

The Consensual Effects of Seniority: An Analysis of Tenure in State Supreme Courts

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Abstract

This paper capitalizes on attention directed to consensus (Brace and Hall, 1990, 1993; Maltzman, Spriggs, and Wahlbeck, 2000; Sheldon, 1999), as well as state methods of judicial retention (Huber and Gordon, 2004; Sheldon and Maule, 1997). Within the paper, methods of judicial retention are found to affect both the tenure characteristics of judges present in state courts and the approach these judges take when making decisions. First, elective methods of judicial retention are found to strongly influence the tenure length of judges present in state high courts. Second, state supreme courts display substantial variation in terms of the frequency of majority concurrence as determined by seniority among active judges. These findings indicate that decision-making is intricately tied to choices concerning method of retention and the difficulty of remaining within state courts.

The Consensual Effects of Seniority: An Analysis of Tenure in State Supreme Courts

This paper explores consensus within state courts with an eye toward the impact of seniority. Essentially, in more senior courts, the occurrence of dissent is expected to be greater than in less senior courts. Importantly in less senior courts, the frequency of dissent is expected to decrease. For reasons specific to each state court environment, low-ranking judges are expected to fear dissent for two primary reasons. First, judges often must acclimate to their environment, learning the preferences of colleagues and how the court operates (Bowen, 1995; Hettinger, Lindquist, and Martinek, 2003; Howard, 1965; Hurwitz and Stefko, 2004; Snyder, 1958). If serving within a state court that promotes consensus, then judges may fear sanctions and avoid acts of independence. Sanctions may include fewer opinion assignments or the assignment of less desirable policy areas. Judges may also prefer inclusive majority coalitions to shield themselves from the public (Brace and Hall, 1990, 1993, 1997; Hall, 1987; Hall and Brace, 1989; Traut and Emmert, 1998). Within elective courts in particular, research speculates that consensual forms of behavior are the norm. Within state courts, judges are portrayed as strategic actors; therefore, the decision to join a majority is a strategic action intended to maintain security and not alienate voters or colleagues.

Within the federal courts, attention has been directed to the freshman effect, the period of service where less tenured judges acclimate to the court environment. The premise of this argument suggests that more junior judges are unwilling to dissent from the majority as frequently as more senior judges. In effect, a period of conformity exists following arrival to the court (Howard, 1965; Hurwitz and Stefko, 2004; Snyder, 1958). Noting the important impact of precedent and social needs of conformity, this perspective suggests that seniority has important consequences for the behavior of judges. Following a period of acclimation, judges utilize judicial power more freely and increasingly dissent. Acclimation effects are found in many areas of judicial decision-making, including general voting patterns (Hagle, 1993; Heck and Hall, 1981; Hurwitz and Stefko, 2004; Wood, Keith, Lanier, and Ogundele, 1998) and the frequency of dissent (Bowen, 1995; Bowen and Scheb, 1993; Hettinger,

Lindquist, and Martinek, 2003; Maltzman, Spriggs, and Wahlbeck, 2000). While the effect of acclimation is persuasive, the effect has been under-explored at the state level. Of primary interest within the paper is the impact of service duration on decisions to join or not join a majority decision.

To understand the characteristics of consensus in state courts, this paper directs attention to the mechanisms for the retention of state judges. After all, it is very likely that judges consider their careers when making decisions. Therefore, this paper focuses on the tenure diversity of state supreme courts, suggesting that to better understand decision-making in state supreme courts we must also understand the complexion of those present. Several studies suggest that different state selection or retention methods (appointed or elected) create different forms of judicial policy-making (Brace and Hall, 1993, 1997). Together, the influence of institutions and state environments either allow judges to act upon their sincere preferences or act strategically, promoting the will of the court or their constituents.

