

Chapter One

The Judiciary in a System of Checks and Balances

Over one hundred and fifty years ago Alexis de Tocqueville commented that, “Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.”¹ Tocqueville’s astute observation could not be truer today, especially with respect to courts in the American states. The expansion of rights in state constitutions and devolution of federal authority to state governments has placed American state courts in center stage of the public policymaking arena.

A growing number of legal disputes are being addressed in state supreme courts, with these courts adjudicating an inexhaustible array of novel issues. While it is common to think of our Congress, president, state legislature or governor as sources of the policies that affect our daily lives, it is clear that the final word on many issues of public policy is in the hands of each state’s highest court. In 1996 for example, state supreme courts decided an average of eleven constitutional challenges to state laws and invalidated an average of two laws in each state. These judicial actors provide an alternative vehicle for making public policy in the American states and a mechanism to protect individual rights and liberties beyond the protection afforded by the United States Constitution. Increasingly judges on these state courts of last resort are called upon to determine the constitutional fate of state legislation across a range of policy. As a result, many policies governing the daily lives of citizens are resolved by the votes of state supreme court justices; these actors often become the final arbiters of state public policy.

United States Supreme Court Justice Brennan once observed, “[o]ur states are not provinces of an all powerful central government. They are political units with hard-core constitutional status and with plenary governmental

responsibility for much that goes on within their borders. . . . [we] should remind ourselves that it is state court decisions which finally determine the overwhelmingly aggregate of all legal controversies in this nation” (Brennan 1996, 225). More recently, a prominent scholar of American state courts commented, “[w]ith the power to resolve the vast proportion of the nation’s legal disputes, and with recent shifts in federal-state relations, the ability of state courts to affect the distribution of wealth and power in the United States is at a zenith” (Hall 1999, 115). Another judicial scholar similarly observed, “[w]ith the heavy measure of appellate judicial policy-making taking place in the states, combined with the swing toward decentralization within the American federal system, a whole new (or actually, renewed) chapter in the study of American judiciary is opening up for scholar and practitioner alike” (Stumpf 1998, 376).

The presidential election of 2000 provides a very recent example of the awesome power of state supreme courts and the expansion of their role in the policy process. This close election summoned the Florida Supreme Court into the controversy; the process asked the Florida Supreme Court to interpret Florida’s election laws. In their decision, the Florida Supreme Court extended the deadline for ballot recounts that were underway in some Florida counties. This ruling was contrary to the preferences of presidential candidate Governor George W. Bush; yet in sync with presidential candidate Vice President Al Gore.

Attorneys representing George W. Bush argued the Florida Supreme Court decision violated the United States Constitution and federal law. On national television, Bush implied that the members of the Florida Supreme Court acted like legislators and complained that the state court had usurped legislative authority from the state legislative and executive branch. On the other side of the ideological spectrum, Gore and his team of attorneys, claimed victory and argued that the role of the Florida Supreme Court is to interpret the laws. If policy is made as a result of judicial statutory interpretation, Gore and his associates insisted that citizens must abide by that policy.²

From the above discussion, it is hard to deny the growing importance of state supreme court justices in the policy arena, particularly the role of these actors in adjudicating constitutional cases. Yet, some of the most basic information about state supreme court justices remains unknown. The expanding breadth and importance of state supreme court involvement in public policy and, in particular, judicial review contributes to the centrality of state supreme court decisions in American politics. Questions concerning state supreme court justices as policymakers, the conditions under which these judges exercise judicial review, and the interplay among state supreme court justices, legislatures, and governors are long overdue for scholarly inquiry. A pertinent question, for example, is why some state supreme court justices give greater

deference to the legislated will, while others seem to expand their authority by seeking opportunities to invalidate state laws.

The goal of this book is to begin to fill a gap in our knowledge about the policymaking role of state supreme court justices and shed light on whether or not justices on these courts have unchecked powers in the agenda-setting stage and the decision-on-the-merits stage of judicial review. Along the way, I hope to advance a more general theory about judicial interactions with other governmental actors. From a broader perspective, the relationship among the three branches of state government is assessed through a systematic, comparative examination of how separation-of-powers and state constitutional designs might constrain or facilitate judicial review.

Examination of the exercise of judicial review by state supreme court justices can tell us whether these judges are responsive to the legislature and governor directly. Assessing the degree of judicial independence from other branches of government also indicates whether or not judges are accountable to the public, albeit indirectly. The extent to which other branches of government affect judicial decisions, and differentially across areas of law, is at the core of debates about judicial independence and judicial accountability. Responsiveness thus raises serious questions about whether the judiciary should be insulated from political pressures. Thus, this study informs debates about judicial accountability, motivations of judicial behavior, and the nature of state supreme court justices as makers of public policy.

