage across the items but might also distort the results. To test for the robustness of the ordering I recalculated the average percentage responding to only the pursuit of preference and avoidance of conflict items. The states rank-ordered by this average are presented in column 3 of Table 5.5A.

The average responses did increase with the deference item removed as is expected. In fact, in only 4 states had the average agreement exceeded 70 percent with deference included in the calculation. This number increases to 13 states when deference is omitted and only preference seeking and conflict avoidance are averaged. While some of the states shift somewhat in rank when the deference to legislative intent item is excluded (e.g., Wisconsin moves from a rank of 10th to 6th), the rank order correlation between the measures is quite high (Spearman's rho = .97). Moreover, this relationship is unchanged if re-examined among the subset of states (n = 24) with an average of 10 or more responses across the items. However, the cronbach's alpha, a measure of reliability, for the three item average score is .71 and drops to .51 if the deference variable is excluded. Thus, inclusion of all three general items in measuring independence appears to be the better approach.

In Table. 5.5B the percentage of respondent agreement with each item is converted simply to indicate whether there is at least 70 percent agreement among the respondents to each item in a state. That agreement can be either with the negative or the positive pole of each indicator. For example, over 90 percent of the respondents in Montana agree that the justices of their supreme court seek their preferences. Thus, Montana receives a '1' on this indicator since more than 70 percent of the respondents are in agreement that the court is independent on this indicator. In contrast, only 29 percent of the respondents in Massachusetts perceive its supreme court as a preference seeking body. This is converted to a "-1" since more than 70 percent of the respondents agree that the court is not independent on this indicator. The transformed scores are then summed. Any state in which there is not at least 70 percent agreement among respondents that their supreme court is either at the independent or non-independent pole of the indicator receives a score of '0'. In summing the scores this means that the responses on that item do not affect the overall score on 'general' independence.

Table 5.5B: Rank Ordering of State Supreme Courts on General Levels of Independence Requiring 70 Percent Agreement or Disagreement

State Supreme Court	Preference Seeking 70/30	No Conflict Avoidance 70/30	No Preference Legislature 7/030	Sum 1	Sum 2
Montana	1	1	0	2	2
New Jersey	1	1	0	2	2
Ohio	1	1	0	2	2
West Virginia	1	1	0	2	2
Alabama	1	1	-1	1	1.5
Pennsylvania	1	1	-1	1	1.5
Wisconsin	1	1	-1	1	1.5
Hawaii	1	0	0	1	1
Illinois	1	0	0	1	1

Louisiana	1	0	0	1	1
Michigan	1	0	0	1	1
New Mexico	1	0	0	1	1
Alaska	1	0	-1	0	0
Arizona	1	0	-1	0	0
Florida	1	0	-1	0	0
Idaho	1	0	-1	0	0
Iowa	1	0	-1	0	0
Mississippi	1	0	-1	0	0
North Carolina	1	0	-1	0	0
Colorado	0	1	-1	0	0
Arkansas	0	0	-1	-1	-1
Connecticut	0	0	-1	-1	-1
Kansas	0	0	-1	-1	-1
Kentucky	0	0	-1	-1	-1
Maryland	0	0	-1	-1	-1
Nebraska	0	0	-1	-1	-1
Oregon	0	0	-1	-1	-1
South Carolina	0	0	-1	-1	-1
Vermont	0	0	-1	-1	-1
Virginia	0	0	-1	-1	-1
Washington	0	0	-1	-1	-1
Wyoming	0	-1	0	-1	-1
Georgia	1	-1	-1	-1	-1.5
Missouri	1	-1	-1	-1	-1.5
Nevada	1	-1	-1	-1	-1.5
Rhode Island	1	-1	-1	-1	-1.5
Delaware	0	-1	-1	-2	-2
Indiana	0	-1	-1	-2	-2
Maine	0	-1	-1	-2	-2
Minnesota	0	-1	-1	-2	-2
North Dakota	0	-1	-1	-2	-2
Oklahoma	0	-1	-1	-2	-2
Tennessee	0	-1	-1	-2	-2
Utah	0	-1	-1	-2	-2
Massachusetts	-1	0	-1	-2	-2
New Hampshire	-1	0	-1	-2	-2

South Dakota	-1	-1	-1	-3	-3

The resulting summed index of independence consisting of only 6 categories does not provide a very fine calibration of the degree of independence a court is reported to exhibit. Moreover, because the independence score is a simple sum, a score can reflect several patterns across the indicators. For example, an independence score of '-1' may result from a state scoring 0, 0, and -1 or 0, -1, and 0. Two of these patterns appear to merit further distinction. A state scored 1, 1, and -1 receives the same score, '1', as a state scored 1,0, and 0. The first state, however, has passed the threshold for independence on two indicators while clearly seen as not independent on the third and most demanding indicator. The latter state has passed the threshold on the first, but there is not sufficient agreement on its status on the second and third indicators to provide a score. The 1, 1, and -1 pattern appears to place the court more closely to the independent pole than the 1, 0, and 0 pattern. To deal with these issues, I have created a second summary measure scoring states in this group as '1.5'. Using similar logic, I score states with the pattern 1, -1, and -1 as '-1.5'. Thus, this second summary measure is based on eight categories.

Summary Measure of Independence: Specific

I aggregate specific measures of independence following the approach I used for the general measures. First, the percentage of respondents in each state who agreed that in its issue area of most influence their supreme court was in conflict with one or more of the political branches was averaged with the percentage of respondents in each state that perceived in this issue area the court had been innovative. The courts are ranked from most independent (1) to least (47) in Table 5.6A.

Table 5.6A: Rank Ordering of State Supreme Courts on Specific Levels of Independence

State	Rank
Mississippi	1.0
Louisiana	2.5
Massachusetts	2.5
New Mexico	4.0
West Virginia	5.0
Colorado	6.0
Georgia	7.0
Minnesota	8.0
Maryland	9.5
Indiana	9.5
New Jersey	11.0
Connecticut	12.0
Ohio	14.5
Illinois	14.5
Alaska	14.5
Rhode Island	14.5
Vermont	17.0
Tennessee	18.0
Montana	19.0
Arkansas	20.0
Utah	21.0
Missouri	22.0
Arizona	23.0
Nevada	26.0
Wyoming	26.0
New Hampshire	26.0
South Dakota	26.0
Hawaii	26.0
Kentucky	29.0
Virginia	30.0
Florida	31.0

Alabama	32.0
Nebraska	33.0
Wisconsin	34.5
Idaho	34.5
Oregon	36.0
North Carolina	37.5
Iowa	37.5
South Carolina	39.0
Pennsylvania	41.0
Oklahoma	41.0
Washington	41.0
Maine	43.0
Kansas	44.0
North Dakota	45.0
Michigan	46.0
Delaware	47.0

The correlation between the two items comprising the specific measure is quite low (r = -.069) and in the wrong direction. From a standard index construction perspective combining the two measures would appear problematic. However, these are two measures of two distinct indicators of independence, not two measures of the same indicators. Hence, the measures may not be correlated. Independence can be indicated by the presence of conflict or innovation or both. Courts measuring high on both indicators, however, should be treated as more independent than a court ranking high only on one indicator.

In Table 5.6B, I have ranked the states employing the same 70/30 approach as for the general items. Since the conflict measure involves two questions (conflict with the governor and conflict with the legislature) I score a state as ‘2’ if 70 percent or more of its respondents reported their court was in conflict with both the governor and the

legislature; I score a state as '1' if at least 70 percent of respondents agreed that their court was in conflict with either or both bodies (excluding states already scored as 2). In essence, any court for which 70 percent or more respondents viewed their court in conflict receives 1 point. If 70 percent or more respondents reported their court in conflict with both political branches, then the court receives an additional point (score of 2). States where 30 percent or fewer respondents see the courts in conflict with neither political branch are scored as -1. The remaining courts, those for whom fewer than 70 percent but more than 30 percent perceived conflict with one or the other of the political branch, are scored as '0'. Likewise courts that 70 percent or more of the respondents in a state perceived as innovative were scored 1. Those that 30 percent or fewer perceived as innovative received a -1. The remaining courts were scored as 0. The scores on the two specific items were then summed.

Table 5.7B: Rank Ordering of State Supreme Courts on Specific Levels of Independence Requiring 70 Percent Agreement or Disagreement

State Supreme Court	Conflict 70/30 Both	Conflict 70/30 Either	Innovation 70/30	Sum 1	Sum 2
Missouri	0	0	0	.	.
Hawaii	0	0	0	.	.
Kentucky	0	0	0	.	.
Alabama	0	0	0	.	.
Wisconsin	0	0	0	.	.
Idaho	0	0	0	.	.
Oregon	0	0	0	.	.
Maine	0	0	0	.	.
Louisiana	2	0	0	2	2
Mississippi	0	1	1	2	2
Maryland	2	0	-1	1	1.5
Ohio	2	0	-1	1	1.5

Montana	2	0	-1	1	1.5
Utah	2	0	-1	1	1.5
Nevada	2	0	-1	1	1.5
Wyoming	2	0	-1	1	1.5
New Hampshire	2	0	-1	1	1.5
Florida	2	0	-1	1	1.5
Nebraska	2	0	-1	1	1.5
Massachusetts	0	1	0	1	1
New Mexico	0	1	0	1	1
West Virginia	0	1	0	1	1
Georgia	0	1	0	1	1
Indiana	0	1	0	1	1
New Jersey	0	1	0	1	1
Connecticut	0	1	0	1	1
Illinois	0	1	0	1	1
Tennessee	0	1	0	1	1
Colorado	0	0	1	1	1
Minnesota	0	0	1	1	1
Vermont	0	0	1	1	1
Alaska	0	1	-1	0	0
Rhode Island	0	1	-1	0	0
Arkansas	0	1	-1	0	0
Arizona	0	1	-1	0	0
South Dakota	0	1	-1	0	0
North Carolina	0	1	-1	0	0
South Carolina	0	1	-1	0	0
Virginia	0	0	-1	-1	-1
Iowa	0	0	-1	-1	-1
Pennsylvania	0	0	-1	-1	-1
Oklahoma	0	0	-1	-1	-1
Washington	0	0	-1	-1	-1
Kansas	0	0	-1	-1	-1
North Dakota	0	0	-1	-1	-1
Michigan	0	-1	-1	-2	-2
Delaware	0	-1	-1	-2	-2

In eight states, respondents did not agree above the 70/30 threshold on any of the items. These are treated as missing since the items provide no basis for assessing the independence of these courts. [26] Given the skewed distributions on these items, the summed scored provides little differentiation particularly at the extremes. Only two courts are scored as a 2 and only two courts as -2. The states were only distributed across five categories.

As was the case for the general items, simply summing the patterns of responses in Table 5.6B includes some states in the same summary category whose pattern of scores suggest they should be treated differently. For example, the Maryland Supreme Court is seen by respondents as in conflict with both the governor and the legislature in the state (2) but not as innovative (-1). Thus, it receives the same summary score as Massachusetts ('1') that is seen as only in conflict with at least one branch and the respondents are not in agreement as to whether it was innovative ('0'). Accordingly, I created a second summary score as I did in the general analysis giving states with the 2, 0, and -1 pattern a score of 1.5. The summation of these scores appears in column 6 of Table 5.6B.

I will explore the relationship between the general and specific measures of independence at the end of Chapter 6 after the discussion of the measures of policy impact.

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[26]In the general items all the zero values arose from cancelling (1+-1) and no missing data arose from this.

CHAPTER 6

State Supreme Courts in the Eyes of Elites:

State Level Assessment of Impact

Independent courts are perceived by a majority of respondents to decided cases in accord with their political preferences, tolerate conflict in general and/or willingly engage in conflict where it matters the most, as well as create and/or modifying public policy. Independence is a necessary condition for activism but it is not a sufficient condition since courts meeting this condition may vary in the extent to which they are activist. For example, an independent court follows its own preferences in deciding cases, irrespective of the conflict it may produce. If those decisions, however, are limited to a narrow band of issue areas, the impact the court has on policy is less than another court acting independently but across a wide range of issues. Similarly, independent courts whose potential position on an issue is considered by actors in the political branches when they make policy, has more impact than a court whose potential position on an issue is not considered by the political actors in a state.

Perceptions of Judicial Policy Impact

In the following section I explore the dimensions of impact, also a necessary condition of activism: policy breadth, strategic influence, and implementation. Once again, I considered general and specific indicators of these dimensions separately.

General Measures Impact

Indicator One: General Judicial Policy Breadth

The extent to which a state supreme court is an important player in state politics (i.e., the extent of its activism) is determined in part by the number of issue areas in which it is actively engaged in making and affecting policy. The greater the policy breadth of a court, the more issues it engages in, the greater its policy impact.

As a first step in assessing policy breadth, I asked respondents to identify issues areas in which they felt their supreme court played an 'active' role from 1998-2002. I provided respondents with 32 issue areas that they could identify their court as being active in during the study period. Based on open-ended responses, I added 12 additional issue areas, totaling 44 issue areas of potential activity.

I calculated the arithmetic mean, standard deviation and median for all 47 state supreme courts. The average mean across states is 8.19 and is significantly larger than the overall median of 7.31, indicating the mean is skewed upwards. Consequently, I rely on the more conservative measure of central tendency, the median. I list state supreme courts in descending order based on the median level of policy activity reported by respondents in Table 6.1.