Speculation about the effects of judicial selection (appointment versus election) has led to a well-developed body of literature, which suggests that selection methods influence both decision-making and the types of state judges selected to serve. Research further demonstrates that state methods of judicial selection affect the complexion of state courts, affecting ideological diversity, (Boyea, Forthcoming), gender diversity (Bratton and Spill, 2002; Hurwitz and Lanier, 2003; Martin and Pyle, 2002), and racial diversity (Hurwitz and Lanier, 2003, Martin and Pyle, 2002) among state courts. Furthermore, research finds that voters within elective methods of selection are aware of candidate differences when participating in judicial elections (Bonneau and Hall, 2003; Hall and Bonneau, 2006).¹

¹ Hall and Bonneau (2006) find that voters frequently distinguish between qualified and less qualified judicial candidates. Qualified status was determined by experience as a judge in a lower state-level court. Such findings provide doubt that voters are unable to make informed decisions, as opponents of judicial elections assert (ABA, 2003; Dubois, 1980).

With the central goal of understanding the relationship between seniority characteristics of state courts and the agreements characteristics of those courts, this paper examines two unique phenomena. This first section of the paper focuses on the relationship between the characteristics of judicial office structure, including state methods of judicial retention. Competitive elections involving incumbent judges should encourage limited service tenures, as voters within these states are presented with frequent opportunities to remove judges. On the other hand, the nature of appointive and less competitive elective methods of retention should be less adversarial. While candidates frequently oppose incumbent judges within elective systems, governors or the state legislature must be dissatisfied to restrict later terms. The second and primary focus of this paper is the degree of consensus in state supreme courts and the relationship between seniority and consensus. Where courts are composed of more or less senior judges, decision-making characteristics, including the frequency and quality of dissent, are expected to be quite different. More senior courts should promote less consensual outcomes while less senior courts should promote agreement.

Policy Venue for Testing Seniority Effects

Research on state supreme courts note a substantial shift in the business of state supreme courts. While state supreme courts once disproportionately heard appeals involving property matters and debt obligation, most state high courts are now turning toward areas of public law as their primary function (Kagan, Cartwright, Friedman, and Miller, 1977; Kritzer, Brace, Hall, and Boyea, n.d.). Accordingly, this paper, noting such a shift, evaluates the sometimes controversial public law area of taxation policy. This offers several advantages compared to the preceding literature, which have focused heavily on capital appeals. Capital appeals arguably provide the most advantageous policy for finding both ideological motivation for dissent and attention to the public. Where findings involving a policy area outside of capital crimes show that decision-making is weighted by the state contextual or institutional environments, then such findings are noteworthy.

Testing for the Relationship between Consensus and Seniority

To understand the determinants of tenure and the impact of tenure this paper promotes an understanding premised on the neo-institutional perspective (Brace and Hall, 1990, 1993, 1997; Traut and Emmert, 1998). Specifically, two separate models are specified, which utilize independent variables expected to affect both the amount of seniority and judicial consensus. Together, these models bring together different features of state courts including the selection of judges and their decision-making characteristics.

Conceived as an independent two stage process, the first stage evaluates tenure characteristics of state supreme court justices. To investigate these characteristics, the mean amount of seniority by year for each state supreme court from 1995 to 1998 is employed. Appendix A lists each independent variable used as an explanation of tenure diversity.

The second stage of this investigation focuses on judicial outcomes related to consensus, directing specific attention to the impact of seniority. To understand this relationship, this investigation uses case information, related to taxation appeals, collected within the Brace-Hall State Supreme Court Data (SSCDA) Archive.² The years of this study are restricted to the years collected within the SSCDA, including the years from 1995 to 1998. These data provide a unique and important opportunity to understand both the impact of selection methods on career longevity and representation, including the representation style of more senior judges. Appendix B lists each independent variable used as an explanation of consensus.