More specifically, this book addresses the following questions: (1) how other branches of government influence judicial review; (2) why the judiciary is expected to pay attention to legislative and gubernatorial preferences; (3) under what conditions state legislatures and governors influence state supreme court justices when they decide constitutional challenges to state legislation; and (4) whether or not legislative-judicial relations vary across areas of law, permitting legislatures and governors to impose greater constraints on judges in some areas of law more than others? Over four hundred docketed challenges to campaign and election laws, workers' compensation laws, unemployment compensation laws, and welfare laws during the 1970–1993 time period are examined. Additionally, explanations accounting for variation in twenty-three hundred votes to invalidate or uphold statutes in four policy areas are provided. Attention is focused on four different areas of law known to summon distinct actors to the policy arena and cultivate different political relationships in this process.

The primary argument forwarded in this book is that the presence of challenges to state legislation on state supreme court dockets and judges' votes to invalidate legislation varies across areas of law because the stakes in the game differ, depending on the policy. Stated differently, the extent to which state legislatures and governors influence judicial review depends upon

the saliency of the policy area. The relationship between the area of law and the pursuit of political ambitions by the legislature and governor is found to be critical. A fundamental point is that state supreme court justices are most likely to serve as legitimizing agents of the legislature and governor when the issue is of critical import to the legislature and governor or when institutional rules and political environment tie judges' fortunes to other branches of government.

A natural starting point for an examination of state supreme court policymaking begins with the origin of judicial review and the debates surrounding this important policymaking function. In the section that follows, some of the main points of contention about the proper role of the judiciary and its use of judicial review are discussed, with an emphasis on the United States Supreme Court. This summary provides a framework from which we can examine this behavior in state supreme courts.

COURTS AS POLICYMAKERS

The United States Supreme Court assumed a monitoring role over governmental actions in 1803 when the Court found section 13 of the Judiciary Act of 1789 in violation of the U.S. Constitution (*Marbury v. Madison*) ICR. 137 (1803). The doctrine of judicial review, formulated in the *Marbury* decision, gave the judiciary, in this case the United States Supreme Court, the power to invalidate laws that conflict with the principles of the Constitution. Technically, judicial review authorizes courts to constitutionally review the actions of other branches, and assess whether or not such actions, legislation for example, violate state constitutions or the federal Constitution. This notion of judicial supremacy affords each judge, especially those serving on high courts, awesome policymaking powers.

Quite simply, judicial review is viewed as a tool for judges to check governmental actions on constitutional grounds. Judicial review also affords judges the opportunity to unmake public policy. In *Mitchell v. Steffen* 504 N.W. 2d 198 (1993), the Supreme Court of Minnesota declared unconstitutional a Minnesota statute that imposed durational residency requirements on recipients of general assistance work readiness benefits. Here the state supreme court superceded the legislative will to restrict and reduce welfare spending in Minnesota.

Judicial review also gives judges the opportunity to reinforce the status quo (or current policy) and influence the direction of future policy. For example, in *Jones v. Milwaukee County* 485 N.W. 2d 21 (1992) the Wisconsin Supreme Court held that sixty-day waiting period requirements for welfare assistance were constitutional under the equal protection clause of the United

States and Wisconsin Constitutions. This judicial review case not only validated (or legitimized) residency requirements in other Wisconsin counties, but the court's decision also led the way for additional residency restrictions on welfare in other states.

These examples demonstrate that fundamentally, state judicial review decisions affect the lives of the citizenry, influence the nature of existing public policy, and shape the course of future public policy. Additionally, the outcomes in judicial review cases can hinder or advance the budgetary capacity of state governments. Lastly, judicial review decisions can impede or facilitate the political ambitions of governmental actors.

Critical to a discussion about judicial review is the premise that judicial review permits nonelected branches of government to frustrate or replace the majority will. However, scholars also have argued that the system of checks and balances contributes to the Court's ability to play a unique role as protector of minority and individual rights through its power of judicial review (see, e.g., Dye and Zeigler 1972). In this way, the authority and unimpeded ability of courts to monitor governmental actions can protect individuals against a tyranny of majority and impede constitutional violations of rights and freedoms. Quite simply, judicial review affords judges a tool that allows them to protect individuals from arbitrary governmental action. According to one legal scholar, such judicial supremacy ensures "that, at the end of the day, judges free of congressional and executive control will be in a position to determine whether the assertion of power against the citizen is consistent with law (including the Constitution)" (Bator 1990, 267).

