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Why do lawmakers seek to sanction state courts?

Jonathan S. Hack

Department of Political Science, Lehigh University, Bethlehem, PA, USA

ABSTRACT
Yearly, across state legislatures, lawmakers introduce court-curbing bills designed to curtail judicial power by limiting court independence and constraining court decision-making. Capitalising on the variation in institutional and electoral forces across states, I explore whether, how, and under what conditions, the design of state courts – interacting with ideological forces – shape lawmakers' introduction of bills that aim to limit judicial power. Building on previous theories and empirical approaches, I find that inter-institutional dynamics and political discord explain attempts to limit judicial power. Surprisingly, the rules governing how state judges retain their seats on the bench have little effect in explaining the incidence of legislative efforts to sanction the courts.

KEYWORDS Legislative studies; inter-institutional interactions; court sanctioning; judicial retention

Yearly, across state legislatures, lawmakers introduce bills designed to curtail judicial power and limit court independence. In Alaska legislation was introduced, expanding grounds for judicial impeachment, 'A supreme court justice is subject to impeachment by the legislature for malfeasance or misfeasance in the performance of official duties. **Malfeasance includes exercising legislative power.**' (HB 179, emphasis in original). In 2018 alone, lawmakers in eighteen states considered nearly 100 bills that would have diminished the role or independence of their state courts (The Brennan Center, 2018).

Hamilton, in *Federalist 78*, argues that providing judges with lifetime tenure 'is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws' (Rossiter & Kesler, 2009, p. 45). By implication, lifetime tenure ensures judicial independence by insulating judges from political pressures. Unlike Article III judges, who, once appointed, enjoy lifetime tenue, state judges are generally subject to retention procedures. Hamilton's assertion suggests intriguing possibilities for the interactions between state courts and legislatures: If

CONTACT Jonathan S. Hack joh520@lehigh.edu
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lifetime tenure promotes an 'independent spirit' among judges, then retention procedures should offer varying degrees of judicial independence, thereby influencing legislators' attempt to constrain court decision-making.

This paper asks, why do lawmakers introduce bills aiming to limit judicial power? To answer this, I build on previous theories and empirical approaches and construct a novel dataset containing state legislative bills intended to curtail judicial power. My results suggest that inter-institutional dynamics and political discord explain attempts to limit judicial power. Surprisingly, the rules governing state judicial retention do little to explain legislative efforts to sanction courts. These findings have implications for the strength of state judicial independence.

Forces shaping judicial-legislative political interactions

When a court issues a ruling, it imposes its preferences on public policy, influencing whether other political actors can pursue or achieve their goals (Langer, 2002, p. 34). A ruling aligning with legislators' preferences may elicit praise, or at the very least allow business to continue without a response. Rulings at odds with legislative preferences may provoke legislative attempts to limit judicial behaviour, hoping to deter future adverse rulings in a given policy area (Clark, 2009; Hansford & Damore, 2000).[1]

Court-curbing legislation arises when lawmakers perceive judicial behaviour as 'threatening' (Langer, 2002, p. 35). Sanctioning efforts typically attempt – either statutorily or constitutionally – to diminish judicial independence, making it harder for courts to check the other branches of government. Legislative sanctions – or their threat – are direct attempts to intimidate judges and keep them from challenging legislators' preferences.

Some argue that sanctions are hollow threats since any given attempt is likely to fail (Segal, 1997). Yet, lawmakers do propose bills targeting the Supreme Court (Mark & Zilis, 2018), suggesting a belief that court curbing legislation is effective. Sanctions allow lawmakers to publicise their discontentment and signal displeasure, which may deter judges from challenging legislative actions in the future: '*Political attacks on the Court serve as signals of a lack of specific support for the Court, which in turn indicates that further judicial recalcitrance will not be tolerated and that the Court will not be able to effectively set policy*' (Clark, 2009, p. 974, emphasis in original). Simply put, lawmakers can realise their goals even if their bills fail.

From a judicial perspective, court-curbing legislation can be cause for concern. Attempts to place limits on judicial freedom and independence signals a lack of public support and undermine a court's capacity to check governmental actions (Bartels & Johnston, 2013; Gibson & Nelson, 2014). Lacking formal enforcement mechanisms, judges rely on the willingness of others to accept and implement their decisions (Rosenberg, 2008).

Legislative attacks 'impair the judiciary's ability to resolve contentious political and legal disputes' (Moyer & Key, 2018, p. 1), and 'consequently, a Court that strays too far from the broad boundaries imposed by public mood risks having its decisions rejected' (McGuire & Stimson, 2004, p. 1019). Courts must consider whether sanctions represent inconsequential posturing by lawmakers, or if they are 'shots across the bow,' warning that a court has overstepped its bounds.