Stage 1: Modeling the Linkage between Seniority and State Methods of Selection

As noted above, the first objective within this study is to explain the relationship between selection and duration of tenure within state supreme courts. To explore seniority within state courts, the dependent variable used is the average years of service within each state supreme court (*seniority*). The years of investigation include 1995, 1996, 1997, and 1998. The dependent variable,

² Paul Brace & Melinda Gann Hall (2000-2002). "Collaborative research on state supreme courts." National Science Foundation.

seniority, is derived using Langer's collection of state supreme court justice biographical characteristics.³

Several determinants are hypothesized to affect the conditions which promote state supreme court career longevity: (1) appointment and non-competitive retention election methods of re-selection; (2) longer term lengths; (3) fewer judicial positions; (4) greater office resources; and (5) decreased electoral competition. Conversely, where judges run within non-partisan or partisan elections, terms are shorter, more judicial opportunities exist, and state elections are highly competitive, there should be less substantial tenures for state supreme court judges. Ultimately, these explanatory factors fall within the judicial opportunity structure that exists within each state. The decision to seek or remain within office is expected to be a choice based on these characteristics of the state and office.

1) Elective Methods of Judicial Retention

State methods of re-selection provide an excellent opportunity for considering the effects of risk on judicial careers. Decisions to leave state courts after all are not always a judge's decision and should involve significant risk when running for reelection. Retention methods for state judiciaries include five general techniques: partisan elections, nonpartisan elections, appointments by the legislature, appointments by the governor, and the retention elections under the Missouri Plan. Importantly, each form of selection or retention encourages different types of candidates to consider state judicial office as a career (Sheldon and Maule, 1997). Within states with competitive election methods (partisan and nonpartisan elections), judges should experience more constant challenges to their position on a state court (Sheldon and Maule, 1997; Bonneau and Hall, 2003). These increased challenges should equate to less seniority. Competitive retention elections, therefore, are

³ Langer, Laura (2001-2006). "Multiple Actors and Competing Risks: State Supreme Court Justices and the Policymaking (Unmaking) Game of Judicial Review." National Science Foundation.

hypothesized to restrict the duration of judicial service, creating less senior courts (*elective retention method*).⁴

2) Appointments to Fill Vacancies

From a governor's perspective, the authority to fill judicial vacancies as they arise is a powerful tool to shape the judiciary. From a judge or judicial candidate's perspective, appointments to elective court systems provide a unique advantage to earn incumbency status without actually running for judge. Vacancy appointments provide judges that seek re-election with the benefit of both name recognition and incumbent notation on many state judicial ballots (Klein and Baum, 2001, Sheldon and Maule, 1997). Seniority is, therefore, hypothesized to be greater in state courts in which governors are permitted to appoint judges to fill vacancies (*vacancy appointments*).

3) Mandatory Retirement

Twenty-eight states have mandatory retirement restrictions for judges exceeding the age of seventy, seventy-two, or seventy-five years of age. Such restrictions are expected to impair the ability of judges to serve for periods comparable to their federal colleagues. Therefore, mandatory retirement requirements should decrease seniority within state courts (*retirement*).

4) Term Length

Like state methods of selection, the structure of state appellate courts should encourage or discourage judges from serving longer. Studies of state legislatures have noted similar characteristics in legislator decisions to serve longer or shorter periods (Squire and Hamm, 2005; Squire, 1988a). Judges likewise should consider the frequency of terms and the relative power they possess. Related to judicial term length, courts provide either more frequent or less frequent opportunities for people outside of the court to consider entry. While elections may be more competitive where terms are

⁴ The dichotomous independent variable, elective retention method, classifies elective methods where competition is found to exist. Therefore, states that utilize retention elections to re-select judges are classified as non-competitive and grouped with appointments by the legislature and the governor. Hall (2001a) finds compelling evidence that retention elections indeed have extremely low rates of defeats for judges seeking reelection.

longer and fewer opportunities exist to enter a court (Bonneau, 2006), term lengths vary from six to fourteen years ostensibly offering fewer opportunities for entry. Consequently, longer terms are hypothesized to increase the stability of judicial careers, creating longer careers of service (*term length*).