Table 6.1: Policy Breadth: Respondent Agreement Averages of Issue Activity by State Supreme Court

State Supreme Court	Mean	Std. Dev.	Median	Total Responses
Alaska	11.28	8.24	14.00	7
New Jersey	10.83	4.38	11.00	12
Idaho	9.87	3.52	10.00	8
New Hampshire	9.30	5.29	10.00	13

Maryland	8.88	4.94	10.00	17
Indiana	9.14	4.91	9.00	7
New Mexico	10.33	5.90	9.00	9
Wyoming	10.11	6.35	9.00	9
Georgia	9.36	5.39	9.00	11
Montana	10.41	6.06	9.00	12
Nebraska	10.38	4.61	9.00	13
Oregon	9.76	5.73	9.00	13
South Dakota	8.65	5.50	8.50	8
Vermont	10.14	6.64	8.50	14
Iowa	9.22	6.11	8.00	9
Kentucky	7.83	2.94	8.00	12
Tennessee	8.83	3.68	8.00	12
South Carolina	7.46	4.25	8.00	13
Arizona	8.76	4.20	8.00	17
Virginia	8.37	4.43	7.50	8
Alabama	8.60	5.69	7.50	10
Colorado	7.20	4.02	7.00	5
Wisconsin	6.80	6.05	7.00	5
Nevada	9.16	9.10	7.00	6
Maine	8.66	5.89	7.00	9
Florida	8.25	3.72	7.00	12
Connecticut	8.57	7.57	7.00	14
Utah	7.78	6.16	7.00	14
North Dakota	6.33	3.20	6.50	6
Massachusetts	9.88	7.60	6.50	8
Hawaii	6.71	4.00	6.50	14
Louisiana	8.00	8.27	6.00	5
Rhode Island	6.50	4.20	6.00	8
Delaware	9.88	8.34	6.00	9
North Carolina	6.82	4.42	6.00	11
Missouri	4.75	3.93	6.00	12
Minnesota	7.35	5.80	6.00	17
Washington	6.00	3.09	5.50	6
Ohio	5.87	4.25	5.50	8

Oklahoma	5.86	4.26	5.50	8
Mississippi	6.90	5.15	5.50	10
Arkansas	7.50	5.59	5.50	16
Kansas	7.28	5.13	5.00	14
Pennsylvania	6.66	7.47	4.50	6
Illinois	4.42	2.07	4.00	7
Michigan	5.44	4.27	4.00	9
West Virginia	5.87	5.17	4.00	16
AVERAGE	**8.13**	**5.27**	**7.31**	**489**

The median response across states is 7, ranging from a low of 4 to a high of 14 issues. Of the 47 courts I examine, 21 have a median score above 7 (greater than 7.5). In 12 of these states, responses support a median score well above 7.5 (Alaska, New Jersey, Idaho, Maryland, New Hampshire, Georgia, Indiana, Montana, Nebraska, New Mexico, Oregon and Wyoming). In particular, supreme courts in Alaska, New Jersey, Idaho, Maryland, and New Hampshire were active according to respondents in 10 to 14 issue areas.

The large standard deviations by state, however, indicate significant variation by respondents in the number of issues they reported their court was active. Since these respondents are considered knowledgeable of the court in their state, this variation may result from idiosyncratic factors such as a respondent's greater familiarity with certain areas of the law in the state. These idiosyncrasies may have been exacerbated by the checklist format I used. The format may have encouraged over reporting by some

respondents and under reporting by others based on their level of interest in particular areas of law in their state.[27]

As a consequence of these potential measurement problems, I calculated an alternative breadth score based only on the issues that at least 70 percent of the respondents in a state agreed their court was active in during the study period. If this relatively high percentage of the respondents in a state flagged the same issue, I am confident that my breadth measure reliably identifies the issue areas in which the state supreme court was active.

In Table 6.1A I provide the original policy breadth score based on the median number of issues respondents reported (labeled 'median') and an alternative policy breadth score based only on those issues receiving 70 percent of more agreement among respondents (labeled "Breadth"). In the last column, I calculated the percentage of issues included in the median score agreed to by a majority of respondents in the state as issues of activity.

[27]An open-ended format may have dissuaded over-reporting by respondents. In fact, only 18 percent of respondents included additional issues in the open-ended follow-up question I used after the checklist. In the other open-ended part of the survey in which I asked respondents to list the areas the court was active and had the most, second most, and third most influence, the rates of response for areas of most influence were nearly 78 percent of respondents. That rate declined to 50 percent by the time respondents had to list an area in which their court was third most influential.

Table 6.1A: Policy Breadth and Median Scores Compared by State

State Supreme Court	Breadth	Median	Percent of Median
Indiana	4	9.0	44.44
Nebraska	4	9.0	44.44
Alaska	3	14.0	21.43
Arizona	3	8.0	37.50
Idaho	3	10.0	30.00
Maryland	3	10.0	30.00
New Mexico	3	9.0	33.33
Ohio	3	5.5	54.55
Tennessee	3	8.0	37.50
Virginia	3	7.5	40.00
Wyoming	3	9.0	33.33
Colorado	2	7.0	28.57
Hawaii	2	6.5	30.77
Maine	2	7.0	28.57
Mississippi	2	5.5	36.36
Montana	2	9.0	22.22
New Hampshire	2	10.0	20.00
New Jersey	2	11.0	18.18
Vermont	2	8.5	23.53
Washington	2	5.5	36.36
Alabama	1	7.5	13.33
Arkansas	1	5.5	18.18
Connecticut	1	7.0	14.29
Delaware	1	6.0	16.67
Florida	1	7.0	14.29
Georgia	1	9.0	11.11
Iowa	1	8.0	12.50
Kansas	1	5.0	20.00
Louisiana	1	6.0	16.67
Massachusetts	1	6.5	15.38
North Carolina	1	6.0	16.67

North Dakota	1	6.5	15.38
Oklahoma	1	5.5	18.18
Oregon	1	9.0	11.11
South Carolina	1	8.0	12.50
South Dakota	1	8.5	11.76
Illinois	0	4.0	0.00
Kentucky	0	8.0	0.00
Michigan	0	4.0	0.00
Minnesota	0	6.0	0.00
Missouri	0	6.0	0.00
Nevada	0	7.0	0.00
Pennsylvania	0	4.5	0.00
Rhode Island	0	6.0	0.00
Utah	0	7.0	0.00
West Virginia	0	4.0	0.00
Wisconsin	0	7.0	0.00
AVERAGE	**1.47**	**7.31**	

Clearly, in a number of states there is little agreement among respondents concerning the issue areas in which their state supreme court was active during the study period. In eleven states no issue met the 70 percent agreement threshold. While the median number of issues cited by respondents reached a high of fourteen in Alaska, as previously noted, the maximum number of issues in a state reaching the 70 percent agreement threshold is a much lower number of four. The final column measuring the ratio of the median number of issues cited to the number meeting the threshold in each state provides evidence that the latter is not simply a function of the former. The number of issue areas for which 70 percent of the respondents in a state agree that their supreme court has been active is only moderately related to the median number of issues named (Spearman's rank order correlation = .57). Therefore, having a higher number of issues

crossing the 70 percent threshold does not simply reflect a tendency of respondents in some states to name a higher number of issues.

Breadth Explored: In What Areas Are Courts Active?

While my focus is on assessing the breadth of the impact of state supreme courts, it is interesting to note the issue areas driving the results in Table 6.1A. To determine this I tabulated for each of the 44 issue areas included in the survey the number of states in which at least 70 percent of the respondents agreed that their supreme court was active. The results are presented in Table 6.1B.

Table 6.1B: State Supreme Court Activity by Issue Area

Issue Area	Number of Courts Active
Torts	15
Death Penalty	10
Education	10
Criminal Sentencing	8
Child Custody	6
Search & Seizure	4
Divorce	3
Gambling	3
Property Rights	3
Environment	2
Insurance	2
Taxation	2
Abortion	1
Gay Rights	1

In only 14 (32 percent) of the 44 issue areas in the survey do at least 70 percent of the respondents in one or more states agree that this is an issue area in which their court is active. Most of the state supreme courts are active in issue areas that are inherently

judicial in nature. Torts, death penalty, criminal sentencing, child custody and search and seizure are issues that make up part of the standard caseload of a legal system. In relatively few states do 70 percent or more respondents agree that their court is active in more controversial social issues like gay rights, abortion, gambling, and the environment. This result draws attention once again to the disconnect between what appears to be the 'mine run' of judicial policy making in lower visibility areas and the extraordinary attention given to a few courts active in areas of controversial social policy.

Indicator Two: General Strategic Influence

The issue areas in which a court is active is only one indicator of the policy impact a court may have in a political system. The impact of a court may also be revealed by the concern of other policy makers in a state for the reaction of the court to the policies they adopt. Where courts are important policy actors the political branches should consider carefully the likely reaction of the court before making their own decisions. This type of consideration indicates strategic influence of the court on the other policy actors.

The aggregate analysis of the previous chapter demonstrated that a majority of respondents agreed (55 percent) that the governor and legislature when making policy take into account the court's potential reactions to their policies. However, a sizeable plurality of respondents disagreed with this assessment (37 percent).

To assess this category of impact, I asked respondents how much they agreed or disagreed with the following statement and collapsed strong agreement and agreement into one category ("yes") and strong disagreement and disagreement into another ("no"):

'Legislative and executive officials take into account the potential reaction of the (name of court) when they create public policy.'

I report the percentage of respondents in each state who are in agreement that the legislature and governor considered the court's potential reaction to their decisions in Table 6.2.

Table 6.2: Respondent Perceptions of the Strategic Influence of Their State Supreme Court over the Legislature and Governor

State Supreme Court	Strategic Influence	Total Responses
Nebraska	84.62	13
New Hampshire	83.33	12
Tennessee	83.33	12
New Jersey	81.82	11
Alabama	80.00	10
Wisconsin	80.00	5
Montana	77.23	11
Colorado	75.00	4
New Mexico	75.00	8
West Virginia	75.00	16
Ohio	72.73	22
Alaska	71.43	7
Illinois	71.43	7
Arkansas	66.67	15
Indiana	66.67	6
Massachusetts	66.67	6
North Carolina	66.67	9
North Dakota	66.67	6
Pennsylvania	66.67	6
Washington	66.67	6
Wyoming	66.67	9
Maine	62.50	8
Maryland	60.00	15

South Carolina	60.00	10
Hawaii	58.33	12
Oregon	58.33	12
Minnesota	57.14	14
Mississippi	57.14	7
Vermont	57.14	14
Delaware	55.56	9
Michigan	50.00	4
Missouri	50.00	10
Nevada	50.00	4
Oklahoma	50.00	6
Rhode Island	50.00	8
South Dakota	50.00	8
Utah	50.00	14
Arizona	46.15	13
Connecticut	46.15	13
Virginia	42.86	7
Georgia	40.00	10
Kansas	38.46	13
Idaho	37.50	8
Florida	30.00	10
Kentucky	27.27	11
Louisiana	20.00	5
Iowa	14.29	7

There is considerable variation among the states in the responses to this question. The percentage of respondents in a state who agree that the political branches take the potential reaction of the supreme court into account varies from a high of 85 percent in Nebraska to a low of 14 percent in Iowa. In thirteen states at least 70 percent of the respondents agreed that their supreme court had a strategic impact and in only four states did 70 percent agree that it did not. The distribution on this item is, thus, skewed somewhat toward the positive pole of the indicator.

Indicator Three: General Implementation

The survey contains no general measure of the implementation of the supreme court decisions.

Specific Measures of Impact

Indicator One: Specific Judicial Policy Breadth

In addition to asking respondents about the issues areas in which their supreme court had been active, I asked them to indicate the issue areas in which their court had been most, second most and third most influential. As I indicated previously, a significant percentage (23 percent) did not participate in this portion of the survey at all. The number of non-respondents also increased for the item requesting the second most influential issue area (33 percent) and the third most (53 percent) influential issue area. To some extent this may simply reflect 'roll off' as the respondents tired from responding to items. But, if this pattern of responses varies across states then it may also reflect differences in the number of issue areas in which respondents thought that their supreme court was not only active but also influential.

In Table 6.3 I have arrayed the states by a specific breadth score. This is computed by weighting the non-respondents to each of the influence questions. Respondents who failed to respond to these items at all were give a score of -1, those who responded to only the issue area of most influence were given a "1," those who responded to the most and to the second most influence question were given a score of "2" and those who responded to all three survey items received a score of "3." These scores were then summed for the respondents in a state and divided by the maximum possible score of the state, the total number of respondents multiplied by "3." This is the highest possible score

for a state that would only occur when all the respondents responded to all three survey items. The resulting breath score measures the percentage of the maximum actually achieved in each state.

Table 6.3: Specific Breadth Scores by State Supreme Court in Descending Order

State Supreme Court	Specific Breadth Score
Vermont	93
Wyoming	93
Virginia	92
New Jersey	86
Indiana	86
Alabama	80
Wisconsin	80
Ohio	79
Montana	75
Tennessee	75
New Hampshire	74
Hawaii	74
Colorado	73
Arkansas	73
North Carolina	73
Florida	72
Kansas	69
New Mexico	67
Oregon	64
Georgia	64
Arizona	61
Idaho	58
West Virginia	58
Alaska	57
South Carolina	56
North Dakota	56

Nebraska	54
Maryland	53
Kentucky	50
Utah	50
Illinois	48
Washington	44
Delaware	44
Massachusetts	42
Pennsylvania	39
Mississippi	37
Missouri	36
Louisiana	33
Minnesota	31
Rhode Island	25
Nevada	22
Connecticut	21
Iowa	19
Maine	19
Michigan	19
Oklahoma	13
South Dakota	0

There is considerable variation across the specific breadth score. South Dakota scores "0" while Vermont and Wyoming achieve 93 percent of the maximum possible score. The average roll-off of respondents across these items is 35 percent which appears much smaller than the differences observed across the states suggesting that this variance at least in part reflects differences in perceived breadth of influence across the states. The breadth score is strongly related to alternative measures of breadth that might be derived from variation in responses to these items. The correlation between the specific breadth score and the percent of respondents in a state answering the most, second most and third most influential issue questions is .95, .93 and .89 respectively. These correlations

decreased only slightly if analysis was confined to states with ten or more respondents. This indicates that these measures are substitutable and the results of the following analysis are not dependent on the choice of the specific breadth score.