Previous literature has leveraged variation in judicial selection and retention, asking whether judges' pathways to the bench shape court decision-making (Brace & Boyea, 2008; Brace & Hall, 1995; Caldarone et al., 2009; Hall, 1992; Langer, 2002; Leonard, 2014; Nelson, 2016). Such inquiries tend to focus on uncovering whether *judges* are constrained by external political forces: '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 the governor' (Langer, 2002, p. 16).

This, however, this is not a one-way street. Langer and Brace find that lawmakers assess judicial hostility or friendliness towards policy initiatives, influencing the likelihood of legislative enactment (2005). Focusing on education policy, Wilhelm (2007) finds that increased ideologically distance between courts and legislatures limits the number of bills introduced and enacted. In her influential work exploring judicial review in state high courts, Langer posits that judicial-legislative interactions can be viewed as a 'tit-for-tat game': 'Anecdotal evidence indicates that state legislatures worry about reversals and judges worry about legislative retaliation' (2002, p. 35). Overall, under certain conditions, inter-institutional interactions influence the choices political actors make (March & Olsen, 1983).

Ideological differences

Congressional scholars have shown that legislators seek to advance their reelection prospects by engaging in credit-claiming and position-taking activities (Clinton, 2006; Fiorina, 1974; Mayhew, 1974). State legislators, similarly, have an interest in taking stances that generate public records on issues of concern to their constituents. Sanctioning measures, then, are largely introduced as messaging endeavours designed to garner electoral benefits (Clark, 2009; Mark & Zilis, 2018; Mayhew, 1974).[2]

This assumption is neither controversial nor novel. Whether any specific policy is enacted is inconsequential since constituents, generally, do not hold their representatives accountable for failed policy outcomes (Fenno, 1978; Parker & Davidson, 1979).[3] So long as electoral awards stem from positions rather than downstream policy effects, lawmakers have strong incentives to lash out against the judiciary if electoral benefit can be gained. Court-curbing

bills, therefore, should be more common when lawmakers are at odds ideologically with their state court. When legislators believe that the judiciary has strayed beyond what they deem to be an acceptable range of policy decisions, I expect that they will react by introducing sanctioning measures:

> Hypothesis 1: As the ideological distance between courts and legislatures increases, lawmakers will introduce more sanctioning bills.

Directional ideological differences

Lawmakers are expected to engage in court-curbing efforts when they diverge ideologically from their judiciary and believe these efforts will garner electoral awards. However, some suggest that liberal and conservative legislatures vary in their attempts to curb judicial power (Fishkin & Pozen, 2018; Leonard, 2016; Mark & Zilis, 2018). For example, in the wake of the Iowa Supreme Court's decision legalising same-sex marriage, conservative lawmakers introduced a bill allowing the governor to select half of candidates for the judicial nomination committee and lawmakers to select the other half. Such a measure would ensure that 75 per cent of the commission would be appointed by the political party in power. No commissioners would need senate confirmation. Iowa State Senator Julian Garrett (R), upon introduction noted, 'my concern is we have had Supreme Court judges who take the Constitution and change it to the way they think it ought to be rather than the way it's written. Judges are stepping outside their bounds and acting more as legislators' (Endicott, 2019).

Since mass perceptions of courts are shaped predominantly by liberal Supreme Court decisions (Jessee & Malhotra, 2013), conservatives may be 'predisposed' to constraining what they view as liberal judicial decision-making given vestiges from the Warren Court (Lewis, 1999). Directional differences in ideology between legislatures and courts may influence the decision to introduce sanctions:

> Hypothesis 2: Lawmakers in conservative legislatures will introduce more court sanctioning bills compared to lawmakers in liberal legislatures.

Frustrating legislative preferences

Political actors want to see their preferences translated into policy-outcomes (Fenno, 1978) and actions by the other branches, specifically the courts, that prevent this often receive attention. Courts tend toward majoritarian rather than countermajoritarian behaviour (Clark, 2009; Dahl, 1957; Hall & Ura, 2015) and often help advance the agenda of governing coalitions (Gillman, 2002). However, judges are not legislators and are constrained by forces beyond their political inclinations. This can place judges – even those who

are ideologically proximate to their legislature – at odds with legislative preferences, impeding policy outcomes when exercising judicial review.[4]

Since legislators care about policy outcomes, the frequent use of judicial review may lead legislators to introduce sanctioning bills to curtail perceived judicial overreach. For example, when asked why he introduced a bill allowing the legislature to overturn court decisions by a simple-majority vote, Florida state Representative Julio Gonzalez (R) said, 'there is nothing the legislature can do in any way to push back against the court. That's not a check and a balance. That's not a dialogue. It's a monologue from the judiciary to everybody else' (Phillips, 2017). I therefore expect:

> Hypothesis 3: Lawmakers are more likely to introduce sanction bills against courts that frequently overturn state laws.