5) Court Size

The number of state supreme court positions varies from five to nine positions. Judges ought to respond to their pivotal position within smaller courts by appreciating the power they possess. Fewer positions within a political opportunity structure are thought to enhance the value of a particular position (Schlesinger, 1991). As a result, judges should respond to attained power within smaller courts by serving longer (*court size*).

6) Professionalization

Much like state legislatures, the perks of office within state high courts varies tremendously. State courts offer a variety of incentives for judges to both seek and retain office (Brace and Hall, 2001). Some of these incentives include the amount of assistance they receive, their salary, and the amount and type of business each court manages. Judges should respond to greater professionalization by serving for longer periods; however, fewer incentives for service should encourage shorter tenures. As a result, greater professionalization is expected to increase seniority within state courts (*professionalization*).

7) Electoral Competition

Finally, many factors impose costs on political actors seeking additional terms of office. One factor is the importance of the state environment (Bratton and Spill, 2002; Hall and Bonneau, 2006; Hurwitz and Lanier, 2003). Hence, the degree of electoral competition ought to influence how safe a judge's position within a state judiciary actually is (Sheldon and Maule, 1997). Where states are

more competitive, this paper hypothesizes that judicial seniority should decrease (*electoral competition*).⁵

Stage 2: Modeling the Linkage between Consensus and Seniority

In this section, factors contributing to agreement are considered. Above all, this section seeks to determine the relationship between consensus, as a form of decision-making, and the level of seniority among all active judges. The unit of analysis is a state supreme court tax appeal decision between the years of 1995 to 1998. The dependent variable is the event of a unanimous decision (*consensus*), considered to be the strongest form of agreement (Sheldon, 1999). Each model is additionally divided into two separate models: one for elective courts and another for appointive courts. Decisions to separate observations into groups are a common technique for social science experiments (Liao, 2004) and through dividing the models, the results should illustrate how the impact of seniority and each alternative variable affects consensus in different yet comparable court environments.⁶

Factors expected to encourage the occurrence of a unanimous agreement include 1) greater seniority among judges, 2) fewer judicial positions, 3) the presence of an intermediate appellate court, 4) discretionary opinion assignments, 5) more ideologically extreme publics, 6) greater electoral competition, 7) less case salience, and 8) fewer complex issues involved within an appeal. In addition to seniority, prior research specifies that each alternative explanation affects agreement in state courts (Brace and Hall, 1997; Hall and Brace, 1999; Traut and Emmert, 1998).

Consistent with the neo-institutional perspective of decision-making, this approach follows that no single factor explains decision-making completely. Additionally, appointed judges rather than elected judges should be freer to vote sincerely (Brace and Hall, 1997). With higher profile

⁵ The hypothesis is tested using Holbrook and Van Dunk's (1993) measure of state electoral competition.

⁶ Laio (2004) reasons that comparisons of social or political groups are acceptable as an alternative to using interaction variables, as long as group differences exist. Accordingly, each likelihood ratio test performed indicated that elective and appointive court comparisons are statistically valid.

decisions, such as the death penalty, abortion, or torts claims, elected judges uniquely control for external factors quite differently. Generally, the electoral contingencies present within elective state courts encourage judges to consider their personal vulnerability before casting a sincere vote, often encouraging larger coalitions.

1) Seniority

Whether a court is composed of largely senior or junior judges will affect the degree of consensus. Newcomers face a process of acclimation (Snyder, 1958; Howard, 1965), suggesting that collegial norms restrict independence. Accordingly, while low-ranking judges favor support of the majority coalition, senior judges express their independence through more frequent and qualitatively different approaches to the majority's argument (see for ideological voting behavior, Hagle, 1993, Hurwitz and Stefko, 2004; see for the frequency of dissent, Bowen, 1995; see for quality of comment within opinions, Bowen and Scheb, 1993; Hettinger, Lindquist, and Martinek, 2003). With acclimation effects, newcomers vote sincerely less frequently and are instead constrained by their court environment (Brace and Hall, 1997). Accordingly, greater seniority is hypothesized to encourage independence and limit consensus (*seniority*). Importantly, appointed judges rather than elected judges should express dissent at higher rates than elective courts (Brace and Hall, 1990, 1993, 1997). Appointive courts, due to fewer risks and insulation, are freer to vote sincerely. Conversely, this paper expects that senior and junior judges within elective state courts are equally likely to favor dissent.