Indicator Two: Specific Strategic Influence

The survey contains no specific indicator of the strategic influence of the state supreme courts.

Indicator Three: Specific Implementation

As the aggregate analysis showed, general perceptions of legislative and judicial deference are not the same as perceptions of specific interactions between these institutions. If courts are to have policy impact, however, other institutions must not just consider the court's potential reaction in general, but also, the institutions must be willing to implement specific decisions with which they disagree. This is particularly true if a court is viewed as influential in an area; that influence is constrained if the legislature and the executive branch modify the court's policy or worse, avoid it.

The aggregate analysis suggests that in most states, court decisions in the area of most influence were modified a minority of the time and avoided even less. Nevertheless, certain conditions were associated with reports of negative legislative response. For example, when respondents agreed the policy conflicted with the legislature and governor, more respondents reported modification of the court's most influential decisions. Additionally, though court created policy was reported as modified and avoided by fewer respondents than legislatively created policy, more respondents reported modification and avoidance to court policy when both the governor and legislature conflicted with the court's decision.

Following the aggregate analysis but by state, I asked respondents two questions regarding implementation of the court's most influential decisions:

If the decision(s) was in conflict with the preferences of the legislature and or governor, did the legislature or governor attempt to modify the decision (for example, rewrite the statute)?

and

If the decision(s) was in conflict with the preferences of the legislature and or governor, did the legislature or governor attempt to avoid or delay implementation?

Responses to these items are presented in Tables 6.4A and 6.4B in the areas of most influence. In Table 6.4 I present courts in descending order based on respondent disagreement that the court's most influential decisions were modified.

Table 6.4A: Respondent Perceptions of Executive and Legislative Modification of Influential and Conflictual Decisions by State Supreme Courts

State Supreme Court	Percent No Modification	Number of Respondents
Alabama	100.0	4
Louisiana	100.0	2
Maine	100.0	2
Michigan	100.0	1
Minnesota	100.0	4
North Dakota	100.0	2
Nevada	100.0	2
Georgia	87.5	8
Tennessee	85.7	7
Connecticut	83.3	6
Kentucky	80.0	5
Missouri	80.0	5

South Carolina	80.0	5
Virginia	75.0	4
Vermont	72.7	11
Idaho	66.7	3
Maryland	66.7	6
Oregon	66.7	6
Hawaii	60.0	5
New Mexico	57.1	7
Arizona	55.6	9
Illinois	50.0	2
Mississippi	50.0	4
New Jersey	50.0	8
Oklahoma	50.0	2
Pennsylvania	50.0	2
South Dakota	50.0	2
Washington	50.0	2
Wisconsin	50.0	4
Nebraska	42.9	7
Alaska	33.3	3
Iowa	33.3	3
Kansas	33.3	6
Massachusetts	33.3	3
Utah	28.6	7
North Carolina	25.0	4
Rhode Island	25.0	4
Arkansas	20.0	10
West Virginia	20.0	10
Wyoming	12.5	8
Ohio	4.3	23
Colorado	0.0	2
Florida	0.0	7
Indiana	0.0	3
Montana	0.0	7
New Hampshire	0.0	12
Delaware	.	0

Only respondents who had indicated that the court's decision in the area of most influence was in conflict with one or both of the political branches of government were eligible to respond to this item regarding modification. As a result the number of respondents in many of the states is small and inferences must be made with caution. Even with this concern taken into account it is clear that there is variation across the states in respondents' perceptions of whether the political branches attempted to modify the decision of the court. In seven states the respondents were unanimous in saying that the political branches had not modified their court's decision. Fifteen states met the 70 percent threshold of respondent agreement that no modification was attempted. In contrast in five states the respondents were unanimous in agreeing that the political branches modified that court's decision and twelve states met the 30 percent threshold for the negative poll (i.e., 70 percent of more of the respondents agree that the political branches had attempted modification of court policy).

The question regarding legislative efforts to avoid or delay the implementation of supreme court decisions in issue areas of most influence, yields an even more skewed distribution of responses than the question regarding modification. The results appear in Table 6.4B.

Table 6.4B: Respondent Perceptions of Executive and Legislative Avoidance of Influential and Conflictual Decisions by State Supreme Courts

State Supreme Court	Percent No Avoidance	Number of Respondents
Delaware	.	0
Alabama	100.00	3
Colorado	100.00	3
Georgia	100.00	7
Hawaii	100.00	7

Illinois	100.00	2
Kentucky	100.00	4
Louisiana	100.00	2
Maine	100.00	1
Michigan	100.00	1
Minnesota	100.00	2
Mississippi	100.00	5
Missouri	100.00	3
Nebraska	100.00	6
Nevada	100.00	2
New Mexico	100.00	4
North Dakota	100.00	2
Oklahoma	100.00	2
Oregon	100.00	7
Pennsylvania	100.00	2
South Carolina	100.00	4
Washington	100.00	2
Wisconsin	100.00	2
Maryland	86.00	7
West Virginia	86.00	7
Vermont	83.00	12
Kansas	80.00	5
Virginia	75.00	4
Connecticut	71.00	7
Montana	71.00	7
Utah	71.00	7
Massachusetts	67.00	3
Idaho	67.00	3
Tennessee	63.00	8
Alaska	50.00	2
Arizona	50.00	10
Iowa	50.00	4
Rhode Island	50.00	2
South Dakota	50.00	2
Florida	38.00	8
New Jersey	38.00	8
North Carolina	33.00	6
Wyoming	33.00	9

Ohio	17.00	23
Arkansas	11.00	9
New Hampshire	9.00	11
Indiana	0.00	3

In only four states does the percentage of respondents indicating that the political branches tried to avoid supreme court decisions that they disagreed with exceed the 70 percent threshold: Ohio, Arkansas, New Hampshire and Indiana. In contrast in twenty-two states there was unanimous agreement among respondents that for the issue on which the supreme court had been most influential and in conflict with one or both branches, there had been no attempt to avoid or delay the implementation of the decision. Clearly, the political branches were more willing to modify supreme court decisions than they were to attempt to avoid compliance.

Once again, the number of responses to this item in most states is quite low suggesting caution in making inferences. It is worth noting that the four states that exceed the 70/30 threshold on the negative end of the continuum—Ohio, Arkansas, New Hampshire, and Indiana—also exceeded that threshold on the 'modified' policy question. Influential decisions by these courts are regarded as being modified and/or avoided.

Summary Measure of Impact: General

The measures of impact based on the general items in the survey differ in their metric. Breadth is measured as the median number of issues identified by the respondents in a state. Strategic influence is measured as the percentage of respondents in a state agreeing that the political branches of government take into consideration the potential reaction of the supreme court on an issue. To combine these two measures I converted them both into rank order variables and took the average rank for a state on the two

indicators as the general measure of impact. The rank order correlation between the two measures is modest in strength (Spearman's = .15) and not statistically significant. The relationship doubles in magnitude (Spearman's = .32) if the analysis is limited to states with 10 or more responses but the relationship is not statistically significant.[28] I present the ordering in Table 6.5.

Table 6.5: General impact by score and rank order

State Supreme Court	Average General Impact	General Impact Rank
New Jersey	3.00	1
New Hampshire	3.25	2
Nebraska	5.00	3
Alaska	6.75	4
Montana	8.00	5
New Mexico	9.00	6
Tennessee	9.75	7
Alabama	13.00	9
Indiana	13.00	9
Wyoming	13.00	9
Maryland	13.75	11
Wisconsin	15.25	12
Colorado	17.00	13
Oregon	17.25	14
South Carolina	20.25	15
Vermont	20.75	16
Idaho	23.50	18.5
Maine	23.50	18.5
Massachusetts	23.50	18.5
North Dakota	23.50	18.5

[28]The correlations among the measures are provided for completeness. The measures are associated with specific indicators of impact and are not required to be correlated.

South Dakota	23.75	21
Washington	24.50	22
Georgia	25.00	23
Ohio	25.50	24
North Carolina	25.75	26
Arizona	27.75	26
Hawaii	27.75	26
Arkansas	28.50	28
Illinois	29.25	29
Nevada	29.50	30.5
Utah	29.50	30.5
Virginia	30.25	32
Pennsylvania	30.50	33
Kentucky	31.00	34
Minnesota	31.25	35
West Virginia	31.50	36
Connecticut	31.75	37
Iowa	32.00	38
Delaware	32.25	39
Mississippi	34.00	40
Missouri	34.25	41.5
Rhode Island	34.25	41.5
Florida	34.50	43
Oklahoma	37.00	44
Michigan	40.00	45
Louisiana	40.25	46
Kansas	42.50	47

As might be expected, this method of construction groups states well at the extremes. Cases that rank high in terms of breadth and of strategic influence have a high average score and those that rank low in terms of breadth and strategic influence have

high scores. Mixed scores across the two indicators yield middling summary impact scores.

As with independence, I also construct a summary measure of general impact employing a 70/30 percent threshold. For breadth, rather than using the median scores I employed the score based on the number of issues agreed to by 70 percent of the respondents. I also converted the percentage agreement scores for strategic influence with states having at least 70 percent agreement that the political branches of government take into consideration the potential reaction of the supreme court on an issue scored '1'. States where 30 percent of fewer agree (70 percent disagree) receive a '-1'. States with a percentage agreement between 70 and 30 percent were scored '0'. I summed across the two scores to create a summary specific measure of impact. The results are presents in Table 6.6.

Table 6.6: General Impact Scores by State Supreme Court in Descending Order

State Supreme Court	Breadth Score 70/30	Strategic Influence Score 70/30	Summary General Impact
Nebraska	4	1	5
Alaska	3	1	4
New Mexico	3	1	4
Tennessee	3	1	4
Indiana	4	0	4
Ohio	3	1	4
New Jersey	2	1	3
New Hampshire	2	1	3
Montana	2	1	3
Wyoming	3	0	3
Maryland	3	0	3
Colorado	2	1	3
Idaho	3	0	3

Washington	2	1	3
Arizona	3	0	3
Virginia	3	0	3
Alabama	1	1	2
Vermont	2	0	2
Maine	2	0	2
Hawaii	2	0	2
Mississippi	2	0	2
Wisconsin	0	1	1
Oregon	1	0	1
South Carolina	1	0	1
Massachusetts	1	0	1
North Dakota	1	0	1
South Dakota	1	0	1
Georgia	1	0	1
North Carolina	1	0	1
Arkansas	1	0	1
Illinois	0	1	1
Connecticut	1	0	1
Delaware	1	0	1
Oklahoma	1	0	1
Kansas	1	0	1
Nevada	0	0	0
Utah	0	0	0
Pennsylvania	0	0	0
Minnesota	0	0	0
West Virginia	0	0	0
Iowa	1	-1	0
Missouri	0	0	0
Rhode Island	0	0	0
Florida	1	-1	0
Michigan	0	0	0
Louisiana	1	-1	0
Kentucky	0	-1	-1

The range of the resulting summary score of impact is from '-1' at the low end, which is assigned to Kentucky and a high of '5', assigned to Nebraska. Measured using the 70/30 threshold operationalization, the relationship between breadth and strategic influence increases as would be expected given the greater reliability of both measures (Spearman's = .35 sig. at .05; .58 among states is 10 or more respondents).

Summary Measure of Impact: Specific

To provide a summary measure of impact based on the specific items I have simply averaged across the three items: specific breadth, modification, and avoidance. The resulting impact scores are arrayed in Table 6.7.

Table 6.7: Specific Impact Scores by State Supreme Court in Descending Order

State Supreme Court	Specific Impact
Alabama	93.33
North Dakota	85.33
Georgia	83.83
Vermont	83.01
Virginia	80.67
South Carolina	78.67
Hawaii	78.00
Louisiana	77.67
Minnesota	77.00
Oregon	76.90
Kentucky	76.67
Wisconsin	76.67
New Mexico	74.70
Tennessee	74.40
Nevada	74.00
Maine	73.00
Michigan	73.00
Missouri	72.00

Washington	69.33
Maryland	68.47
Illinois	66.00
Nebraska	65.63
Idaho	63.79
Pennsylvania	63.00
Mississippi	62.33
Kansas	60.77
Connecticut	58.58
New Jersey	57.83
Colorado	57.67
Arizona	55.53
Oklahoma	54.33
Utah	50.01
West Virginia	49.90
Montana	48.81
Massachusetts	47.32
Alaska	46.77
Wyoming	46.28
North Carolina	43.78
Florida	36.50
Arkansas	34.70
Iowa	34.10
Ohio	33.56
Rhode Island	33.33
South Dakota	33.33
Indiana	28.67
New Hampshire	27.70

Delaware cannot be measured on this indicator (and is excluded) because no respondents from that state answered either the modification or avoidance item. The correlation between responses to the modification and avoidance items is reasonably strong (r = .65). While the correlation of each of these items with specific breadth is substantially lower (r = .34 and -.33 respectively) it is also negative. This suggests that

states in which respondents reported their court as influential in more issue areas also reported their legislature and/or governor as more willing to modify or avoid the court's policies. The range of scores across this index is considerable from a low impact score of 27.70 for New Hampshire to a high score of 93.33 for Alabama.

The specific impact scores using the standard coding of -1 for less than 30 percent agreement with the activist position and 1 for 70 percent or more agreement with the activist position and zero otherwise are presented in Table 6.8 along with a summary score.