Institutional rules

The Founders understood that institutional arrangements can promote or inhibit if – and how – policies are enacted. Federal and state courts differ in how judicial candidates secure and keep their seats on the bench.[5] Federal judges enjoy lifetime tenure, constitutionally protected salaries, and other institutional mechanisms designed to insulate judicial decision-making from exogenous political forces. States, however, are free to adopt selection and retention mechanisms as they see fit.[6]

Scholars and journalists have shown that judges and legislators view the rules determining judicial retention to be important institutions structuring judicial behaviour (Hunzeker, 1990; Shugerman, 2012). Yet, the question remains: do judicial retention mechanisms play a role in structuring legislative retaliatory behaviour? Put somewhat differently, are judicial retention mechanisms a 'two-way street,' influencing not only judges', but legislators', behaviour?

Perceptions of courts are influence by retention mechanisms (Bonneau & Hall, 2009; Nelson, 2016), suggesting that these institutions have effects well-beyond judicial behaviour. Legislators are not unconstrained actors. While attitudes play a role in decision-making, contextual factors structure the range of feasible outcomes and 'any attempt to explain behaviour with reference to beliefs but not context, such as institutional settings will inevitably be incomplete' (Clayton & Gillman, 1999, p. 3). A neo-institutional framework further contends that rules and norms structure the set of outcomes (Binder, 1997, 1999; Maltzman et al., 2000). As such, legislators are limited by the rules, norms, and institutional 'tools' at their disposal.

When responding to court decisions, legislators must consider what their preferred (or at least acceptable) outcome is and what is an effective way to reach that goal. Judicial retention mechanisms may place constraints on

legislative behaviour by dictating the range of 'tools' available to influence judicial decision-making. When it comes to constraining courts, judicial retention mechanisms may contribute to a legislator's calculus, determining what is an effective way to limit judicial behaviour.

Legislators, in states with judicial retention, will introduce fewer sanctions since they have more tools at their disposal. Legislators can use other measures – failure to reappoint, assist interest group campaigns seeking to unseat judges, or incorporate unseating a judge as a component of their own reelection campaign – to limit judicial power, thus reducing the need for sanctioning measures.

In states where judges are not subject to retention, the threat of failing to retain the judges no longer exists and legislators need other ways to limit court power (Goelzhauser, 2018).[7] Legislators have fewer tools to constrain court power and must rely on ex post measures such as sanctioning bills to rein in 'out of step' courts:

> Hypothesis 4: Lawmakers will introduce more sanction bills when courts are not subject to judicial retention.

The conditional effects of institutional design

Legislatures are unlikely to threaten sanctions if their courts are ideologically proximate since lawmakers will generally agree with the rulings. Additionally, the decision to sanction a court is conditioned by whether judges are subject to retention, since this provides external actors with differing capacities to exercise oversight. These forces should also interact: Retention mechanisms should condition the introduction of sanctions even when courts and legislatures diverge ideologically.

Judges afforded uninterrupted tenure are likely to vote their sincere preferences (Brace et al., 2000; Shepherd, 2009), which may not align with legislative or public preferences. Alternatively, judges subject to retention are likely to render decisions that maximise their chances of being returned to office (Shepherd, 2009). This may mean making fewer controversial decisions, or decisions that align with legislative or public sentiment (Shugerman, 2012). Retention may also vary the extent to which courts engage in self-restraint. Given that retention mechanisms influence ideological homogeneity, it is likely that the propensity to introduce sanctions will vary as well, suggesting:

> Hypothesis 5: As ideological distance between a court and legislature increases (both institutional and directional), courts granted life (or near life) tenure will see more sanctioning measures introduced.

In the coming sections, I detail the steps used to test these hypotheses and present findings that explore these relationships.

Data and methods

To test these expectations, I use the Gavel-to-Gavel database maintained by the National Center for State Courts (NCSC) to assemble a dataset, containing all judiciary-related bills introduced across state legislatures from 2008 to 2012.[8] Monthly, the NCSC releases a list of bills introduced in state legislatures dealing with the judiciary. The NCSC provides a summary explaining the purpose of the bill and its progress through the legislative process.

My unit of analysis is judiciary-related bills introduced in state legislatures. Specifically, I explore the number (or count) of judicial sanctioning measures introduced in each state's legislature in each year. Since the NCSC does not code whether a bill sanctions the judiciary, the analysis required defining sanctions and categorising bills.