The foci of this book are the conditions under which judges engage in judicial review and the conditions under which judges are most and least likely to invalidate laws. When do judges, for example, act as if they are free from legislative and executive control? These simple questions lie at the heart of fundamental debates that have ensued about the role of the judiciary in a democracy, and in particular, the degree to which courts have invalidated statutes. For example, Robert Dahl (1957) argued that United States Supreme Court Justices rarely challenge federal laws because "the frequency and nature of appointments to the United States Supreme Court prohibits it from playing this role" (1989, 598). Besides the appointment process, Dahl argued that the importance of an issue to the current lawmaking majority affected the willingness of Congress to react to the United States Supreme Court via statutory or constitutional amendment. As a result, the importance of the issue shapes the interplay between the United States Supreme Court and Congress.

Richard Funston (1975) also argued that the United States Supreme Court rarely invalidated statutes, because the recruitment process placed judges on the bench whose preferences were consonant with the president and the

median members of Congress. Consistent with Robert Dahl and Richard Funston, John Gates (1987) demonstrated that the United States Supreme Court is more likely to overturn state statutes when the majority on the Court differed from the party in control of state government at the time the law was enacted.

Overall, these scholars have argued that the United States Supreme Court behaves in a countermajoritarian fashion only when the preferences of the Supreme Court and the other branches of government conflict. They believed that the recruitment process guaranteed that the Supreme Court would legitimate the preferences of the current lawmaking majority.³

While debates over the exercise of judicial review continue, scholars have noted that the nation's highest court seems to have shifted some important decision making to American state courts (see e.g. Hall 1999; Brace, Hall, Langer 2001). Other scholars have long-documented the important and rising role of state supreme courts as makers of public policy via the power of judicial review (Sheldon 1987; Emmert 1992).

STATE SUPREME COURT JUDICIAL REVIEW

In the past few years alone, the United States Supreme Court has greatly circumscribed Congress' ability to make federal laws binding on the American states, directly shaping the nature of state politics. For example, in a series of decisions since 1996, the Supreme Court has expanded states' rights and limited federal power over the states in several important policy areas, such as the regulation of business, the right to sue, the regulation of campaign contributions and election systems, and civil rights issues.⁴ Recently, one legal scholar observed that the decisions by the United States Supreme Court in 1999, "have extended the immunity of states beyond a mere limit on federal judicial power into a natural and indigenous right of sovereignty with an uncertain scope" (James 1999, 10).

This shift of decision making to the American states focuses attention on judicial review by state supreme courts. In many ways judicial review by state supreme courts is a continuation of the debate about democratic theory and accountability that has ensued at the United States Supreme Court level. The ability of judges to frustrate the legislated will of majorities and challenge statutes on constitutional grounds, however, takes on new dimensions when examined in state supreme courts. Consequently, scholars can systematically test hypotheses about the policymaking role of judges and the relationship between judges and other branches of government across a host of institutional settings and degrees of accountability. Such inquires cannot be done at the national level simply because variation in important rules, constitutional

designs, and settings is either rare or nonexistent. One of the advantages of my test of the separation-of-powers model to assess the interplay among the judiciary, legislature, and executive branch, is that in the American states there are stronger reasons for policy retaliation from state government, especially in judicial review cases, and there are reasons for judges to worry about electoral retaliation from state government. Hence while the separation-of-powers models: (1) cannot be applied to interactions between Congress and the United States Supreme Court in *judicial review cases* (i.e., overriding a constitutional amendment requires consideration of state legislatures as well); (2) cannot assume *policy as well as electoral motivations* of judges when tested on interactions between Congress and the United States Supreme Court; and (3) has not been tested across varying institutional rules, in the American states these limitations do not exist.