2) Structural Characteristics

Speculation about the effects of court structure has shown that varied institutional features impact decision-making (Brace and Hall, 1997). These features both enhance and restrict the freedom of judges to vote their minds. The first structural determinant examined is the size of each state's judicial office. Office size is emphasized to influence the degree of independence (Hall and Brace, 1989; Rohde, 1972; Shapley and Schubert, 1954). Judges within smaller courts, for example,

may feel greater pressure to submit to the court's majority, while larger offices allow greater relative independence for each judge. Consequently, smaller courts are expected to increase the likelihood of unanimity (*court size*).

The business of state courts also varies from state to state (Brace and Hall, 2005; Kritzer, Brace, Hall, and Boyea, n.d.). One important characteristic affecting the distribution of state supreme court cases and the degree of controversy is the presence of lower appellate courts (Brace and Hall, 1990; Brace, Yates, and Boyea, 2006). The presence of lower appellate courts is found to significantly deter agreement in most state courts, as lower appellate courts resolve many mundane cases allowing state supreme courts to settle more controversial disputes. Accordingly, discretionary dockets within states with lower appellate courts are hypothesized to decrease the event of unanimity (*lower appellate court*).

The final structural characteristic evaluated is method of opinion assignment. Unlike the US Supreme Court, which allows the Chief Justice or ranking justice to allocate opinion assignments, state supreme courts utilize a variety of discretionary and non-discretionary arrangements (Hall, 1990). Prior research speculates that non-discretionary forms of opinion assignment permit greater latitude for sincerity (Brace and Hall, 1990; Hall and Brace, 1989). Accordingly, judges are less concerned about sanction following acts of dissent, as few consequences exist. Unanimity, as a result, is hypothesized to be less common where state courts allocate opinions randomly rather than discretionarily (*random opinion assignment*).

3) State Contextual Environments

Research demonstrates that electoral environments affect the behavior of judges (Brace and Hall, 1993, 1997; Traut and Emmert, 1998). Where judges face elections from time to time, their observed nature is to avoid conflict and favor more inclusive majority coalitions (Brace and Hall, 1993). Accordingly, where judges face the pressures of an ideological unified state environment, consensus will be the norm. Ideologically extreme political environments, or where the public is

either largely conservative or liberal, are hypothesized to increase the likelihood of unanimity (*ideological extremism*).⁷ Importantly, this effect should only occur in elective state courts, where judges respond to contextual stimuli by avoiding the attention of an angered public.

The competitiveness of elections is also expected to shape consensus (Brace and Hall, 1990; Hall, 1987; Hall and Brace, 1999). Where state judges face the pressure of competitive political environments, they should favor consensual decisions. The event of unanimity is hypothesized to be more likely in electorally competitive states (*electoral competition*).

4) Case Characteristics

The final category included within neo-institutional perspectives of judicial behavior is case characteristics. Judges are responsive to attention directed to the court by third party actors, amici curiae (Maltzman, Spriggs, & Wahlbeck, 2000). Decisions involving an amicus brief should promote less consensus, as these cases involve more weighty issues. Greater case salience is, therefore, expected to reduce the likelihood of a unanimous majority coalition (*case salience*).

Finally, the development of consensus within a particular decision is likely related to the complexity of a case (Hall and Brace, 1999; Traut and Emmert, 1998). While all cases bring forth complex issues, judges also have opportunities to focus on specific issues areas. From discovery to sufficiency of evidence, these issues provide greater opportunity for disagreement. Therefore, greater complexity is hypothesized to reduce consensus (*appeal complexity*).