I define court-curbing measure as: *attempts by lawmakers* (either through statute or constitutional amendment) *to remove judicial autonomy and prevent courts from acting as checks on the other branches*. Using this definition, two coders hand coded a random sample of twenty bills together to establish a common and consistent coding scheme. Recognising that hand coding can be an error-prone task, I set an intercoder reliability standard of 0.9 or higher (Neuendorf, 2016, p. 145).[9] Once agreement was reached, the coders, independently of each other, coded the remaining bills in batches of 100, comparing results to verify intercoder consistency. Once completed, the intercoder reliably scores for any batch of 100 bills ranged from 0.9 to 1.0.[10] The results from this coding process informed the construction of the dependent variable.

Dependent variable

For this analysis, the dependent variable is the number of bills that sanction the judiciary introduced in each state legislature over the five years under analysis.[11] As seen in Table 1, the plurality of sanction bills (33.1 percent)

Table 1. Sanction bills by category and retention mechanisms.

	Life tenure	Nonpartisan elections	Partisan elections	Reappointment	Retention elections	Total
Selection	26	98	31	70	286	511
Other	59	47	23	61	142	332
Salary & Budget	7	57	4	37	114	219
Jurisdiction	9	52	11	35	92	199
Rule Making Authority	14	25	13	37	57	146
Structure Changes	7	9	9	14	35	74
Qualification & Terms	13	9	7	15	19	63
Total	135	297	98	269	745	1544

attempt to change selection and retention mechanisms. SCR 1007 – introduced in the Arizona state Senate in 2009 – illustrates these types of bills. Arizona follows the merit plan, where a judge is appointed by the governor, serves for two years and then is subject to retention by the voters. SCR 1007 proposes Senate confirmation in additional to gubernatorial appointment for a judge's intimal term. Should a judge secure retention, they would still, at the Senate's discretion, require confirmation.

The next largest category is 'Other,' which span a range of topics. For example, HB 3906 – introduced in the Tennessee House of Representative in 2008 – would require that all courtrooms 'have a conspicuous notice posted immediately outside the courtroom,' informing litigants that the Court of the Judiciary is able to hear complaints against judges and can impose sanctions against a judge if needed.

Independent variables

To test what motivates legislative decisions to threaten courts, I include several independent variables capturing both state-level political context and institutional design. The key independent variables in this analysis are inter-institutional and directional ideological distance between a state's legislature and high court, the number of laws held unconstitutional by a state high court, and modes of judicial retention.

I generate the ideological distance measures using Bonica's CFscores for state office holders (2013, 2014). First, I find the ideological median for both the state legislature and supreme court. To do this, I merge Bonica's (2013) individual candidate ideology scores with Klarner's (2013) state legislative election data, generating scores for nearly every member of each state legislature for each year. I obtained the median ideology for each chamber, as well as the median of the overall legislature.[12] Higher scores indicate a more ideologically liberal legislature.

Next, I generate an overall supreme court ideology measure using Bonica's CFscores for state court judges.[13] I find the ideology score for each judge and then use these individual judicial scores to find a court's median member, in each year. Higher scores indicate a more ideologically liberal court.

To construct inter-institutional ideological distance, I took the absolute distance between court ideology and legislative ideology.[14] For ease of interpretation I rescaled these measures to range from 0 to 1: Higher scores indicate a larger ideological gap between the judiciary and the legislature.

Directional ideology is simply the difference between legislative and judicial ideology, controlling for 'left-right' ideological differences between a legislature and court. Stated differently, this variable measures how conservative

or liberal a legislature is relative to its court. This variable ranges from −0.52 to 0.47, with negative numbers indicating a conservative legislature, relative to its court and positive values indicating a liberal legislature, relative to its court.

To operationalise how a court's use of judicial review shapes the introduction of sanctioning bills, I use the number of cases overturning a state law in the previous year (Hack, 2018). I assume that lawmakers introduce bills as a response to what they perceive as judicial activism and attempts to frustrate legislative goals. Court rulings that act as vehicles of change often produce heated backlash. As Klarman notes, 'judicially mandated social reform may mobilise greater resistance than change accomplished through legislatures or with the acquiescence of other democratically operated institutions' (Klarman, 2005, p. 475). Although legislators are unlikely to keep a running tally of how often their state court invalidates legislative action, they are likely to have a sense of how 'active' their court was. Lagging judicial review better captures legislative behaviour: lawmakers assess (informally) how active their court was and based on this sense engage in court-curbing behaviour. Moreover, since four states have legislatures that meet biennially (even though their supreme courts meet annually), these lawmakers are introducing sanctions retrospectively.