Table 6.8: Specific Impact Scores Accounting for Error by State Supreme Court in Descending Order

State Supreme Court	Specific Breadth Score 70/30	Modification Score 70/30	Avoidance Score 70/30	Specific Impact 70/30
Delaware	0	.		.
Alabama	1	1	1	3
Vermont	1	1	1	3
Virginia	1	1	1	3
North Dakota	0	1	1	2
Georgia	0	1	1	2
South Carolina	0	1	1	2
Hawaii	1	0	1	2
Louisiana	0	1	1	2
Minnesota	0	1	1	2
Kentucky	0	1	1	2
Wisconsin	1	0	1	2
Tennessee	1	1	0	2
Missouri	0	1	1	2
Oregon	0	0	1	1
New Mexico	0	0	1	1
Nevada	-1	1	1	1
Maine	-1	1	1	1

Michigan	-1	1	1	1
W. Virginia	0	0	1	1
Maryland	0	0	1	1
Illinois	0	0	1	1
Nebraska	0	0	1	1
Pennsylvania	0	0	1	1
Mississippi	0	0	1	1
Kansas	0	0	1	1
Connecticut	-1	1	1	1
New Jersey	1	0	0	1
Colorado	1	-1	1	1
Montana	1	-1	1	1
Idaho	0	0	0	0
Arizona	0	0	0	0
Oklahoma	-1	0	1	0
Utah	0	-1	1	0
Washington	0	-1	1	0
Massachusetts	0	0	0	0
Alaska	0	0	0	0
Wyoming	1	-1	0	0
North Carolina	1	-1	0	0
Florida	1	-1	0	0
Arkansas	1	-1	-1	-1
Iowa	-1	0	0	-1
Ohio	1	-1	-1	-1
South Dakota	-1	0	0	-1
Indiana	1	-1	-1	-1
New Hampshire	1	-1	-1	-1
Rhode Island	-1	-1	0	-2

The correlations among the component variables—breadth, modification and avoidance—employing the 70/30 threshold operationalization are comparable in

magnitude and direction to that under the initial operationalization employing percentages.[29]

Measuring Activism: Joining Independence and Impact

Activism as I have defined it involves two dimensions, independence and impact with independence constituting a necessary condition. These two dimensions need not be correlated. For example, the correlation (Spearman's) between a state's rank in terms of general independence and its rank in terms of general impact is .10 and only increases to .19 if the analysis is confined to states with 10 or more respondents. The correlation increases to .18 and .34 (n> = 10) if the 70/30 operationalizations of the variables are employed. As an illustration, I present in Table 6.9 the top 20 states in terms of general independence along with their general impact score.

Table 6.9: General Independence and Impact Ranks

State Supreme Court	General Independence Rank	General Impact Rank
Washington	1	22
Ohio	2	24
Montana	3	5
Alabama	4	9
Michigan	5.5	45
New Mexico	5.5	6
New Jersey	7	1
Illinois	8	29
Louisiana	10	46

[29]Given the limited categories of each variable, a measure of association like gamma is more appropriate than Spearman's rank order. With gamma the strength of association increases between responses to each item. This, however, may reflect the fact that gamma picks up non-linear association.

Pennsylvania	10	33
Wisconsin	10	12
Hawaii	12	26
North Carolina	13	26
Mississippi	14	40
Alaska	15	4
Idaho	16	18.5
Florida	17	43
Arizona	18.5	26
South Carolina	18.5	15
Colorado	20	13

Washington and Ohio are top ranked in terms of independence but are ranked in the middle of the states in terms of their impact. Similarly, Michigan is tied with New Mexico for the fifth highest in independence but ranks near the bottom of states in terms of impact while New Mexico's ranking on impact is comparable to its ranking on independence. A similar disparity is appears for Louisiana, Pennsylvania and Wisconsin that share a common rank on independence but whose ranks on impact diverge significantly.[30] The point is that while thinking of activism as capturing the extent that the supreme court is a policy player in a state rightly combines independence and impact (success), some definitions of activism might well see independence as sufficient to declare a court as activist, even if it loses its battles.

The varying operationalizations of independence and impact I have adopted thus far provide the basis for four separate approaches to measuring activism which include combined measures of independence and impact: First, I construct a measure that

[30]A telling illustration occurs for specific independence where Ohio is tied for 14th in rank. However, over 70 percent of the respondents agreed in this state that the legislator/governor modified or avoided the court's decision in the area of most influence.

employs only general items in the survey and treats variation in responses as reflective of variation in respondents' perceptions of their supreme court. Given variation in the scaling of general independence and impact I calculate this measure as a states' average rank on these two dimensions of activism. This variable is reported in column 2 of Table 6.2. Second, I construct a measure employing the general items but assuming that the variation in responses reflects error. This measure is calculated by summing the independence and impact measures employing the 70/30 threshold and appears in column 3 of the Table. Third, I construct a measure that employs the specific items and treats variation in responses as reflective of variation in respondents' perceptions of their supreme court. Given scaling differences between the measures of specific independence and specific impact, I again convert the measures to ranks and take the average. This measure appears in column 4 of Table 5.7B. Finally, I construct a measure of activism using the specific items but assuming the variation in responses reflects unreliability. This measure is computed by summing the measures of impact and compliance using the specific items with a 70/30 threshold. Note that since independence is defined as a necessary dimension of activism, states that did not reach the 70/30 threshold on independence are treated as missing in the combined activism measure. These four measures are presented in Table 6.10.

Table 6.10: Four Measures of Activism

State Supreme Court	Measure One: Activism General Rank (2)	Measure Two: Activism General 70/30 (3)	Measure Three: Activism Specific Rank (4)	Measure Four: Activism Specific 70/30 (5)
Alabama	4	3.5	10.5	.
Alaska	5	.	25	0
Arizona	22	.	26	0

Arkansas	28.5	0	35	-1
Colorado	10	.	12.5	2
Connecticut	39.5	0	16.5	2
Delaware	47	-1	.	.
Florida	31.5	.	40.5	1.5
Georgia	23	-0.5	1	3
Hawaii	16	3	10.5	.
Idaho	12	.	32	.
Illinois	14.5	2	14	2
Indiana	27	2	29	0
Iowa	31.5	.	46	-2
Kansas	42	0	40.5	0
Kentucky	38	-2	19	.
Louisiana	28.5	1	2	4
Maine	36	0	34	.
Maryland	18	2	8	2.5
Massachusetts	34	-1	15	1
Michigan	25	1	36	-1
Minnesota	43	-2	3.5	3
Mississippi	26	2	7	3
Missouri	45	-1.5	18	.
Montana	1.5	5	27.5	2.5
Nebraska	8.5	4	30	2.5
Nevada	36	-1.5	20	2.5
New Hampshire	19	1	42.5	0.5
New Jersey	1.5	5	16.5	2
New Mexico	3	5	3.5	2
North Carolina	17	.	45	0
North Dakota	30	-1	24	1
Ohio	8.5	6	31	0.5
Oklahoma	46	-1	42.5	-1
Oregon	20.5	0	22.5	.
Pennsylvania	20.5	1.5	38	0
Rhode Island	44	-1.5	33	-2
South Carolina	11	0	21	2

South Dakota	39.5	-2	39	-1
Tennessee	24	2	9	3
Utah	36	-2	27.5	1.5
Vermont	14.5	1	5	4
Virginia	41	2	12.5	2
Washington	7	5	6	2
West Virginia	33	-1	44	-1
Wisconsin	6	2.5	22.5	.
Wyoming	13	2	37	1.5

As would be expected the correlations between the varying approaches to measuring each dimension are quite high. The rank order correlation between measures three and four (columns 4 and 5) is .85 (Spearman's) and that between measure one and two (columns 2 and 3) is .84. The ordering of states based on general items in the survey, however, bears little relationship to the ordering based on the specific items. The rank order correlations are .20 and statistically insignificant between measures one and two with either measure three or measure four.

These results are consistent with the previously noted disconnection between how respondents answered general questions about their states' supreme court and how they answered specific questions about the issue areas in which the court has been influential. This observed disconnection is important for how we should think about and measure judicial activism. This pattern emphasizes that a scholar who aggregates up a measure of activism from the outcomes in specific cases (did the court avoid conflict in issue 'x', did its decision get implemented in issue y, etc.) may come to very different conclusions than a scholar focused more generally on the relationships between the court and the political branches.

In the next chapter I will explore the relationship between my alternative measures and the results of previous efforts to measure supreme court activism. I will also explore some of the hypotheses in the literature regarding the affects of structural/formal independence and activism.

CHAPTER 7

Measuring Judicial Activism and Assessing its Determinants in State Supreme Courts

In this chapter I present four separate measures of judicial activism. Each merges the independence and impact measures I developed in Chapters 5 and 6, respectively. Two treat the general proclivities of courts to act while the other two focus upon more specific instances of activism. I compare my measures with other measures of activism as well as explore (test) hypothesized relationships from the literature between activism and its suggested correlates.

Measuring Activism: Joining Independence and Impact

Activism as I have defined it involves two dimensions: independence and impact with independence constituting a necessary condition. These two dimensions need not be correlated. For example, the correlation (Spearman's) between a state's rank in terms of general independence and its rank in terms of general impact is .10 and only increases to .19 if the analysis is confined to states with 10 or more respondents. The correlation increases to .18 and .34 (n > = 10) if the 70/30 operationalizations of the variables are employed. As an illustration, I present in Table 7 the top 20 states in terms of general independence along with their general impact score.

Table 7.1: General Independence and Impact Ranks

State Supreme Court	General Independence Rank	General Impact Rank
Washington	1	22
Ohio	2	24
Montana	3	5
Alabama	4	9
Michigan	5.5	45
New Mexico	5.5	6
New Jersey	7	1
Illinois	8	29
Louisiana	10	46
Pennsylvania	10	33
Wisconsin	10	12
Hawaii	12	26
North Carolina	13	26
Mississippi	14	40
Alaska	15	4
Idaho	16	18.5
Florida	17	43
Arizona	18.5	26
South Carolina	18.5	15
Colorado	20	13

Washington and Ohio are top ranked in terms of independence but are ranked in the middle of the states in terms of their impact. Similarly, Michigan is tied with New Mexico for the fifth highest in independence but ranks near the bottom of states in terms of impact while New Mexico's ranking on impact is comparable to its ranking on independence. A similar disparity appears for Louisiana, Pennsylvania, and Wisconsin that share a common rank on independence but whose ranks on impact diverge

significantly.[31] While thinking of activism as capturing the extent that the supreme court as a policy player in a state rightly combines independence and impact (success), some definitions of activism might well see independence as sufficient to declare a court as activist, even if it loses its battles. Courts may be considered activist even though they have had little success in having their policy contributions implemented.

In contrast, the varying operationalizations of independence and impact I have adopted provide the basis for the four separate measures of activism I now propose. Measure one employs only general items in the survey and treats variation in responses as reflective of variation in respondents' perceptions of their supreme court. Given variation in the scaling of general independence and impact I calculate this measure as a states' average rank on these two dimensions of activism. This variable is reported in column 2 of Table 7.1. Measure two employs the general items of measure one but assumes that the variation in responses reflects error. It is calculated by summing the independence and impact measures employing the 70/30 threshold and appears in column 3 of the Table. Measure three employs the specific items in the survey and treats variation in responses as reflective of variation in respondents' perceptions of their supreme court. Given scaling differences between the measures of specific independence and specific impact, I again convert the measures to ranks and take the average. This variable appears in column 4 of the Table. Finally, Measure four uses the specific items in the survey but assumes the variation in responses reflects unreliability. This measure is computed by summing the measures of independence and impact using the specific items with a 70/30

[31]A telling illustration occurs for specific independence where Ohio is tied for 14th in rank. But over 70 percent of the respondents agreed in this state that the legislator/governor modified or avoided the court's decision in the area of most influence.

threshold. Note that since I have defined independence as a necessary dimension of activism, states that did not reach the 70/30 threshold on independence are treated as missing in the combined activism measure.

Table 7.2: Four Measures of Judicial Activism: Independence and Impact Joined

State Supreme Court	Measure One: Activism General Rank	Measure Two: Activism General 70/30	Measure Three: Activism Specific Rank	Measure Four: Activism Specific 70/30
Alabama	4	3.5	10.5	.
Alaska	5	.	25	0
Arizona	22	.	26	0
Arkansas	28.5	0	35	-1
Colorado	10	.	12.5	2
Connecticut	39.5	0	16.5	2
Delaware	47	-1	.	.
Florida	31.5	.	40.5	1.5
Georgia	23	-0.5	1	3
Hawaii	16	3	10.5	.
Idaho	12	.	32	.
Illinois	14.5	2	14	2
Indiana	27	2	29	0
Iowa	31.5	.	46	-2
Kansas	42	0	40.5	0
Kentucky	38	-2	19	.
Louisiana	28.5	1	2	4
Maine	36	0	34	.
Maryland	18	2	8	2.5
Massachusetts	34	-1	15	1
Michigan	25	1	36	-1
Minnesota	43	-2	3.5	3
Mississippi	26	2	7	3
Missouri	45	-1.5	18	.
Montana	1.5	5	27.5	2.5
Nebraska	8.5	4	30	2.5

Nevada	36	-1.5	20	2.5
New Hampshire	19	1	42.5	0.5
New Jersey	1.5	5	16.5	2
New Mexico	3	5	3.5	2
North Carolina	17	.	45	0
North Dakota	30	-1	24	1
Ohio	8.5	6	31	0.5
Oklahoma	46	-1	42.5	-1
Oregon	20.5	0	22.5	.
Pennsylvania	20.5	1.5	38	0
Rhode Island	44	-1.5	33	-2
South Carolina	11	0	21	2
South Dakota	39.5	-2	39	-1
Tennessee	24	2	9	3
Utah	36	-2	27.5	1.5
Vermont	14.5	1	5	4
Virginia	41	2	12.5	2
Washington	7	5	6	2
West Virginia	33	-1	44	-1
Wisconsin	6	2.5	22.5	.
Wyoming	13	2	37	1.5

As would be expected, the correlations between the varying approaches to measuring each dimension are quite high. The rank order correlation between measures three and four (columns 4 and 5) is .85 (Spearman's) and that between measure one and two (columns 2 and 3) is .84. The ordering of states based on general items in the survey, however, bears little relationship to the ordering based on the specific items. The rank order correlations are .20 and statistically insignificant between measures one and two with either measure three or measure four.