The exercise of judicial review, viewed by some as a threat to democratic government, might be encouraged by the constitutional designs in some states. For example, like members of the United States Supreme Court, some state supreme court justices are more insulated from the political pressures of other governmental branches. Conversely, constitutional designs, institutional rules, and the nature of political systems in the American states can mitigate the dangers of countermajoritarian behavior. The practice of constitutional amendment passage by state legislatures for example is fundamentally different from Congress. Unlike constitutional decisions made by the United States Supreme Court, state supreme court constitutional decisions are relatively easy to override via constitutional amendment. The average amendment rate in the American states is 1.23 amendments per year compared to only .13 per year for the U.S. Constitution (Lutz 1994, 367). Indeed eight states averaged two or more constitutional amendments per year. Moreover, state legislatures utilize the amendment procedure routinely; ninety-one percent of amendments in the American states during 1970 to 1979 were initiated by the legislature (Lutz 1994, 360; see also Hammons 1999). Depending on institutional rules, context, and political settings, state supreme court justices might act as faithful agents of the state legislature and governor. Judges on these courts might be less likely to challenge the will of legislative majorities, when confronted with politically threatening situations that increase fears of policy or electoral retaliation from the legislature and governor. In these instances, one might say a “majoritarian difficulty” becomes a potential concern for democratic theory because these judges, fearful of retaliation from other branches of government, might ignore constitutional grievances or legal harms committed against minorities in an effort to keep in sync with the ruling elite.

From this complex political milieu in the American states, appropriate questions for judicial scholars include, to whom are judges beholden, to what extent, and under what conditions? Systematic examination of the extent to

which state supreme court justices make public policy through the exercise of judicial review, and under what conditions, is thus critical and timely. This book offers the first assessment of these questions pertaining to whether or not state supreme court justices are beholden to state legislatures and governors across four areas of law. Of course, if judicial review in state supreme courts does not vary across states, over time, and across areas of law, the benefits of a systematic, comparative study of this nature are few. A brief look at the use of judicial review by state supreme courts is offered in the next section to emphasize the variation that exists.

EVOLUTION OF JUDICIAL REVIEW IN STATE SUPREME COURTS

One of the most important ways state supreme courts make public policy is through their power of judicial review. While other ways exist for state supreme courts to make public policy (see, e.g., Canon 1983), reviewing and invalidating state laws is perhaps the most intrusive and salient mechanism by which judges can translate their preferences into public policy. Many view invalidating laws as heightened judicial activism.

Charles Sheldon noted that, “even before Chief Justice Marshall’s reaffirmation of this power for the nation’s high court in *Marbury v. Madison* (1803), a number of state courts had negated acts of their legislature” (1987, 71). In his examination of the evolution of judicial review from 1890 to 1986 in state supreme courts and, in particular, Washington’s state supreme court, Sheldon also found that state high courts began exercising an increasingly active role in the policymaking process starting in the late 1970s.

Sheldon also noted that a different function of judicial review had emerged over time. In his study, for example, he observed that judicial review by state supreme courts had typically been used as a defensive mechanism to protect courts from legislative or gubernatorial encroachments of power.⁵ This protection mechanism was considered to be a fundamental tenet in the American judicial system, providing a safety device to dissuade elected persons from temptations to abuse power. For example, when state legislatures engaged in activities that were constitutionally delegated to the executive branch, judicial review allowed judges to stop abuses of this kind.

Similarly judicial review allowed judges to prevent the executive or legislative branches from taking power away from the courts. Here the courts invalidated laws that determined appellate procedures or dictated sentencing guidelines, which were viewed as typical judicial responsibilities. Moreover, judicial review could be used to secure basic rights, protect citizens from governmental abuses of power, and ensure each branch of government some

authority in the process (*Federalist* No. 51 and No. 78). Over time, however, Sheldon found that judicial review increasingly had become a mechanism for judges to enhance and expand their authority rather than simply protect the judicial institution and the citizenry from abuses by the other governmental branches (1987, 69).

State judicial review has oscillated between periods of judicial restraint and judicial activism. The 1970s marked a period of new judicial activism and state supreme court justices adopted a role that was exceedingly active in the 1990s (see e.g., Baum 1997). During these periods, judicial review by state supreme courts also had become both a defensive and offensive mechanism. The application of judicial review beyond protection from encroachments of power is further evidence that state supreme court justices over time have assumed a more authoritative role in making policy. Through this power, courts have maintained a veto in a system of checks and balances and broadened their authority in the policymaking process. Other judicial scholars also have noted increasing trends of judicial activism by state high courts (see, e.g., Sheldon 1987; Tarr and Porter 1988; Glick 1991). Some have referred to the expanding role of state supreme courts as new judicial federalism, noting that a growing reliance on state constitutions and an expansion of these documents has contributed to a resurgence of state supreme court power (Tarr 1998).