To test how retention mechanisms influence the introduction of court-curbing measures, I include a five-level categorical variable accounting for each mode of retention: Co-branch Reappointments, Partisan Elections, Nonpartisan Elections, Retention Elections, and Lifetime Tenure. Additionally, I explore the interaction effects between judicial-legislative ideological distance and retention mechanisms. This captures whether retention mechanisms influence the introduction of sanction bills as ideological incongruence increases.

Control variables

I also control for factors that might coincidentally drive sanctioning efforts. Using the legislature's median ideology score as a measure of institutional ideology,[15] allows for investigating the influence of legislative ideology on the propensity to sanction courts. Higher scores indicate a more ideologically liberal legislature.

My analysis also controls for differences in legislative professionalism and workload capacities. Highly professionalised legislatures tend to have legal elites who, even when they disagree with judicial decisions, maintain high levels of institutional legitimacy towards courts (Bartels et al., 2015). Professional legislators, due to their preexisting levels of institutional legitimacy and norms guiding legislative behaviour, should be less willing to introduce measures threatening judicial independence. I control for legislative

professionalism using measures developed by Bowen and Greene (2014). Their measure is particularly useful since it is updated through 2013. Further, their dataset measures each professionalism component – expenditures, compensation, and session length – individually, across the states, allowing for an analysis of both short-term and long-term changes in professionalism.

Studies looking at state-level politics generally control for the effects of state-level citizen ideology and overall state government ideology. However, correlation tests and other diagnostic results suggest a strong relation between legislative ideology and state ideology.[16] Due to possible collinearity problems, I rely on legislative ideology to proxy and control for overall state ideology.

Despite the limited time frame, this dataset offers a unique lens with which to view judicial-legislative dynamics at the state-level. By compiling different measures of state institutions, ideology, and policy into one dataset, the analysis and results illuminate the factors that motivate and condition legislative attempts to constrain judicial independence and decision-making.

Results

Between 2008 and 2012, 5,055 bills were introduced across state legislatures dealing with their judiciaries. Of those, 1,544 sought to limit court power. The total number of sanction bills introduced, by state, over the five-year period ranges from 0 (North Dakota) to 229 (Tennessee).[17] In general, the number of bills introduced designed to limit court independence is relatively low compared to the entire set of bills dealing with the judiciary. Although varying by year, approximately a quarter of the legislative workload dedicated to the judiciary in each year attempts to sanction courts.[18]

In Figure 1, institutional ideological distance is plotted over time for the three states with the highest number of sanctioning efforts (Tennessee, Oklahoma, and New Jersey) and the three states with the lowest number of sanctioning efforts (Wyoming, Delaware, North Dakota). When plotting changes in institutional ideological distance, a partial answer begins to emerge: Increased sanctioning efforts tend to correspond with increases in institutional ideological distance between the court and the legislature.

These exploratory statistics begins to contextualise the differences in the number of sanctions introduced by states. However, to formally test the hypotheses, I use random effects negative binomial regression models, which best account for the data generating process.[19] Since nonlinear coefficients cannot be directly interpreted, I present and interpret average

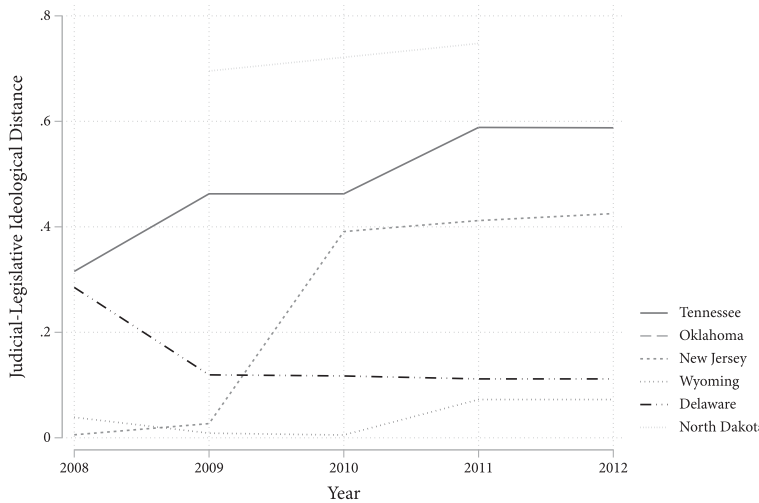

Figure 1. Overtime institutional ideological distance for select states.

marginal effects.[20] Marginal effects can be interpreted much like OLS coefficients – a one-unit change in the independent variable, yields a marginal-effects change in the dependent variable, holding all else constant.