Estimation Techniques

Two separate model designs are utilized to achieve the objective of understanding seniority and the impact of seniority. To understand the impact of state court environments, an analysis is performed to understand the causes of greater or lesser seniority. The dependent variable within this analysis, *seniority*, is a continuous measure, so an ordinary least squares (OLS) design is used to

⁷ The hypothesis for ideological extremism is tested using Erikson, Wright, and McIver's (1993) measure of public liberalism. Scores were calculated by subtracting each state score from the national mean.

assess the validity of several causal expectations. Noting that variation exists over time and space, the model utilizes a pooled cross-sectional time series design noting that all fifty states are assessed over four years from 1995 to 1998.⁸ The second model, designed to analyze the event of unanimity, *consensus*, utilizes a binary dependent variable. Therefore it is appropriate to use a maximum likelihood estimation (MLE) technique to uncover the factors influencing consensus. Directing attention to each state supreme court and decisions involving taxation policy, the model performs two separate tests of unanimity, one within elective courts and another within appointive courts. Again, the model is a pooled cross-sectional time-series design noting that almost every state had a taxation ruling from 1995 to 1998.⁹

Finally, the second part of this investigation also uses a generalized estimating equation (GEE) in response to the unknown nature of dependence within both elective and appointive courts. Such a technique, allows for a more specific estimation of the impact of seniority and the alternative explanatory variables (Zorn, 2006). The GEE method is specifically useful where data are non-exchangeable and paneled. Both characteristics exist within this data. Related to the GEE method, the unit of clustering within both the elective and appointive court models is an individual case. Prior findings suggest that decisions to cluster judicial decisions by case, rather than judge or even state offers the best option for accounting for the effects of conditional inter-dependence.

Empirical Results

Seniority Results

The length of judicial service varies greatly from state to state as Figure 1 depicts. While the average length of service varies from more than four years in Minnesota to over fourteen years in

⁸ For the investigation of seniority, observations of seniority are restricted to state supreme courts that hear civil matters as opposed to exclusively criminal courts, such as the Texas and Oklahoma courts of criminal appeals. Omission is justified due to the second stage's evaluation of taxation policy and the impact of seniority on consensus within those decisions.

⁹ Every state supreme court heard at least two taxation appeals over the four year period of this investigation. New Mexico had the fewest decisions with two appeals, while Ohio heard the greatest quantity with ninety-seven appeals.

Maryland, variation within these bounds is well distributed. What accounts for such widespread variation? The following analysis seeks to provide several answers.

[INSERT FIGURE 1 HERE]

The following empirical results show that seniority among state supreme courts is influenced by many of the factors expected. Importantly, the expected relationship between competitive retention methods and seniority is uncovered and confirmed. The overall performance of the model is very strong statistically with the F-test providing strong statistical support, exceeding the .05 level of statistical significance. Additionally, the r-square goodness of fit is nearly .33, suggesting that the model explains approximately one-third of the observed variance related to seniority.

[INSERT TABLE 1 HERE]

Table 1 presents the predictors of state supreme court seniority.¹⁰ The impact of these estimators is very informative. Consistent with expectations regarding seniority, where incumbent judges face competitive re-elections, there is a very strong, negative impact on seniority. Where judges seek further terms either by re-appointment or within non-competitive retention elections, they hold an advantageous situation compared to their elected colleagues involved in both partisan and nonpartisan elections. This finding suggests that appointive processes indeed have important consequences for those active within state courts.

Two other predictors of seniority also explain seniority. First, states that permit governors to select judges following a vacancy, encourage longer terms. The effect on elected courts suggests that while judges face competitive pressures in subsequent elections, incumbency, even by initial appointment, favors longer tenure. Second, term length is positive related to longer periods of service. Intuitively, courts with twelve or fourteen year terms rather than six year terms encourage longer careers.