The degree to which courts invoke their policymaking powers and the frequency with which state supreme court justices vote to invalidate state laws varies across states, over time, and across issue areas. For example, Sheldon (1987) found that an average of one in twenty-five cases resolved by the Washington Supreme Court in the late 1970s and 1980s involved a constitutional challenge to legislation. Of these cases, the Washington Supreme Court invalidated one out of every four statutes (Sheldon 1987, 89), with the number of unanimous decisions varying over this time period. Susan Fino (1987) found that state courts of last resort during the 1975 and 1984 period were more likely to invalidate statutes; on average, state supreme courts upheld only 22.7 percent of equal protection challenges (Fino 1987, 62). This marked a significant rise in the number of laws invalidated on equal protection grounds by state supreme court judges.

In a more comprehensive study, Craig F. Emmert found that state supreme courts decided over three thousand judicial review cases between 1981 and 1985 (Emmert 1992, 549). Of these cases, the state statutes that were challenged before the courts were declared unconstitutional almost 20 percent of the time (Emmert 1992, 551) and the likelihood of a court overturning a state law varied, depending on the policy issue.

Emmert also observed tremendous variation across states in the propensity of these courts to review and invalidate state statutes. For example, Emmert

found that the Georgia Supreme Court decided the constitutionality of statutes in 165 judicial review cases during the 1981 through 1985 period, while Hawaii's high court heard only twenty-one judicial review cases during this same period (cited in Glick 1991, 100). More recently, Russell S. Harrison and G. Alan Tarr (1996) noted that twenty-two state supreme courts reviewed constitutional challenges to school finance systems during the 1973 through 1993 period. Of these states, twelve courts rejected the constitutional challenge and ten courts found the systems violated constitutional mandates. Since 1989 alone, four state supreme courts invalidated school-finance programs (Harrison and Tarr 1996, 179).

Turning to the cases examined in this book, during the 1970–1993 time period, state supreme court justices decided the constitutional fate of over four-hundred pieces of state legislation in just four areas of law (i.e., campaign and election law, workers' compensation law, unemployment compensation law, and welfare law). In some instances, the outcome of the court decision was to uphold the state law; yet, in other states, the court invalidated similar legislation. The individual votes of judges in these cases also reveal interesting patterns. For example, some state supreme court justices voted to uphold the legislation being challenged, while other judges on the same court voted to overturn the legislation. Moreover, some state supreme court justices wished to avoid certain policy issues, while tackling issues willingly in other areas of law.

Clearly there are differences in the occurrence of these cases on state supreme court dockets, the propensity of courts to overturn legislation, and the likelihood of judges voting to invalidate laws. These variations in judicial votes raise a host of important, yet unanswered, questions about judicial review in state supreme courts. This book sheds light on why challenges to state legislation occur on some state supreme court dockets, but not others. This book also addresses why some judges assert an active role in the policymaking arena, striking down state laws, and other judges exercise much more restraint.

By looking at the timing of docketed judicial review cases and patterns of votes by individual judges deciding state constitutional cases across four areas of law, this book identifies how the interplay among judicial, legislative, and gubernatorial ambition affect voting behavior and subsequently public policy. From this examination, a broader understanding of the motivations of judicial behavior and policymaking under various constitutional designs and institutional settings is possible. Moreover, a better understanding of how judges react to the legislature and governor as well as whether judges seek to legitimize the actions of other governmental branches can be gained. The next section lays the foundation for the proposition that legislative and gubernatorial interests can and do shape judicial review.

ADVERSARIAL NATURE OF JUDICIAL REVIEW: ITS IMPLICATIONS ON VOTING

While the scope of some or even many court reversals may be quite narrow, invalidations of state law are nonetheless instances when state supreme courts supersede legislatures with their own policy preferences. In these cases, state supreme court justices usurp policymaking authority from other branches of government, and become the final arbiter of policy, at least in the short run. Essentially, they are exercising their prerogative in the system of checks and balances created by the separation of powers common in American government and state constitutions.

Clearly this is an adversarial process likely to evoke conflict and retaliation from the other actors involved in the policymaking game. Chief Justice, Shirley S. Abrahamson, of the Wisconsin Supreme Court observed “[l]egislators do not universally welcome judges in the legislative process. Some legislators express resentment toward judges’ incursions into their domain . . .” (1996, 82). Consider also the remark by state Supreme Court Chief Justice, Judith S. Kaye on the New York Court of Appeals, “No one can question the legislature’s authority to correct or redirect a state court’s interpretation of a statute. Indeed, on our court we especially strive for consensus in statutory interpretation cases as a matter of policy, knowing that the legislature always can, and will, step in if it feels we have gotten it wrong” (Kaye, 1995, 23). Judges are even more concerned about legislative retaliation in constitutional cases.