These results are consistent with the previously noted disconnection between how respondents answered general questions about their states' supreme court and how they

answered specific questions about the issue areas in which the court has been influential. This observed disconnection is important for how we should think about and measure judicial activism. This pattern emphasizes that a scholar who aggregates up a measure of activism from the outcomes in specific cases (did the court avoid conflict in issue 'x', did its decision get implemented in issue y, etc.) may come to very different conclusions than a scholar focused more generally on the relationships between the court and the political branches. I examine these potential differences by comparing my measures to existing measures of activism for the same courts next.

Scales of Judicial Activism Compared

I compare my rank order of state supreme court activism to three other studies of the same 47 courts. Each uses a different and highly specific measure of activism: Canon and Baum's study of state supreme court innovation in tort reform, Caldeira's measure of prestigious or trend-setting state supreme courts, and Emmert's measure of state supreme court use of judicial review. Canon and Baum's innovative court rankings correlate with Caldeira's trendsetting courts with a coefficient of .55 (Spearman's). Emmert's scale is weakly correlated with both (.28 with Canon and Baum and .22 with Caldeira).

However, Caldeira's list of the most and the least prestigious courts does not match Canon and Baum's most and least innovative list of courts. While tort innovation may be diffused beyond the state border by some courts, none of these courts rank very highly on Emmert's scale. Thus, judicial review appears weakly related to innovation or its diffusion across state lines. I presume these differences in rank order are a function of the narrow focus on either one issue area and/or tool used by courts to exhibit activism.

Since all of my measures cover multiple issues and tools used by courts, my measure may not detect the specific issues and tools focused on by these approaches.

The four rank orderings of state supreme courts are based on the scores assigned to each court on each measure. Measure one and three are an average of the converted ranking on independence on impact (either general or specific). The resulting rank order of courts on these measures is self-explanatory. Measure two and four required 70 percent agreement among respondents, yielding many fewer possible scores. Courts are thus pooled into groups based on the same score.

I compare general and specific activism to these studies separately. Courts are rank ordered in their general activism in Table 7.3A and correlations with these other rankings are presented in Table 7.3B. Specific activism rank ordering and correlations with these measures are presented in Tables 7.4A and 7.4B.

Table 7.3A: Rank Order of State Supreme Courts Based on General Measures of Judicial Activism

	Measure One: General Activism		Measure Two: General Activism 70/30 Threshold
1.5	Montana	1	Ohio
1.5	New Jersey	2	Montana
3	New Mexico	2	New Jersey
4	Alabama	2	New Mexico
5	Alaska	2	Washington
6	Wisconsin	6	Nebraska
7	Washington	7	Alabama
8.5	Nebraska	8	Hawaii
8.5	Ohio	9	Wisconsin
10	Colorado	10	Illinois
11	South Carolina	10	Indiana
12	Idaho	10	Maryland

13	Wyoming	10	Mississippi
14.5	Illinois	10	Tennessee
14.5	Vermont	10	Virginia
16	Hawaii	10	Wyoming
17	North Carolina	17	Pennsylvania
18	Maryland	18	Louisiana
19	New Hampshire	18	Michigan
20.5	Oregon	18	New Hampshire
20.5	Pennsylvania	18	Vermont
22	Arizona	22	Arkansas
23	Georgia	22	Connecticut
24	Tennessee	22	Kansas
25	Michigan	22	Maine
26	Mississippi	22	Oregon
27	Indiana	22	South Carolina
28.5	Arkansas	28	Georgia
28.5	Louisiana	29	Delaware
30	North Dakota	29	Massachusetts
31.5	Florida	29	North Dakota
31.5	Iowa	29	Oklahoma
33	West Virginia	29	West Virginia
34	Massachusetts	34	Missouri
36	Maine	34	Nevada
36	Nevada	34	Rhode Island
36	Utah	37	Kentucky
38	Kentucky	37	Minnesota
39.5	Connecticut	37	South Dakota
39.5	South Dakota	37	Utah
41	Virginia	.	Alaska
42	Kansas	.	Arizona
43	Minnesota	.	Colorado
44	Rhode Island	.	Florida
45	Missouri	.	Idaho
46	Oklahoma	.	North Carolina
47	Delaware		Iowa

Table 7.3B: Spearman's Rank Order Correlations for General Measures of Activism

	Canon & Baum Tort Innovation	Caldeira Prestige	Emmert Judicial Review
Measure One: General Activism	.01 (.95)	.08 (.59)	-.06 (.69)
Measure Two: General Activism (70/30 Threshold)	.04 (.81)	.20 (.21)	-.14 (.38)

The size and significance of the rho coefficients indicate no relationship between my general measures and those of the 3 existing measures I compare them to. These results may indicate that my measures are not sensitive enough to detect the behaviors measured by these studies. The 3 rankings are based on a small sub-set of behaviors and/or issue activity demonstrated by courts. My general measures presumably include but do not strongly include these subsets of behaviors but rather assess each court in broader terms.

Measures three and four treat activism more specifically and may detect these smaller subsets of behaviors in one or a few issue areas. Recall that specific measures of activism are based on questions about areas in which a court has demonstrated the most influence among issues it is considered active by respondents. Overlap may exist between those areas flagged by respondents as influential and those areas focused on by the other studies.

Table 7.4A: Rank Order of State Supreme Courts Based on Specific Measures of Activism

	Measure Three: Specific Activism		Measure Four: Specific Activism 70/30 Threshold
1	Georgia	1.5	Louisiana
2	Louisiana	1.5	Vermont
3.5	Minnesota	3	Georgia
3.5	New Mexico	3	Minnesota
5	Vermont	3	Mississippi
6	Washington	3	Tennessee
7	Mississippi	7	Maryland
8	Maryland	7	Nevada
9	Tennessee	7	Montana
10.5	Alabama	7	Nebraska
10.5	Hawaii	11	New Mexico
12.5	Colorado	11	Washington
12.5	Virginia	11	Colorado
14	Illinois	11	Virginia
15	Massachusetts	11	Illinois
16.5	Connecticut	11	New Jersey
16.5	New Jersey	11	Connecticut
18	Missouri	11	South Carolina
19	Kentucky	19	Utah
20	Nevada	19	Wyoming
21	South Carolina	19	Florida
22.5	Oregon	22.5	Massachusetts
22.5	Wisconsin	22.5	North Dakota
24	North Dakota	24.5	Ohio
25	Alaska	24.5	New Hampshire
26	Arizona	26	Alaska
27.5	Montana	26	Arizona
27.5	Utah	26	Indiana
29	Indiana	26	Pennsylvania
30	Nebraska	26	Kansas
31	Ohio	26	North Carolina
32	Idaho	32	Arkansas
33	Rhode Island	32	Michigan
34	Maine	32	South Dakota
35	Arkansas	32	Oklahoma
36	Michigan	32	West Virginia
37	Wyoming	37	Rhode Island
38	Pennsylvania	37	Iowa
39	South Dakota	.	Alabama

40.5	Florida	.	Hawaii
40.5	Kansas	.	Missouri
42.5	New Hampshire	.	Kentucky
42.5	Oklahoma	.	Wisconsin
44	West Virginia	.	Oregon
45	North Carolina	.	Idaho
46	Iowa	.	Maine
.	Delaware	.	Delaware

Table 7.4B: Spearman's Rank Order Correlations for Specific Measures of Activism

	Canon & Baum Tort Innovation	Caldeira Prestige	Emmert Judicial Review
Measure Three: Specific Activism	.08 (.61)	-.01 (.95)	-.02 (.90)
Measure Four: Specific Activism (70/30 Threshold)	.02 (.89)	-.13 (.45)	.09 (.60)

The specific measures of activism and their corresponding rank ordering of state supreme courts are also unrelated to the 3 existing scales. These results also suggest either the specific measures of activism are unreliable or they remain too broad to capture the narrower focus of the studies. Though my specific activism measures do examine areas in which courts are viewed as most influential, my measures cover a range of both issue areas and tools used by courts.

The lack of correlation between any of the four measures and their corresponding rank orders and the other 3 measures may also result from a lack of consideration by any of these other measures of judicial impact. Indeed, none of these studies examines whether or not courts are in fact successful in their activism. Therefore, comparing my rankings to their rankings may be problematic since they do not assess impact.

To determine whether this might be the case, I examined my general and specific measures and their rank orders to independence only. The correlations all improved moderately, except with Canon and Baum (which decreased), but none of the coefficients are statistically significant. Again, either the reliability of my measure is the issue or the broad scope which I measure independence does not adequately capture the small subset of behaviors focused on by these measures (even absent impact).

Lack of Consistency and Implications for Hypothesis Testing

One criticism I raise of existing 'thin' large-n studies of activism is the lack of consensus about which courts are activist. My study appears to contribute to this lack of consensus though my measures are based on a broader set of behaviors and issues and include impact unlike 'thin' approaches. Thinner case level data approaches, however, are forced to focus on one behavior and/or issue area in order to examine multiple courts. Hypothesis testing using these various thin measures has produced conflicting results. The results themselves, however, are problematic since error has been introduced on the dependent variable through the necessary omission of multiple indicators of activism.

My survey approach addresses this issue by focusing more broadly on the perceptions of the policy contributions of courts in general and in areas they are regarded as influential. Low response rates in several states and respondent variation within states, however, requires caution in relying on the results of hypothesis testing I conduct in the next section.

Variables and Hypotheses

Large-scale studies assessing the suggested determinants of activism generally, and especially among state supreme courts, are rare. The theoretical morass of judicial

activism presents a virtual kitchen sink of its suggested correlates. To organize these suggested determinants for testing, scholars tend to group variables as structural, descriptive, and political. I follow this organization in assessing determinants but test political and demographic variables together.

Structural Variables

Structural variables treat system differences as a potential source of activism. The presence of an intermediate court of appeal, the type of selection system used by the state to staff its high court, as well as the length of the state's constitution have all been hypothesized to influence activism.

The presence of an intermediate court of appeals should increase activism as high courts have more discretion over their docket if intermediate courts are there to filter the load. Such choice might offer courts more opportunity to act in comparison with courts required to manage a workload without such courts. Emmert did find the presence of these courts was associated with higher instances of judicial review. Canon and Baum and Caldeira, however, found no relationship between the presence of immediate appellate courts and the inclinations of supreme courts to innovate and/or in their prestige.

Selection systems have been hypothesized to affect activism as well. Whether a high court judges are appointed, retained, or elected could influence their willingness to act. Elected judges may be more restrained in their actions for fear of electoral backlash, particularly with regard to hot-button issues, whereas judges who are appointed may not. Retained judges face less electoral backlash than elected judges but are not as insulated as

their appointed cohorts. Upon testing, selection systems have not been found to affect activism among state supreme courts.

Constitutional length has been suggested to influence activism as longer constitutions should offer more opportunity for courts to justify their activist decisions. Only Emmert found constitutional length to affect instances of activism whereas Canon and Baum as well as Caldeira found no such relationship. Obviously, Emmert's focus on judicial review cases narrows his focus to constitutionally based decisions. Tort innovation and/or trend-setting decisions on the other hand may not rely on constitutional support. In fact, Caldeira does find that many of the most prestigious courts had the oldest constitutions and also the shortest.

I relied on the National Center for State Courts database for structural variables. Of the 47 states I examined, 10 of these states do not have intermediate courts of appeal, 11 have justices appointed, 18 have some kind of retention system, and 18 have direct elections (both partisan and non-partisan). The average length of a state constitution by number of provisions is 792, with a minimum length of 233 provisions in Vermont and a maximum of 5204 provisions in Alabama. While Emmert finds two of these variables to influence activism, Canon and Baum and Caldeira do not. Given these conflicting findings, I take no position on the direction of these hypotheses.

Before testing is conducted and analyzed, the coding schemes I used require attention. On the four dependent variables of activism, courts with higher scores are more activist (toward the positive pole) than courts with lower scores (toward the negative pole). On the independent side, states with an intermediate court of appeals were scored "1" and states without "0." I utilized dummy variables for each type of selection system,

appointed, elected, or retained. Constitutional length remains an interval level variable from high to low number of provisions.

I present the results for measures one through four with respect to structural variables in Table 7.5.

Table 7.5. Structural Variables Assessed: Spearman's Rho Coefficients and Their Significance Levels for All Four Measures of Activism

	Measure One: General Activism	Measure Two: General Activism 70/30	Measure Three: Specific Activism	Measure Four: Specific Activism 70/30
Intermediate Court of Appeal	.14 (.34)	.26* (.10)	.30** (.03)	.08 (.59)
Appointed	-.14 (.33)	-.04 (.79)	.04 (.78)	.07 (.67)
Retained	-.02 (.91)	.03 (.83)	-.18 (.23)	-.20 (.22)
Elected	.14 (.33)	.00 (.97)	.14 (.34)	.15 (.37)
Constitutional Length	.14 (.33)	.06 (.69)	.18 (.22)	-.02 (.88)

Measures one and four are not correlated with any of these structural variables while measures two and three are modestly and statistically significantly correlated with the presence of an intermediate court of appeals. Measure two is the more demanding of the two general activism measure and thus I have more confidence that generally active courts tend to reside in states with an intermediate court of appeals. Measure three is less demanding than measure four. With respect to specific activism, I am less confident in concluding that more specifically activist courts reside in states with intermediate courts.