¹⁰ Controls for geographical region are included within the statistical model of seniority. The southern region has a statistically discernable and positive effect on the seniority of judges; regardless, several variables including elective retention methods remain statistically significant.

Contrary to the stated hypotheses, several predictors of seniority either fail to reach the conventional level of statistical significance or have an unexpected impact. Two factors failing to reach statistical significance are the professionalization of state high courts and mandatory retirement requirements. Two variables that are statistically significant, yet have an unexpected impact are size of office and electoral competition. Unexpectedly, larger courts have a positive influence on seniority. Perhaps this indicates that judges within these smaller institutions compared to legislative institutions value their position whether they serve on a court of five or nine judges. Lastly, while contrary to the expectation of electoral competition, greater electoral competition fosters greater tenure within office. Like the rationale of consensus that follows, judges may act in a manner while on the court that defeats the impact of state competition.

Overall, the results concerning seniority reveal that tenure duration is largely explained by competitive re-election methods, a governor's authority to appoint following a vacancy, and the term of office.

Consensus Results

Here the paper considers the effects of several independent variables on the event of unanimity.¹¹ The results demonstrate and confirm many expectations both within elective and appointive state courts of last resort. Most importantly, the impact of seniority is informative when comparing appointive and elective courts. Within both models, the hypotheses largely gain directional and statistical support. Accordingly, marginal effects are calculated for each estimator that receives support.

The range of consensus with taxation cases is illustrated in Figure 2. The values depicted are the percentage of cases within each state court from 1995 to 1998 that are unanimous. While preferences for unanimity are most evident in Delaware and Rhode Island, many other states including Michigan, Mississippi, and Oklahoma are far less consensual with few cases reaching

¹¹ Both models of consensus control for effects of a specific year on the event of unanimity.

unanimity. Like seniority, consensus is a characteristic of state courts that varies. The following analyses are designed to explain why such variation occurs.

Results for Appointive Courts

The explanatory predictors of consensus are presented in Table 2.¹² Overall, there were 561 taxation appeals from 1995 to 1998. The model's ability to explain agreement within these appeals is strong. The chi-square ($\alpha=.05$) test reported in Table 2 demonstrates that the fitted model outperforms the null. Additionally, the predicted probability that a case is unanimous is 77 percent.

[INSERT TABLE 2]

Notably within Table 2, several variables, including seniority, are statistically significant. Where seniority is high, appointive court decisions are less likely to be unanimous. This finding verifies the primary hypothesis and rationale of this paper, substantiating that senior judges act more independently than lower-ranking judges. Where states have intermediate appellate courts, consensus within appointive courts is least. Where courts hear more continuous issues, there are fewer unanimous outcomes.

Once again, several variables are not statistically discernable or affect agreement in an unanticipated manner. Variables not affecting the event of unanimity include random opinion assignments and the complexity of a case. As expected, neither ideological extremism nor electoral complexity operates to influence the event of unanimity in appointive courts. Lastly, court size works to strengthen consensus in appointive courts.

Substantively, the effect of seniority stands out as important effect on agreement. Change across the full range of seniority, from four to fourteen years, results in a 25 percent decrease in the likelihood that a taxation decision will be unanimous. The results indicate the presence of lower appellate courts decreases the likelihood of unanimity by almost 15 percent. The results also indicate that amici curiae increase the likelihood of a unanimous outcome by 13 percent. Where judges serve

¹² Only one year, 1996, has a statistically significant effect on consensus.

longer, lower appellate courts filter less controversial issues, and third parties are active, state supreme courts favor less inclusive majority decisions.

Overall, the results concerning appointive courts reveal that consensual behavior is largely explained by three characteristics: seniority, lower appellate courts, and third party briefs. As hypothesized, seniority is an important condition for understanding behavior within appointive courts.