Observations made by other state supreme court justices and legislators also demonstrate the contentious, tit-for-tat nature of judicial review. Superior Court Chief Justice Joseph Nadeau of New Hampshire was quoted as saying, “. . . [w]hen removal is threatened for the kind of conduct that is *expected* of a judge, judicial independence is compromised. When there is legislative retaliation for decisions, independence is compromised” (Wise, 1999, 22). Recognizing the reality of a system of checks and balances, Chief Justice Ellen Ash Peters’ of Connecticut’s high court stated, “courts are not ivory towers, sheltered from the vicissitudes of everyday life and controversy. . . [state court judges work] in an adversarial context, facing a relentless tide of new cases” (cited in Kaye 1995, 4). Moreover, Daniel Blue, speaker of the North Carolina House once noted that, “[t]he political environment in which we operate can be divisive, both within and between the branches of government. . . . Many judges are elected or at least retained at the polls and therefore are not removed from the political processes faced by those of us in representative government” (Blue 1991, 34).

Combined these comments indicate that the relationships among state governmental actors is one characterized by political pressure, political

games, and contentious behavior. These comments also imply that state supreme court justices, legislators, and governors pursue political ambitions (e.g., electoral or policy goals) that might be hindered by other governmental actors.

The system of checks and balances ties political ambitions pursued by judges to the ambitions of the other government actors. While each branch of government works against the other, they also must work together. Paul Brace and Barbara Hinkley (1992) in their book on the presidency remind us of the unfriendly relationship between Congress and the president. They observe, “. . . a political cartoonist showed an elegant president poised on a tennis court, racket in hand. Across the net was a heavysset, unshaven opponent, Congress, clutching a bowling ball” (Brace and Hinkley 1992, 72). Given the anecdotes shared by state supreme court justices, legislators, and scholars, it seems that a similar cartoon including the judiciary is appropriate. In states where the judiciary is insulated from political pressures, such a cartoon would depict the legislatures and governors holding the racket on the tennis court with state supreme courts clutching a bowling ball. However, in states where the judiciary is directly tied to the other branches of government, the cartoon would depict state supreme courts holding the racket and the legislative and executive branches with the bowling ball.

Judges, legislators, and governors have incentives to pay attention to each other's actions. They also have reasons to engage in tactics that keep the other in line, or at least out of harms way. The interplay between judges and the other branches of government can be detrimental to the careers of the actors involved in the game of judicial review. The stakes also are much higher in these constitutional cases where legislators watch more closely the actions of judges as these judges decide the ultimate fate of legislation.

PAST APPROACHES TO STUDYING STATE SUPREME COURTS AS POLICYMAKERS

Despite the importance of judicial review as a policymaking tool and the political nature and significance of this activity, the causes and consequences of judicial review have received scant attention in the American states. Moreover, extant literature on state supreme courts as policymakers, while informative, has been primarily historical and descriptive. Most research employs cross-sectional approaches that study one or several issues at a single point in time or longitudinal designs of single states or a single issue (see e.g., Sheldon 1987, Tarr and Porter 1988, Glick 1991). Alan G. Tarr and Mary Cornelia Aldis Porter's (1988) study provides one of the best comparative accounts of state supreme courts in their policymaking roles, adopting primarily a case-

study approach that emphasizes the important intricacies of the fifty-two state courts of last resort (Texas and Oklahoma each have two courts of last resort, separating civil from criminal cases). Other scholars, Sheldon for example, have employed a longitudinal approach, historically documenting differences in one state over time.

Some scholars also have substantially advanced our understanding of judicial review by state supreme courts through systematical examination across states and time (see e.g., Emmert 1992); however, a common theme of previous studies is that courts are isolated from other branches of government. Stated differently, explicit tests of how and under what conditions legislatures and governors influence judicial review have not been conducted. Another shared characteristic of past approaches to state supreme court judicial review, and policymaking more generally, is a concentration on aggregate court behavior instead of individual voting patterns. Typically, these studies examine the number of cases on court dockets or the number of statutes invalidated by the court.

If we want to develop an overarching theory of judicial behavior and understand the policy role of judges, we ought to move beyond single institutions, single issues, and high levels of aggregation. Systematic examination of individual voting behavior, across policy issues, and within the context of systems of checks and balances is an important consideration that deserves attention in the judicial literature.