Descriptive and Political Variables

Next, I examine a group of descriptive and political variables hypothesized to affect activism in state supreme courts. I treat descriptive and political variables together since they are often discussed together by scholars and appear to overlap. Common descriptive variables include: the regional designation of the state (Northern, Southern, Western, and Midwestern), the size of the state's population, the percentage of the population living in an urban area, and the average income of the state. Common political variables include the average support for liberal ideas in the state, the percentage of college-educated inhabitants in the state, and the percentage of union households in the state. Wealthier states tend to be more educated and more liberal, but in addition, they tend to be more urban and some are more populous.

Region is hypothesized to affect activism as more activist courts may be concentrated in certain geographic areas. The designation is connected to political culture as region often serves as a proxy for ideological inclinations. The South and Midwest are regarded as more conservative while the West and Northeast are more liberal. Hypothesis testing has yielded conflicting results. While Canon and Baum ad Caldeira found no regional differences, Emmert found that courts from Southern states engaged in judicial review more frequently than their regional counterparts. Upon further investigation, however, he found that Southern states generally had longer constitutions and length better explained higher levels of judicial review in the South.

More populous, urban, wealthier, educated, unionized, and generally liberal states have been hypothesized to influence activism, but testing has yielding mixed results. For example, while Canon and Baum found that litigants bringing cases that high courts were

innovative tended to come from urban areas, litigant characteristics were more important. Caldeira found wealthier and more urbanized states had prestigious courts, but generally found that professionalized (more educated and more liberal states) had the most prestigious courts. Emmert found none of these demographic and political variables to explain activism.

I relied on Pollock's "States" database from 2000-2004 for demographic and political variables to ensure overlap with my study period. All of these variables are interval except region. I created dummy variables for each of 4 general regions. In all,12 states are 'Midwestern', 10 'Northeastern', 13 'Southern', and 12 'Western'. Population is measured per square mile, with the average number of inhabitants per square mile as 731, with a low of 1 inhabitant per square mile in Alaska and a high of 1,093 inhabitants in New Jersey. The percent of a state's population living in an urban area on average is 65 percent, with a low of 28 percent in Vermont and a high of 100 percent in New Jersey. The average per capita income for states is $21, 030.00 with a low of $15, 726 in Mississippi, and a high of $30, 214.00 in Hawaii.

With respect to political variables, the average percentage of union households per state is 11 percent, with a minimum percentage of 3 percent in North Carolina and a high of 23 percent in Hawaii. The percentage of the population that considers itself liberal is 19 percent, with a low of 12 percent in South Dakota and a high of 30 percent in Vermont. The average percentage of college educated inhabitants per state is nearly 24 percent with a low of 16 percent in West Virginia and a high of 34 percent in Colorado. Again, given conflicting finding or lack of support for many of these variables I take no position with respect to their direction in hypothesis testing. I present the results of

hypothesis testing using all four measures of activism for all descriptive and political variables in Table 7.6.

Table 7.6. Descriptive and Political Variables Assessed: Spearman's RHO Coefficients and Their Significance Levels for All Four Measures of Activism

	Measure One: General Activism	Measure Two: General Activism 70/30	Measure Three: Specific Activism	Measure Four: Specific Activism 70/30
Midwest	-.12 (41)	.00 (.24)	-.25* (.08)	-.30* (.06)
Northeast	-.13 (.38)	-.06 (.67)	-.05 (.70)	.02 (.88)
Southern	-.14 (.37)	-.11 (.51)	.17 (.26)	.19 (.25)
Western	.38** (.01)	.19 (.24)	.14 (.36)	.10 (.54)
Population	.13 (.39)	.14 (.40)	.08 (.55)	-.01 (.93)
Urban	.10 (.49)	.04 (.80)	.20 (.18)	.03 (.82)
Income	.03 (.79)	.14 (.41)	.11 (.48)	.09 (.59)
Union	.16 (.29)	.22 (.18)	.12 (.37)	-.03 (.82)
Liberal	.10 (.48)	.16 (.31)	.17 (.24)	.13 (.43)
College Educated	.02 (.85)	.00 (.99)	.24* (.10)	.16 (.35)

While none of the coefficients are particularly robust, 'Midwestern' states are negatively correlated with specific activism while 'Western' states are positively correlated with general activism. In areas of most influence, courts that are not particularly activist tend to reside in the Midwest. What about Midwestern states indicates they have fewer activist courts in the area of most influence? To determine whether other descriptive and political variables were associated with region that might also be hypothesized to decrease activism, I ran Spearman's correlation for Midwestern

states. Only the percentage of liberal inhabitants had a statistically significant inverse relationship to Midwest (-.32**).

While general activism is correlated positively and statistically significantly with Western states, that is only the case for measure one. Measure two is a more demanding measure of general activism and it is not correlated with any regional variable. Consequently, since both measures are not correlated with "western' I am much less confident in concluding that courts regarded as more active reside in the West.

Determinants of Activism Explored

Varying measures of activism used to test its suggested determinants have not surprisingly produced conflicting results. These contradictory findings are particularly troublesome when measures are correlated with each other. Specifically, Canon and Baum and Caldeira's rankings correlate but hypothesis testing yielded different results. Baum and Caldeira argue that prestigious courts were not often innovative in tort law, explaining the lack of consistency in findings as the result of idiosyncratic features; in particular, the presence of certain litigants offers greater opportunity for policy creation and thus diffusion of some policies but not others (torts) among the states.

These findings, however, cannot be justified as indicative only of specific tools/issues/behaviors of courts for they vary systematically. They are suggested as causes of a general phenomenon. For a court to act, certain general conditions must be present. Under these conditions, some courts may act while others may not. The point is that systematic conditions are necessary for action in the first place. As such, non-comprehensive measures threaten external validity by introducing error on the dependent

variable. Hypothesis testing using such measures appears to inflate or deflate relationships, accordingly.

My measures are more comprehensive and consistent and testing is less problematic with respect to validity. Given response rates and respondent variation, however, I am less confident in their reliability. To assuage these uncertainties, I rely on the more demanding measure of general and specific activism that account for respondent variation by requiring 70 percent respondent agreement. The more demanding of these measures supports an intermediate court of appeals as moderately correlated with general proclivities of courts to act. This finding contradicts the literature but at least with respect to general activism, I am more confident in concluding that intermediate courts are present in states with more activist supreme courts. Among the demographic and political variable, Midwestern and Western states designations appears related to activism among supreme courts.

A potential explanation for the difference between my results and those of other studies may be my inclusion of impact. Most studies of activism assess activism as a court's willingness to act irrespective of the success (impact) of their actions. Consequently, I reran my analysis but relied only on the measures of general and specific independence. I present results in Table 7.7.

Table 7.7. General and Specific Independence: Structural, Descriptive, and Political Variables Assessed

	Measure One: Gen- Ind	Measure Two: Gen-Ind 70/30	Measure Three: Spec- Ind	Measure Four: Spec-Ind 70/30
Intermediate Court of Appeal	.22 (.13)	.32** (.02)	.05 (.69)	-.05 (.73)
Appointed	-.25* (.09)	-.21 (.16)	-.01 (.98)	-.13 (.42)

Retained	-.14 (.34)	-.09 (.51)	.02 (.84)	.00 (.98)
Elected	.36** (.01)	.27** (.05)	-.03 (.86)	.11 (.49)
Constitutional Length	.25* (.09)	.27* (.07)	.07 (.62)	.01 (.95)
Midwest	-.08 (.56)	-.08 (.57)	-.23 (.13)	-.25 (.15)
Northeast	-.20 (.16)	-.19 (.20)	.06 (.72)	-.02 (.90)
South	.15 (.32)	.01 (.93)	.12 (.41)	.12 (.47)
West	.13 (.38)	.25* (.09)	.05 (.73)	.16 (.33)
Population	.10 (.49)	.11 (.45)	.14 (.33)	-.06 (.72)
Urban	.05 (.70)	.14 (.35)	.16 (.29)	-.02 (.89)
Income	-.09 (.54)	.09 (.53)	.04 (.84)	-.04 (.78)
Union	.18 (.20)	.27* (.06)	.07 (.62)	-.07 (.65)
Liberal	.02 (.87)	.14 (.35)	.12 (.41)	.00 (.95)
College	-.06 (.68)	.05 (.71)	.08 (.56)	-.10 (.51)

Measures three and four of specific independence are not correlated to a statistically significant degree with any structural, descriptive, or political variables. Measures one and two of general activism are correlated with several variables to a modest and statistically significant degree. Measure one is correlated modestly and inversely with appointed systems while positively with elected systems; it is also positively correlated with constitutional length. Measure two is more demanding and reiterates these findings but in addition is correlated with the presence of an intermediate court of appeals, western states, and states with greater union strength as an indicator of liberalism.

All of these relationships are in the hypothesized direction except the inverse correlation with appointed systems and the positive correlation with elected systems. The literature suggests that the threat of electoral backlash is diminished or non-existent for appointed jurists and stronger for elected judges. Independent behavior should thus increase among appointed courts and decrease among elected courts. I find the opposite.

The omission of impact reiterates the earlier results in which impact is included. The leverage gained from including impact is thus diminished. Moreover, with respect to general independence, more leverage appears to be gained in understanding the affect of selection systems on court behavior when impact is left out. These findings underline that independence is a necessary condition for activism while impact is not required. Nevertheless, determining whether a court is successful in asserting its independence remains important in assessing the actual policy contributions of courts. In addition, perceptions of independent behaviors may be more recognizable to respondent than knowing whether courts were actually successful in their policy actions.

Conclusion

Future work should look more carefully at selection systems and their effect on independence, considering that court curbing reforms at the state level that have been proposed involve structural changes to selection systems (Bonneau 2007). In fact, the focus on judicial elections has become a recent focus of scholarly inquiry and the amount of money spent on state supreme court elections has increased significantly in recent years (Bonneau 2004 and 2007). Like other elections, the amount spent on state supreme court elections has had the intended effect of increasing competition (2007). Clearly, those interests spending money in these cycles view the election outcome in judicial

elections as important in some significant way with respect to judging. Perhaps elected judges are political animals more so than their appointed or even retained brethren. Their inclinations to act as they are expected may be the direct result of their supply route.

CHAPTER 8

Assessing and Measuring Judicial Activism: A Way Forward

The central problem my dissertation addresses is the failure of previous scholarly work to develop and to employ a comprehensive and consistent conceptualization and measure of judicial activism across multiple courts. The following serious problems arise as a result: (1) in identifying courts as generally activist; (2) in creating conflicting characterizations of the same court as activist, depending on the measure employed; (3) in omitting forms of activism typically ignored in conventional case level data analyses; and (4) in assessing the systemic causes of activism which have important implications for institutional design and maintenance.

While single case and small comparative studies can ameliorate the first three problems, they are severely limited in their generalizability. Larger comparative studies appear to provide more leverage on the suggested predictors of activism; however, case level data force scholars to adopt 'thin' operationalizations of activism by focusing on a single trait of activism (e.g. judicial review, innovation) to assess multiple courts. To overcome these limitations, I measure activism using perception data drawn from an elite multi-informant survey. I contacted a diverse group of individuals who have knowledge of a particular court and the political and institutional context in which that court operates. The survey questions covered general and specific manifestations of policy independence and impact, both conditions of activism.

Given variation in the political, social, and economic environments of the U.S. states, I implemented my survey at the state level, focusing on state courts of last resort.

In addition to the comparative advantage offered by state level analysis, scholarly interest in the new judicial federalism has increased the prominence of these courts as they are recognized as having the last word in a vast array of policy areas. Moreover, judicial activism and policymaking among these courts in particular has created a dialogue (both scholarly and ideological) regarding institutional design and maintenance, underlining the critical importance of appropriately conceptualizing and measuring activism in these courts.

Respondents were identified and contacted via mail from various elite groups, including academics, journalists, political actors, and members of the practicing bar in each state. They were asked general and specific questions about their supreme court's policy independence and impact in their state. General questions of independence included whether members of these courts made decisions in accord with their policy preferences and whether they avoided conflict with the legislative branch. Specific questions were asked about the areas in which respondents felt their court was both active and most influential and whether these decisions were innovative or in response to legislative initiation. General impact questions addressed how broadly courts act across issue areas as well as their strategic influence over the legislature. Specific impact questions addressed whether the court's most influential decisions were modified or avoided.

Substantive Results

While my survey was focused at the state level, aggregate results provide an overview of this diverse set of institutions with respect to their perceived independence and impact. To begin, I asked respondents whether their court plays an important role in

their state. Most respondents agreed with this characterization of their high court. As a summary assessment of activism, such a finding might lead to the false conclusion that all state supreme courts are activist. In fact, when respondents were asked more explicit questions about their court's independence and impact a more nuanced picture of these courts emerged.

In general, respondents agreed their courts were independent with respect to preference seeking, less so with respect to conflict avoidance and innovation, and deferential to legislative intent. In addition, a plurality agreed their court was innovative in areas identified by respondents as issues their courts were both active and influential. A plurality of respondents agreed their court's potential reactions were considered by legislative officials (before these officials acted), suggesting strategic influence and impact by courts. Courts were also viewed as acting in range of issues areas, in some states less broadly than others. Of the 44 issues respondents identified as areas their court was active, 10 issues capture a majority of the total responses provided by respondents: (1) torts, (2) criminal sentencing, (3) insurance, (4) child adoption and custody, (5) education, (6) search and seizure, (7) property rights, (8) the death penalty, (9) business regulation, and (10) divorce law.