Figure 2 presents the results from models 1 and 2, which explore the unconditional effects of the ideological distance measures and retention mechanism on the introduction of sanction bills. Model 1 shows that as inter-institutional ideological distance between a legislature and court

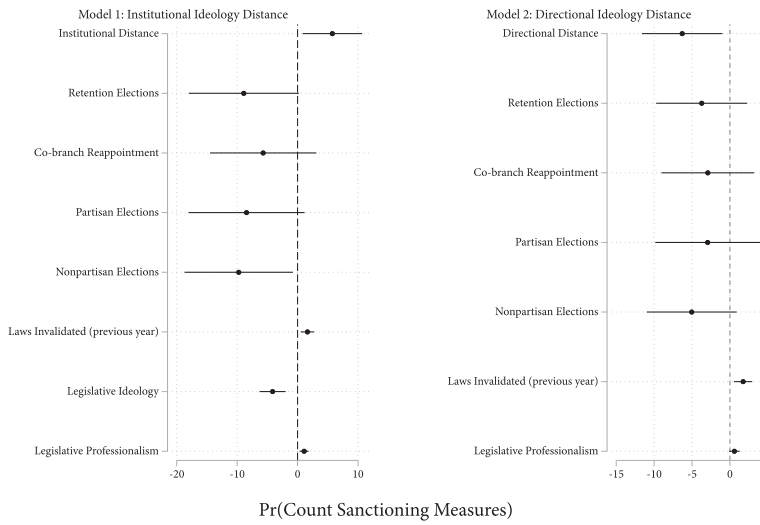

Figure 2. Average marginal effects for unconditional models.

increases so too does the predicted number of introduced sanctions, holding all else constant. Concretely, a one-unit increase in ideological distance between a court and legislature predicts 6 additional sanction measures are introduced, all else constant. Ideological distance reaches statistical significance with a *p*-value less than 0.05 (Figure 3).

Turning to model 2, the results suggest that a one-unit increase in directional distance decreases the predicted number of sanctioning bills by approximately 1.0. Put differently, as a legislature becomes more liberal relative to its court, it introduces fewer sanctioning bills. Conversely, as a legislature becomes more conservative relative to its court, it introduced more sanctioning bills. The mean for this measure is 0.01. Thus, a value of 0 approximates a situation where a court and legislature are ideologically identical. At a value of 0.47 – a liberal legislature relative to its court – a legislature is predicted to introduce approximately 4 sanction measures. At a value of −0.52 – a conservative legislature relative to its court – a legislature is predicted to introduce approximately 11 sanction measures. At a value of 0 – ideologically similar – a legislature is predicted to introduce approximately 7 sanction measures.[21]

My third hypothesis expects the number of laws invalided by a court in the previous year to increase sanctioning efforts. As shown, for each case decided by a court invalidating a state law, approximately two sanctioning measures are introduced, *ceteris paribus*. This is statistically signification with a *p*-value near zero.

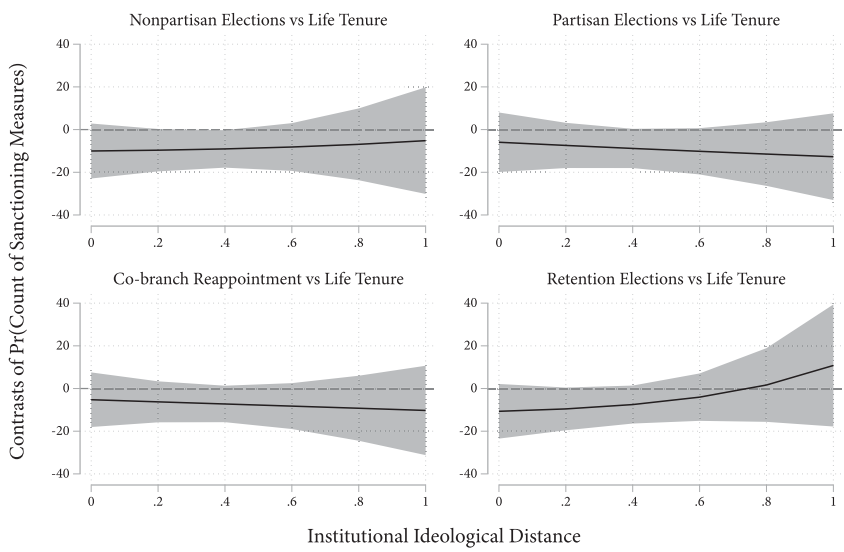

Figure 3. Contrast plot for the interaction between institutional ideological distance and retention mechanism.