By ignoring how, why, and under what conditions, legislatures and governors shape the individual votes of justices in judicial review cases, we are missing important information about the policymaking process in the American states that affords each political actor some say in the process. Differences in policies across states, for example, could be due to variation in the degree to which judges are an integral part of the process. Moreover, these differences might be related to the extent to which judges are insulated from legislative and gubernatorial threats and pressures that target individual judges. The role state supreme court justices play as policymakers is thus contingent upon the interplay between courts and other branches of government.

Equally important is how differences across areas of law shape judicial review. For example, when judicial behavior varies across policy areas it suggests that certain issues are more likely to be decided by the legislature and governor, while other issues tend ultimately to be decided by the courts. Not only does this speak to the distribution of power in the policymaking arena, but also it indicates which conflicts might be advantaged or disadvantaged by court intervention. Some areas of law, for example, might encourage justices to invoke their gatekeeping powers more than other areas. In these instances, litigants who turn to the courts for resolution of their constitutional grievances might be shut out from the policymaking process.

Given that policies summon different actors to the political arena and encourage distinct interactions in and out of the policymaking process, access to courts as alternative vehicles for public policy can vary across areas of law. These differences have important ramifications for policymaking when we consider that judges might be more constrained when deciding the constitutionality of issues “near-and-dear” to elected elite. This might be especially true in states where judicial ambitions can be impeded by other branches of government. Thus, evaluation of how judicial review varies across policy saliency can help us better understand why some judges are more likely to address trivial issues while other judges are willing to address more controversial issues.

STRATEGIC VERSUS SINCERE BEHAVIOR

One of the pivotal debates in the literature on U.S. courts is the extent to which judges can and do act strategically vis-à-vis other actors. For example, scholars have posited that judicial ideology explains voting behavior in cases that pose constitutional challenges to legislation. Stated more simply, a liberal judge will vote in a liberal direction and a conservative judge will vote in a conservative direction (Segal and Spaeth 1993). This is referred to as the “Sincere Voting Hypothesis.” Alternatively, scholars have argued that a judge votes a particular way because external actors (e.g., legislative branch) influenced her decision. This implies that a liberal judge is encouraged to vote in a conservative direction when an external actor is conservative, for example, because the external actor can penalize the judge for objectionable decisions (e.g., Murphy 1964; Gely and Spiller 1990; Epstein and Knight 1998). This is called the “Strategic Voting Hypothesis.”

Examination of individual voting patterns across areas of law thus advances our understanding of why some policies encourage justices to alter their behavior, while other issues permit justices to vote in accordance with their own ideology. In this way, the book informs the ongoing discussion about strategic or sincere voting by members of the judiciary. In short, the benefits from an empirical, comparative examination over time and across areas of law, using both aggregate and individual level analyses, are obvious and numerous.

The American states provide an excellent opportunity to assess whether justices make strategic calculations when engaging in judicial review across four areas of law. First, states provide analytical leverage to test hypotheses about strategic behavior across a host of alternative institutional rules, designs, and competing political actors (see e.g., Brace and Hall 1995). States also provide the variation necessary to examine the forces which influence

why these cases appear on some state supreme court dockets but not others. Moreover, states have many legislative and executive mechanisms for dealing with judicial decisions that declare a statute unconstitutional (Abrahamson and Hughes 1991). The myriad tools available to legislatures and governors intensify interbranch conflict and presumably increase incentives for strategic behavior and tit-for-tat games between state supreme court justices and other governmental actors.

To address questions about judicial review and strategic behavior, I begin with the premise that state supreme court justices are rational actors pursuing political ambitions, such as policy and electoral goals (see e.g., Baum, 1997, Brace, Hall, Langer 1999). I assess whether these pursuits affect state supreme court justices' votes on the constitutional fate of state law. I extend a separation-of-powers conceptualization of the judiciary to consider dual goals that state supreme court justices pursue.

An important feature of state political systems is that state supreme court justices operate under a variety of electoral and institutional constraints. In the American states some justices are fearful they will be held accountable to the legislature and governor for their votes, because these branches have the power to supersede the preferences of an individual judge, for example, overriding that judge's vote with a constitutional amendment. Additionally, in some states, the legislature and governor have the authority to retain judges. In these states, a judge's electoral fate is directly in the hands of the legislature and governor.

This book thus considers both policy and electoral fears that might shape the relationship among state supreme courts, the legislature, and the governor. Which, as a result, influence strategic behavior. I argue that when institutional rules, such as method of retention, and political conditions, such as ease in amendment passage, facilitate retaliation, justices are expected to engage in strategic behavior. These rules and contexts can make it easier for other branches of government to remove justices from the bench or reverse a judge's vote through constitutional amendment. The central issue underlying this conceptualization of judicial review is whether or not justices are induced to vote strategically vis-à-vis other political institutions.