Reiterating the policy impact literature on courts more generally, a majority of respondents did not report influential court decisions were modified by legislative and/or executive officials even when those actors disagreed with the court's decisions. An even larger majority did not report the court's decisions were avoided. Both avoidance and modification increased, however, when the legislature and not the court created the policy.

The aggregate results raise interesting questions regarding independence and impact, but low response rates in many states severely limited the leverage I had at the state level to address them. In addition, state level response variation with respect to both specific and general independence and impact threatened reliability. While this variation could merely reflect idiosyncratic differences among respondents (for example, the types of behaviors and issues they happen to focus), the threat to reliability required the creation of additional measures of both independence and impact. I constructed additional measures for both specific and general independence and impact that required high levels (70 percent) of respondent agreement. The merging of independence and impact thus yielded 4 separate measures of activism, two general and two specific. One general and one specific measure treat respondent variation as idiosyncratic while one general and one specific require a much higher threshold of agreement among respondents to improve reliability.

I compared these four measures to existing measures of the same courts. None of the measures were correlated with existing measures of activism and their corresponding rank ordering of state supreme courts. These results suggest either my measures of activism are unreliable or they remain too broad to capture the narrower focus of past studies to a single issue and/or behaviors by these courts. My measures cover a range of both issue areas and tools used by courts and thus may not be comparable to existing measures. In addition, the time lapse between the construction of my measures and those of existing measures is nearly two decades. Courts may have become more of less independent or influential during this time period undermining the comparative value of these studies to my work. While these are the only existing measures available for

comparison, the failure of any of my measures to correlate with any existing measures does undermine their validity.

With this caution in mind, hypothesis testing on the suggested correlates of activism did reveal some interesting findings with respect to structural and political/descriptive variables. Based on results when the more reliable specific and general measures were employed, I find the presence of an intermediate court of appeals is correlated modestly and statistically significantly to general activism while courts from mid-western states are perceived to be less specifically activist.

The failure of most structural and political/descriptive variables to predict either specific of general activism may result from the presence of poor hypotheses rather than the measures themselves. Scholars assessing these correlates have come up with conflicting results depending on the measure employed. The lack of consensus has presumably contributed to the more critical focus needed to examine variables on the independent side of the equation. In addition, since existing measures of activism focus exclusively on the independence of courts in their actions rather than how successful they are in making or influencing policy (impact), I conducted the same testing but on specific and general independence exclusively.

General independence, in fact, is correlated with all structural variables as well as a few descriptive/political variables. The presence of an intermediate court of appeals, an election system, and a longer constitution are all associated with greater independence among state supreme courts. Additionally, these courts tend to be western and have a higher percentage of their population belonging to unions as an indicator of liberalism. Particularly with respect to selection systems, elected judges are hypothesized to be less

active than their appointed and retained cohorts. The electoral ramifications of activism should decrease such tendencies. I find the opposite. Given the increasing focus on judicial campaign spending and its impact, future scholarship should look more carefully at selection systems and their effect on independence. Results from such studies may speak directly to proposed court curbing reforms at the state level.

Lessons Drawn: A Way Forward

In contrast to general independence, specific independence is not correlated with any structural or political/descriptive variable. These findings suggest that future studies of activism could focus on general independence and/or activism exclusively rather than summarizing specific instances of activism as I have. For example, while a I find a majority of respondents in states name an area in which a court is active and influential, a majority of respondents only agree on a few of these issues. The impact of courts in this regard appears to vary slightly, offering little interpretive value. Yet, every recognized indicator of specific activism is based on the court's actions in these few specific policy areas in which they are regarded as influential. How influential courts are compared with other courts, however, is not addressed directly by my survey. This is because areas of influence are flagged by respondents from areas of activity. Of those issues of activity, respondents can identify a few issues the court was more influential. The degree of influence in these issue areas may vary greatly but I cannot know how much or how little using my survey. These sorts of issues need to be examined more closely before a summary measure is adopted.

In addition, general indicators of independence and impact need to be elaborated. For example, when I first designed the survey, I had presumed that policy preference

seeking, lack of conflict avoidance, and lack of deference would be positively related. In fact, most respondents agree their court follows its own preferences but also defers to the legislature. A majority of respondents also disagree their court avoids conflict with the legislature but a majority of these respondents report their court as deferential. I would suggest focusing on this sort of disjuncture and constructing follow-up questions which help explain these seeming inconsistencies. For example, perhaps deference to the legislature is exclusive to statutory cases and some distinction might be made between legislative preferences and legislative intent.

Some specific independence and impact questions also might be made into general questions. For example, instead of focusing on areas of most influence to ask questions regarding innovation or implementation, these questions could be made more general. Respondents could be asked to think in general whether the legislature or governor tried to modify or avoid the court's decision. They could be asked to cite examples. Innovation could be defined more carefully as well, in which respondents are asked whether their court made decisions to act before the legislature in policy areas important in their state. They could also be asked to cite examples to support their position.

Even if question construction and elaboration occurs, however, the multi-informant survey approach remains a problematic instrument given low and varied response rates across elite groups and states. Surveys are particularly vulnerable by mail and may not be taken as seriously as interviews using either open or close-ended formulae. On the other hand, face to face interviews (even of many fewer respondents) may yield the more serious engagement required of such a complex concept like

activism. As such, variation in the number of respondents by state would be diminished as a threat to validity.

As an alternative, non-informant based measures using published sources (newspaper, law review articles, etc.) to identify issue areas of activism across an open-ended issue frame could be adopted. Variation in number of articles and number of issues reported could be used as a summary measure of activism. This measure could be enhanced using content analysis and research on specific cases mentioned could be used to delve more deeply into the court's contributions to and engagement in policy in the state. The downside of such an approach is it relies on coverage of the court's activity by a varying number of journalistic and academic resources across states. Courts in more rural and less populated states may be covered significantly less given the small number of resources available to cover them. If they do receive any coverage one might presume the court's actions were particularly salient. In contrast, courts from larger more urban states may be covered more regularly but coverage might include more 'routine' court action.

To address potential threats to validity, the approach might be used in combination with an informant-based measure. For example, in states where resources are lacking, interviews of elites could serve as a proxy for coverage to assess activity and influence by these courts. Surveys and interviews of a few elites could also be used to delineate the routine from the salient issue areas in states where courts are covered more regularly. A smaller number of respondents could be interviewed regarding these specific areas to determine whether their court acted independently and/or had an impact. Many fewer respondents could be used without threatening validity.

Conclusion

As noted earlier, a primary goal of studies of court activism is to determine the factors and contingent circumstances that generally promote and deter judicial activism. The emphasis is on identifying activist courts in order to examine system level traits and conditions that contribute to the level of observed activism. The ability of the extant research to address this important goal has been undermined by the lack of a comprehensive approach to measuring activism. This failure of comprehensiveness arises in two ways, a focus on one or a few of the policy tools available to courts and a focus on a narrow range of substantive policy areas. Case level data forces these sorts of thin operationalizations, so this approach cannot be relied upon exclusively to provide the comprehensive and consistent assessment needed across courts.

My multi-informant approach is a direct attempt to ameliorate the problems created by case level data approaches. This approach has its own set of problems but could be enhanced. For example, by reconstructing general independence and impact questions as well as including non-informant based measures (accompanied by qualitative interviews to assess specific activism more directly) validity could be increased. My approach and my proposed modifications underline a quandary that plagues literature on judicial policymaking and activism that scholars have not adequately addressed: should activism be measured by focusing on specific actions taken by courts in highly salient issues areas or as general policy activity by a court across issues? If activist courts are independent and influential in their policy environments (as I define activism) then can and should scholars focus on those few issue areas in which

courts have been engaged (such as gay rights, abortion, school finance, right to die, tort reform, etc.) or on general patterns and trends by courts across policy?

To frame this quandary more succinctly, I briefly address state supreme court decisions affirming gay marriage. This issue has received considerable attention in recent years and has contributed to a highly charged political atmosphere. While several state legislatures, governors, and/or citizenry have acted on the issue, only 4 supreme courts in Connecticut, Iowa, Massachusetts, and New Jersey have legalized gay marriage in their states. The actions of these courts can surely be considered activist; they have inserted themselves directly into a highly charged and contentious policy. Do their actions make them activist courts or simply activist in gay rights? Have they engaged in other contentious issues, which may have the cumulative effect of leading observers to conclude they are activist courts? Here a non-informant based approach could be used to examine the types of issues covered by journalists and scholars of these courts to determine what if any other issue areas they are also active.

In terms of my measures of specific and general independence, only the New Jersey Supreme Court ranks highly on general independence while the other 3 rank toward the bottom; all of these courts, except Iowa, however, rank highly on my measure of specific independence. These findings appear to confirm that specific and general activism are separate phenomenon and that 3 of these courts are specifically activist in more issue areas than gay rights.

Even so, general activism by courts should not be excluded from any approach claimed to be comprehensive. Whether courts in general do not avoid conflict with their legislature and/or follow their policy preferences should be considered as part of an

overall view of activism. Moreover, the correlates of activism vary in their relationship depending on whether general or specific activism is being treated as the dependent variable. Improving both types of measures should have even greater implications with respect to institutional design and maintenance. As such, I argue both specific and general activism should be included in any measure of activism but treated as separate measures of activism.

To these points I would reiterate the need to focus on judicial independence over impact. Whether courts are successful in having their decisions carried out is certainly important but is not directly related to whether they engaged in public policy in the first place. Implementation is certainly an important aspect of policymaking, but including it as a necessary condition of activism may be too hard a requirement for any institution to pass. By focusing exclusively on independence, the suggestions I make to refine my approach could be adopted more easily. At a later date, impact could be assessed at least in terms of specific activism to further enhance our understanding of courts as policy players in their political environment.

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Appendix A. Respondent Identification, Selection, and Contact Protocol

Respondent Identification and Selection Protocol by Group

Academics

Full and part-time faculty at all law schools in the state were included if they taught classes related to state constitutional law, appellate law, and/or criminal and civil procedure.

Full and part-time faculty of political science departments (government and politics) were included if their teaching and/or scholarship dealt with the supreme court in their state.

State Attorneys General

From each state website links provided to the state department of justice or legal unit; all attorneys general from the appellate divisions were included; if the state did not discriminate between appellate and non-appellate, all attorney generals in the state were included

Bar Officials

Head of the state bar association was included and found through the state's website

State party Leaders
Chair and Vice Chair of both the state Democratic and Republican Parties gathered from respective websites and included.

Journalists

All newspapers in the state directories search for political unit, and in particular, court beat reporters. As a small group n each state, it was possible to examine story content to confirm these individuals wrote about the state high court.

Judiciary Committee

All members included from both houses (if applicable) and found through the legislative website for the state.

Legislative Leaders

Found through legislative website and include majority and minority leaders of both chambers

Private Lawyers

Through Martindale (http://www.martindale.com/law-firm/law.htm), I searched under "appellate practice" by state. Those lawyers with a state appellate practice were included.

Respondent Contact Protocol

Each respondent was sent a packet and had a unique identification:
State Postal Code Group ID Numbered Alphabetically.

For example:

Private Lawyer from Alaska with a last name "Adams," followed by private lawyer from Alaska "Baker" would be assigned:

AKLAW1 (Adams)
AKLAW2 (Baker)

Group Codes:

ACD: Academics
AG: Attorney General
BAR: Bar officials
JOUR: Journalist
JUD: Judiciary Committee
LEG: Legislative Leaders
PTY: Party Leaders

Appendix B. Code Book

Data fields:

ID1: Database key variable.

Personal Data:

- ID
- STATE
- Title
- Full Name
- Address1
- Address2
- Address3
- Address4
- City
- Field10: mailing State
- Zip
- E-mail
- 2add1
- 2add2
- City2
- state2
- Zip2
- sortby1: a truncated Zip Code used for bulk mail sorting
- sortby2: a truncated Zip+4 extension used for bulk mail sorting
- Status: Active = 1, Responded = 2, Refused = 3

Response Variables:

Closely: How closely would you say that you follow the decisions of the State Court?

1- **very closely**
2- **somewhat closely**
3- **modestly**
4- **very little AND not at all**

Please check **only** those issue areas in which you believe the «SupremeCtName» has played an **active** role.
1 = checked
0 = not checked

Education
FreePres: Freedom of the Press
ReligEst: Religious Establishment
Abortion
RightDie: Right to Die
Sentenc: Criminal Sentencing
Ag: Ag. & Agrarian Interests
Welfare
Custody: Child Adoption & Custody
Divorce

DomViol: Domestic Violence
Juvy: Juvenile Justice
Paternit: Paternity Rights
Business: Business Regulation
Enviro: Environmental Issues
Property: Property Rights
Speech: Freedom of Speech
DeathPen: Death Penalty
ReligFre: Religious Freedom
Gay: Gay Rights

Seizure: Search and Seizure
Corrupt: Government Corruption
Insuranc: Insurance
Torts
Prisons
Habeas: Habeas Corpus
Obscene: Obscenity
AffirmAc: Affirmative Action
Tax: Taxation
Gambling
Racial: Racial Discrimination
Contract: Contracts

Other:

Below are a series of follow-up questions regarding the issues on which you rated the court as having played the <u>most, second most, and third most influential role.</u>

For the Most Important Role Issue from Page 2-3:

<u>(1 = yes 0 = no)</u>

- **Import1**: Would you consider this to be an important policy issue in the state?
- **BeforCt1**: Was this an issue the legislature had addressed before the court became involved?
- **LegYear1**: Has the legislature addressed it in the last year?
- **MajLeg1**: In your judgment, was the court's decision(s) consistent with the preferences of a majority of the legislature?
- **GovPref1**: In your judgment, was the court's decision(s) consistent with the preferences of the governor?