I find little support for my expectation that retention mechanisms influence legislative decisions to introduce sanctioning measures. In general, states with life (or near life) tenure, see the largest predicted count of sanction bills. In other words, without a retention mechanism, legislators rely more heavily on sanction measures to constrain judicial behaviour.[22] If actually constraining courts is less important than position-taking, then the rules dictating judicial retention may not factor into a legislator's calculus to introduce sanction bills. Stated differently, if, as Segal (1997) suggests, these are hollow threats, then the range of tools available to influence judicial behaviour may be less beneficial than the credit-claiming aspect offered by introduction sanctioning bills.

Models 3 and 4 control for the interaction between the ideological distance measures and retention mechanisms. Overall, I find no moderating effects on the number of sanction bills introduced. Figures 3 and 4 present the contrast plot for these interactions.[23] Contrast tests interaction effects by computing the difference in effects among categories relative to a baseline category, in this case the baseline is life (or near life) tenure. A horizontal line at 0 is included showing null effects throughout.[24]

These findings lend mixed support for my theory and expectations. I find that inter-institutional dynamics and political discord help explain the frequency of attempts to limit judicial power. Surprisingly, the rules governing how judges remain on the bench prove inconsequential for explaining court curbing efforts.

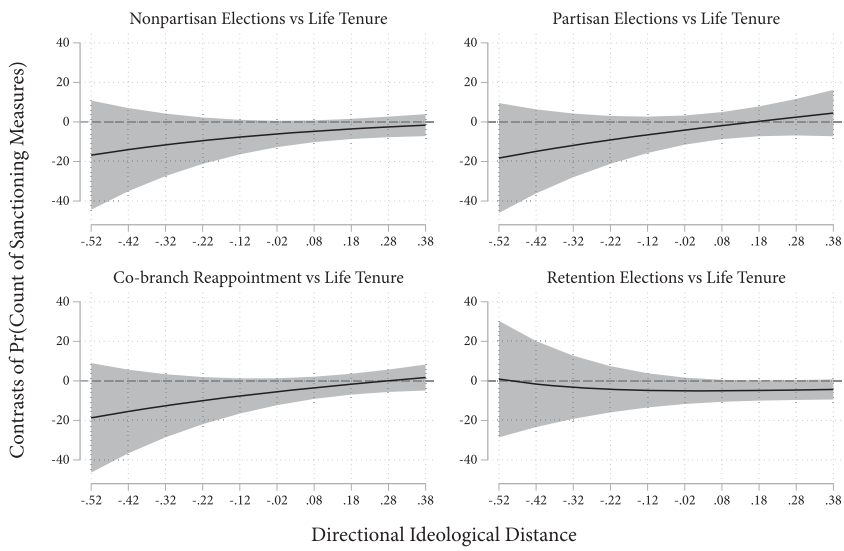

Figure 4. Contrast plot for the interaction between institutional ideological distance and retention mechanism.

Conclusions

Hamilton argues that judicial independence is best achieved through 'the permanent tenure of judicial offices' (Rossiter & Kesler, 2009, p. 45). Moving to the state level allows us to test for the impact of state-level judicial retention mechanisms to investigate court power and independence. My findings are mixed, with some corroborating expectations and others not. When ideological preferences between a court and legislature diverge, lawmakers are more likely to introduce sanctions, as a tool to limit court power. Conservative legislatures are more inclined to introduce court-curbing measures, suggesting differences in democratic norms between conservatives and liberals with regards to the importance of an independent judiciary. Additionally, repeated use of judicial review invalidating state laws provokes legislators' ire, resulting in more bills constraining judicial decision-making.

Unexpectedly, judicial retention mechanisms have a muted influence on the decision to introduce sanctioning measures. Although judges in states without retention see the largest predicted number of sanction bills, relative to other modes of retention, these findings fail to reach statistical significance. Even if retention mechanisms confer varying degrees of job security (and thus vary in the extent to which they insulate judges from external oversight), these results mirror Mark and Zilis (2018) findings about Members of Congress. State – like federal – lawmakers' political and ideological motivations are paramount in shaping their legislative agendas vis a vis the courts. Indeed, such motivations swamp any incentives to sanction courts that might arise from the institutional design of state judiciaries. Future research should investigate whether retention rules affect the likelihood that court sanctions are enacted, rather than just threatened. Moving legislation through two chambers is far more costly than dropping bills in the legislative hopper, and modes of retention may well condition both the passage and ideological tenor of sanctioning legislation.