A COMPARATIVE APPROACH TO JUDICIAL AUTONOMY AND STATE JUDICIAL REVIEW

Scholarly inquiry on state supreme court judicial review fails to advance a theory that accounts for variation of judicial review across areas of law within the context of a policymaking game. Moreover, with few exceptions, scholars have not empirically evaluated how two stages of judicial review

(i.e., agenda-setting stages and decision-on-the-merits) are related. By utilizing state supreme courts as the laboratories to examine alternative explanations of judicial review, this book tests important hypotheses that have not undergone systematic evaluation.

Fundamentally, judges do not operate in a vacuum. Rather state supreme court justices are expected to alter their votes in response to the anticipated reactions from the legislature and governor. Thus, it is critical to assess how state supreme court judges interact with other governmental actors, and why judicial review might vary across areas of law, particularly due to state legislative and gubernatorial interests.

The approach utilized thus complements both attitudinal and separation of powers explanations of judicial behavior. I conceptualize state supreme court justices as if they are inside or outside of ideological and institutional/contextual safety zones. Safety zones are defined by the degree to which preference distributions, institutional rules, and political settings tie the fate of judges' policy or electoral ambitions to other branches of government. Stated differently, the safety zone depicts the extent to which judges anticipate retribution for their voting behavior from the state legislature and governor. Strategic behavior manifests when judges alter their behavior in response to legislative and gubernatorial electoral or policy threats. For example, judges insulated from other branches of government were found to vote in accordance with their sincere policy preferences, while justices whose careers and policy ambitions were tied to the legislature and governor were found to engage in strategic behavior.

Next, I test whether or not we can generalize these types of behavior on the gamut of issues on which state supreme court justices might exercise their power of judicial review. The following four policy areas chosen are reasoned to be of varying degrees of saliency to elected elite: (1) election and campaign legislation, (2) workers' compensation legislation, (3) unemployment compensation legislation, and (4) welfare legislation. Particular attention is given to legislative and gubernatorial influence over judges to assess how constitutional designs and systems of checks and balances affect the nature of policymaking by state supreme court justices and the interplay among the three branches of government.

The crux of the argument is that state supreme court justices can be held accountable to the legislature and governor for their votes. The degree of accountability varies across policy issues. Strategic behavior thus is contingent not only upon institutional rules and designs, but also on legislative and gubernatorial ambitions, which are conditional on the area of law. As this book will show, this has important implications for policymaking in the American states; the role state supreme court justices play in this process, and the notion of strategic behavior.

This institutional approach to study judicial behavior permits an evaluation of the degree to which judges are responsive to other branches of American state government, and under what conditions. According to Douglass C. North (1990), institutions should be modeled as constraints on action, evaluating how they affect the interaction among actors and the choices available to actors. Similarly, Barry Weingast contends that studies considering the strategic interplay among the three branches of government, “show how decisions made by actors in one branch systematically depend on the sequence of interaction; and the preferences, actions, and potential actions of actors in the other branches. The potential result is a genuine theory of interaction of the major institutions of American national politics, a mature theory of the separation of powers.” (Weingast 1996, 174).

Thus, it is important to utilize an approach that encompasses some of the important features of a separation-of-powers argument, accounts for the diversity across the American states, and builds upon the premise that state supreme court justices, legislators, and governors pursue similar ambitions.

ORGANIZATION OF THE STUDY

I have argued that judicial votes to review and invalidate state laws are influenced, in part, by the anticipated reaction from the legislature and governor. I have laid the foundation for the proposition that judicial review is shaped by the pursuit of political ambitions, the institutional rules and arrangements governing judicial behavior in the state, and the nature of the policy adjudicated before the court. In the next chapter, four influential conceptualizations of judicial behavior are discussed, offering divergent perspectives about judicial motivations and judicial review.

Chapter three takes a closer look at electoral and policy motivations of judges and offers several hypotheses to be tested. A theory of state supreme court responsiveness to the other branches of government is developed further.

In chapter four, how I conceptualize policy saliency is discussed. Results for models of judicial review across four areas of law are presented in chapter five and the implications of strategic and sincere behavior on judicial review are discussed in the concluding chapter.

A more complete understanding of state supreme courts in the policymaking arena is gained when we consider attitudinal and separation-of-powers explanations of judicial review, across alternative institutional rules, political settings, and competing political actors in the American states.