<u>(1= yes 0- no; n/a = 9):</u>

- **Modify1**: If the decision(s) was in conflict with the preferences of the legislature and/or governor, did the legislature or governor attempt to modify the decision (for example, by rewriting a statute)?
- **Avoid1**: If the decision(s) was in conflict with the preferences of the legislature and/or governor, did they attempt to avoid or delay implementation?

For the following variables, the definitions are the same as for <varname>1, above.

- Import2
- BeforCt2
- LegYear2
- MajLeg2
- GovPref2
- Modify2
- Avoid2
- Import3
- BeforCt3
- LegYear3
- MajLeg3
- GovPref3
- Modify3
- Avoid3

The following items ask you to agree or disagree with statements about the state Supreme Court. The focus is not on a specific decision of the court but on your perceptions of the court in general.
1 = strongly agree
2 = agree
3 = disagree
4 = strongly disagree
9 = Don't Know

- **PolicyRol**: The state Supreme Court plays an active policy role in the state.
- **Increase:** The state Supreme Court's policy influence has increased substantially over the last decade.
- **Potentil:** Legislative and executive officials take into account the potential reaction of the state Supreme Court when they create public policy.
- **Harmony:** The state Supreme Court generally tries to avoid political conflict with the state legislature and/or executive branch.
- **PolPref:** The state Supreme Court's decisions are influenced by the political preferences of its members.
- **TrendSet:** The state Supreme Court is a trend-setter among other state supreme courts, creating precedents that are borrowed by other courts in similar cases.
- **LegLimit:** The power of the state Supreme Court to decide controversial cases involving public policy should be limited by the legislature.
- **Scholars**: The members of the State Supreme Court are respected for their legal abilities and scholarship.
- **GoodFth**: The justices of the state Supreme Court make a good faith effort to follow the intent of the legislature in interpreting statutes.
- **Unconst**: The power of the state Supreme Court to declare statutes to be unconstitutional should be eliminated.
- **Rewrite**: The state constitution should be rewritten to reduce the powers of the court.

Ideology scores (0-100):

Ideol_S: State Legislature Score
Ideol_G: Current Governor Score
Ideol_L: Current Court Score

Ideol_Y: Respondent's own score

Appendix C. Survey Blueprint

Survey Blueprint for All U.S. States

ID# _____

Survey: The Role of the _____Supreme Court

The questions in this survey are designed to assess your perceptions of the role that the _____ State Supreme Court has played in the political system of _____. The focus of the study will be on the recent past, the period from 1998 to the present.

How closely would you say that you follow the decisions of the _____ State Supreme Court?

___ very closely
___ somewhat closely
___ modestly
___ very little
___ not at all

Following is a list of issues that the **state of _____** may have confronted since 1998. Please check **only** those issue areas in which you believe the **_____ State Supreme Court** has played an **active** role.

____	education	____	freedom of speech
____	freedom of the press	____	death penalty
____	religious establishment	____	religious freedom
____	abortion rights	____	gay rights
____	right to die	____	search and seizure
____	criminal sentencing	____	government corruption
____	agriculture & agrarian interests	____	insurance
____	welfare policy	____	torts
____	child adoption & custody	____	prisons
____	divorce	____	habeas corpus
____	domestic violence	____	obscenity
____	juvenile justice	____	affirmative action
____	paternity rights	____	taxation
____	business regulation	____	gambling
____	environment	____	racial discrimination
____	property rights	____	contracts

In the space provided below, please indicate any issue areas on which you believe the _____ State Supreme Court has played a role that are omitted from the preceding list:

Thinking about the issues on which the _____ **Supreme Court** has been active since 1998, indicate the issues in which the court has exerted the **(1) *most,* (2) *second most and,* (3) *third most influence* since 1998.** (If the space provided below is not sufficient, please write on the back of this page.)

(1) Describe the issue on which the _____ Supreme Court has played its ***most influential role*** and *if possible*, the case or cases in which the court acted. (If you cannot recall the case name(s) describe the case.)

(2) Describe the issue on which the _____Supreme Court has played the ***second most influential role*** and *if possible*, the case or cases in which the court acted. (If you cannot recall the case name(s) describe the case.)

(3) Describe the issue on which the _____ Supreme Court has played the ***third most influential role*** and *if possible*, the case or cases in which the court acted. (If you cannot recall the case name(s) describe the case.)

Below are a series of follow-up questions regarding the issues on which you rated the court as having played the **most**, **second most**, and **third most influential role**.

	MOST INFLUENCE	2ND MOST INFLUENCE	3RD MOST INFLUENCE
Would you consider this to be an important policy issue in your state?	Yes ____ No ____	Yes ____ No ____	Yes ____ No ____
Was this an issue that the legislature had addressed before the court became involved?	Yes ____ No ____	Yes ____ No ____	Yes ____ No ____
Has the legislature addressed it in the last year?	Yes ____ No ____	Yes ____ No ____	Yes ____ No ____
In your judgment, was the court's decision(s) consistent with the preferences of a majority of the legislature?	Yes ____ No ____	Yes ____ No ____	Yes ____ No ____
In your judgment, was the court's decision(s) consistent with the preferences of the governor?	Yes ____ No ____	Yes ____ No ____	Yes ____ No ____
If the court's decision(s) *was in conflict* with the preferences of the legislature and/or governor, did the legislature or governor attempt to modify the decision of the court (for example, by rewriting a statute)?	Yes ____ No ____ N/A ____	Yes ____ No ____ N/A ____	Yes ____ No ____ N/A ____
If the court's decision(s) *was in conflict* with the preferences of	Yes ____ No ____	Yes ____ No ____	Yes ____ No ____

the legislature and/or governor, did they attempt to avoid or delay implementation?	N/A ____	N/A ____	N/A ____

The following items ask you to **agree or disagree** with statements about the _____ Supreme Court. The focus is **not** on a specific decision of the court but on **your perceptions of the court in <u>general</u>**.

	STRONGLY AGREE	AGREE	DISAGREE	STRONGLY DISAGREE	DON'T KNOW
The _____ Supreme Court plays an important policy role in the state of Georgia.					
The _____Supreme Court's policy influence in Georgia has increased substantially over the last decade.					
Legislative and executive officials take into account the *potential* reaction of the _____ State Supreme Court when they create public policy.					
The _____ Supreme Court generally tries to avoid political conflict with the state legislature and/or executive branch.					
The ____ State Supreme Court's decisions are influenced by the political preferences of its members.					
The _____ State Supreme Court is a *trend-setter* among other state supreme courts, creating precedents that are borrowed by other courts in similar cases.					
The power of the _____ Supreme Court to decide controversial cases involving public policy should be limited by the legislature.					
The members of the _____					

Supreme Court are respected for their legal abilities and scholarship.					
The justices of the _____ Supreme Court make a good faith effort to follow the intent of the legislature in interpreting statutes.					
The power of the _____State Supreme Court to declare statutes to be unconstitutional should be eliminated.					
The state constitution should be rewritten to reduce the powers of the court.					

The continuum below ranges from **extremely liberal (far left)** to **extremely conservative (far right).** Only considering the political context in Georgia, place the **_____ State Supreme Court as (S)**, the **governor as (G)** and the **legislature as (L)** on the continuum below. (If the court, legislature and/or governor is perfectly balanced between liberal and conservative or is entirely moderate, it should be placed directly in the **middle**.

MODERATE

EXTREMELY LIBERAL — EXTREMELY CONSERVATIVE

I----------I----------I

Using the same scale, place **yourself (Y)**.

MODERATE

EXTREMELY LIBERAL — EXTREMELY CONSERVATIVE

I----------I----------I

Do you usually think of yourself as close to any particular political party?
If so, which party is that? _____

Have you ever been party to a case before the Georgia State Supreme Court in which your *personal* (as opposed to your professional) interests were at stake? If so, please explain the circumstances and whether the court sided in your favor.

Thank you again for taking the time to fill out this survey.

Appendix D. Modification and Avoidance Explored

Most Influential Areas of State Supreme Courts by Modification by Executive and/or Legislative Officials 1998-2002

Issue Area	Modified Frequency	Modified Percent	Modified Cum. Percent
Education	63	45.65	45.65
Elections	17	12.32	57.97
Torts	10	7.25	65.22
Environment	6	4.35	69.57
Crim Sent	5	3.62	73.19
Death Penalty	5	3.62	76.81
Taxation	5	3.62	80.43
Abortion	3	2.17	82.61
Gay Rights	3	2.17	84.78
SOP	3	2.17	86.96
Search & Seizure	2	1.45	88.41
Gambling	2	1.45	89.86
Gov't Oversight	2	1.45	91.30
Crim Pro	2	1.45	92.75
Free press	1	0.72	93.48
Ag Interests	1	0.72	94.2
Child Adopt/Cust	1	0.72	94.93
Insurance	1	0.72	95.65
Professional Cond	1	0.72	96.38
Civil Pro	1	0.72	97.10
Labor/Emp	1	0.72	97.83
Land Use/Zone	1	0.72	98.55
Stat Int./Con	1	0.72	99.28
Nat Amer Sov	1	0.72	100.00
Total	**138**	**100.00**	

Second Most Influential Areas of State Supreme Courts by Modification by Executive and/or Legislative Officials 1998-2002

Issue Area	Modified Frequency	Modified Percent	Modified Cum. Percent
Torts	27	33.75	33.75
Education	7	8.75	42.50
Elections	6	7.50	50.00
Insurance	5	6.25	56.25
Criminal Sentencing	3	3.75	60.00
Death Penalty	3	3.75	63.75
Gay Rights	3	3.75	67.50
Taxation	3	3.75	71.25
Abortion	2	2.50	73.75
Juvenile Justice	2	2.50	76.25
Business Regulation	2	2.50	78.75
Criminal Procedure	2	2.50	81.25
Civil Rights	2	2.50	83.75
SOP	2	2.50	86.25
State Con Law	2	2.50	88.75
Environment	1	1.25	90.00
Property Rights	1	1.25	91.25
Government Corrupt	1	1.25	92.50
Gambling	1	1.25	93.75
Contracts	1	1.25	95.00
Government Oversight	1	1.25	96.25
Professional Conduct	1	1.25	97.50
Labor & Employment	1	1.25	98.75
Land Use/Zoning	1	1.25	100.00
Total	**80**	**100**	

Third Most Influential Areas of State Supreme Courts by Modification by Executive and/or Legislative Officials 1998-2002

Issue Area	Modified Frequency	Modified Percent	Modified Cum. Percent
Torts	11	18.33	18.33
Education	5	8.33	26.67
Insurance	5	8.33	35.00
Criminal Procedure	5	8.33	43.33
Criminal Sentencing	3	5.00	48.33
Child Adopt/Custody	3	5.00	53.33

Prop Rights	3	5.00	58.33
Death Penalty	3	5.00	63.33
Abortion	2	3.33	66.67
Welfare	2	3.33	70.00
Business Regulation	2	3.33	73.33
Gambling	2	3.33	76.67
Contracts	2	3.33	80.00
Government Oversight	2	3.33	83.33
Religious Establishment	1	1.67	85.00
Paternity Rights	1	1.67	86.67
Environment	1	1.67	88.33
Free Speech	1	1.67	90.00
Prisons	1	1.67	91.67
Obscenity	1	1.67	93.33
Taxation	1	1.67	95.00
Elections	1	1.67	96.67
Professional Conduct	1	1.67	98.33
State Con Law	1	1.67	100.00
Total	**60**	**100**	

Most Influential Areas of State Supreme Courts by Avoidance of Executive and/or Legislative Officials 1998-2002

Issue Area	Avoided Frequency	Avoided Percent	Avoided Cum. Percent
Education	60	68.97	68.97
Elections	9	10.34	79.31
Taxation	3	3.45	82.76
Environment	2	2.33	85.06
Gay Rights	2	2.33	87.36
SOP	2	2.33	89.66
Criminal Sentencing	1	1.15	90.80
Agricultural Interests	1	1.15	91.95
Death Penalty	1	1.15	93.10
Torts	1	1.15	94.25
Gambling	1	1.15	95.40
Government Oversight	1	1.15	96.55
Professional Conduct	1	1.15	97.70
Land Use/Zone	1	1.15	98.85
Nat Amer Sov.	1	1.15	100
Total	**87**	**100**	

Second Most Influential Areas of State Supreme Courts by Avoidance of Executive and/or Legislative Officials 1998-2002

Issue Area	Avoided Frequency	Avoided Percent	Avoided Cum. Percent
Education	5	16.13	16.13
Taxation	5	16.13	32.26
Elections	5	16.13	48.39
Torts	4	12.90	61.29
Death Penalty	2	6.45	67.74
Civil Rights	2	6.45	74.19
SOP	2	6.45	80.65
Free Press	1	3.23	83.87
Business Regulation	1	3.23	87.10
Gay Rights	1	3.23	90.32
Insurance	1	3.23	93.55
Government Oversight	1	3.23	96.77
State Con Law	1	3.23	100.00
Total	**31**	**100**	

Third Most Influential Areas of State Supreme Courts by Avoidance of Executive and/or Legislative Officials 1998-2002

Issue Area	Avoided Frequency	Avoided Percent	Avoided Cum. Percent
Education	2	12.50	12.50
Business Regulation	2	12.50	25.00
Insurance	2	12.50	37.50
Torts	2	12.50	50.00
Gambling	2	12.50	62.50
Environment	1	6.25	68.75
Government Corruption	1	6.25	75.00
Prisons	1	6.25	81.25
Contracts	1	6.25	87.50
Government Oversight	1	6.25	93.75
Criminal Procedure	1	6.25	100.00
Total	**16**	**100**	