Notes

1. Vanberg (2001) and Rosenberg (2008) show that legislators and executives evade implementing court decisions. Evasion does not explain legislative incentives to court-curb, therefore, like Whittington (2003), I do not concentrate on evasion mechanisms.
2. Research by Clark and McGuire (1996) show that constituent preferences motivate legislative responses to, and attacks on, the judiciary.
3. 'Fenno's Paradox' (see, e.g.Binder, 2004), where constituents can hate Congress, yet love their own member (Fenno, 1975) is equally applicable to state legislatures (see, e.g. Ansolabehere & Snyder Jr, 2002; Kanthak & Krause, 2012).

4. See, for example, Chief Justice Roberts in *National Federation of Independent Business v Sebelius* (567 US __ (2012)). Or Justice Gorsuch in *Bostock v. Clayton County* (590 US __ (2020)).
5. Scholars frequently use judicial 'selection' and 'retention' interchangeably, however, as the appendix shows, some states initially select their judges using one system but retain them using another. My analysis focuses on retention, rather than initial selection.
6. Retention systems are dividing into electoral and appointive systems. The former include: partisan, nonpartisan, and retention elections. The latter include: appointments that require reappointment by another branch of government or appointment with life or near-life tenure.
7. Legislators could always draw up articles of impeachment and attempt to remove judges.
8. Two sources of data constraint limit this analysis to a five-year period. First, the NCSC database begins tracking state legislation in 2008, thereby dictating the start date for this project. Second, although the NCSC database is updated frequently, this analysis ends in 2012 due to data constraint stemming from using Bonica's (2013, 2014) CFscores. The appendix details my rational for using CFscores measuring judicial and legislative ideology.
9. The intercoder reliability statistic was calculated using Cronbach's alpha.
10. Batches of 100 are an approximation. There are 5055 bills in total, thus fifty batches of 100 and one batch of fifty-five. To validate these hand coded results, a different random batch of 100 bills was used as a training set programmed into the ReadMe package for R (Hopkins et al., 2010). A table comparing hand coded results to those produced by ReadMe can be found in the appendix.
11. Four states – Montana, Nevada, North Dakota, and Texas hold biennial sessions and meet only in odd years. This results in unbalanced panel data. To avoid mischaracterisation and zero-inflations, observations for these states do not exist in even years.
12. My overall legislative ideology score takes the median member's score for a state legislature for a specific year (Krehbiel, 2010).
13. Although Windett et al.'s (2015) ideological measures are more robust, their scores end in 2010. Uncomfortable imputing ideology scores for 2011 and 2012, I relied in Bonica's measure of judicial ideology.
14. Where court ideology is measured as the median judge and legislative ideology is measured as the median member, treating bicameral legislatures as unicameral (Krehbiel, 2010).
15. My overall legislative ideology score takes the median of a state legislature for a specific year. I determined the members of the legislature serving together for each year, taking the fiftieth percentile of their ideology scores to general an overall legislative ideological measure (Krehbiel, 2010).
16. Although on different scales, the correlation between overall legislative ideology and state ideology is 0.81.
17. The appendix contains a table presenting the total number of sanction bills introduced by state for each year.
18. The appendix compares the total number of judiciary-related bills introduced to the number of sanction bills introduced.
19. Debates exist as how to best model time-series cross-sectional data. Primo et al. (2007) suggest using a pooled approach with clustered standard errors.

Gelman and Hill (2007) argue that such data should be analysed using hierarchical approaches to best model the data-generating process. My modelling strategy follows Bartels (2015). Using hierarchical models with time-series cross-sectional data solves interpretation problems frequently associated with cluster confounding and accounts for cluster-level heterogeneity.

20. Average marginal effects (AMEs) are calculated following King et al. (2000), Long and Jeremy (2014), and Hanmer and Kalkan (2013). The appendix contains a table of coefficients.
21. In the appendix, figure A.7. plots the marginal effects of directional ideology on the predicted count of sanction measures. A pairwise comparison uncovers no statistical difference in the predicted number of sanction bills between an ideological value of −0.52 and 0. The other comparisons reach statistical significance.
22. In the appendix I present a pairwise comparisons among these retention categories.
23. Given the overlap between confidence intervals a plot showing marginal effects proves visually unpleasing and difficult to interpret. A faceted contrast plot presents these findings following suggestions made by Brambor et al. (2006) (see also, Long & Jeremy, 2014).
24. A comparison of endpoints reveals no statistical difference in the introduction of sanctions at high or low ideological distance across retention mechanisms.

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Notes on contributor

Jonathan S. Hack is Visiting Assistant Professor, Department of Political Science, Lehigh University, Bethlehem, PA 18015 (joh520@lehigh.edu).

ORCID

Jonathan S. Hack http://orcid.org/0000-0003-1318-725X

Data availability statement

Data and replication materials are available at http://www.jonhack.com/data.

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