Results for Elective Courts

Here the paper turns toward the behavior of judges within elective courts and the likelihood that a case is unanimous. Table 3 presents the analysis for states that elect their judges. Importantly, elective state supreme courts heard 374 taxation appeals from 1995 to 1998. Once again, the chi square ($\alpha=.05$) test indicates the model performs better than the null. Additionally, the predicted probability that an appellate decision is unanimous is almost 60 percent.

Notably, four variables are statistically discernable and signed in the hypothesized direction.¹³ Where courts are larger, elected judges favor unanimity less than smaller courts. Where opinion assignments are distributed randomly, judges demonstrate less consensual behavior and fewer unanimous decisions emerge. Where elective state supreme courts have lower appellate courts, greater disharmony exists. Lastly, courts have fewer unanimous majority coalitions where cases are more complex and include more legal issues to resolve.

Importantly, seniority while marginally significant fails to register any independent effect on consensus. As expected within elective courts that reduce the impact of personal characteristics, judges are concerned with independence and instead prefer a more consensual tone regardless of tenure length. Three other variables are not statistically discernable. Amici briefs fail to affect consensus in state supreme courts. Additionally, state context surprising does not affect decision-making within taxation appeals.

¹³ The effect of time has no independent effect on the occurrence of unanimity within elective retention courts.

Substantively, the results indicate that the smallest five-member courts rather than the largest nine-member courts are 28 percent more likely to forge a unanimous decision. Similarly, states without lower appellate are 23 percent more likely to have unanimous agreement. The results also demonstrate that discretionary opinion assignments increase the likelihood of a unanimous decision coalition by 24 percent. Lastly, less complex appeals are 68 percent more likely to reach unanimity than a decision involving the most appeals. Where taxation appeals occur in smaller courts, where lower appellate courts remove less controversial appeals, where opinions are distributed non-randomly, and where cases involve fewer legal issues, elected state supreme court judges are much more likely to favor unanimous agreement.

Together, the results for elective courts produce an important illustration of states with competitive retention elections. While agreement is the norm within elective state high courts, the institutional arrangements of the courts and characteristics of the appeals themselves can from time to time encourage dissent. Importantly, seniority has no effect in elective courts suggesting that preferences for independence based on tenure alone are not sufficient within elective courts. Compared to the negative effect of seniority on consensus within appointive courts, elective courts are much restrictive related to dissent.

Conclusion

The results within this paper are important for several reasons. First, the findings affect the on-going commentary concerning the neo-institutional perspective and that perspective's ability to explain judicial behavior. The neo-institutional perspective is supported strongly. Not only are structural characteristics, such as methods of opinion assignment, court size, and term length important predictors of judicial behavior, but methods of retention additionally define the independence of judges in both elective and appointive courts. Second, decision-making is related to the characteristics of judges. Within appointive state courts, the impact of seniority is extremely important. More senior judges within these insulated courts favor independence over inclusive

majorities. Within elective courts, however, the findings differ; seniority has no effect. Accordingly, institutions once again are important determinants of where personal characteristics matter. Within elective courts, at least within the area of taxation policy, senior judges much like junior judges have no preference for independence. Likely, the environment of competitive elections provides judges, both senior and junior in rank, with potential risk.

The results also provide evidence of acclimation effects for low-ranking judges. The theory, however, is modified to fit the state courts. Evidence from appointive courts, the courts posited to most closely resemble the federal courts through limited interaction with the public, offer validity to the expectation that senior judges act differently. The environments of elective courts, however, restrict behavioral differences based on seniority. Judges within these courts act alike and independence is not a central trait.

Together, these findings portray a state judicial system that is highly dependent on the state method of retention. While an indirect relationship, appointive methods of retention allow judges to remain on the court for exceedingly long periods of time. Within appointive courts, in particular, this increases independence. Within elective courts, no such trend emerges. Elective courts encourage shorter tenures, and elective courts that have more senior judges still prefer inclusive majority opinions. These analyses suggest that decisions to alter selection methods in favor another, as seen in recent decades, are important decisions for both the composition and behavior of state courts.

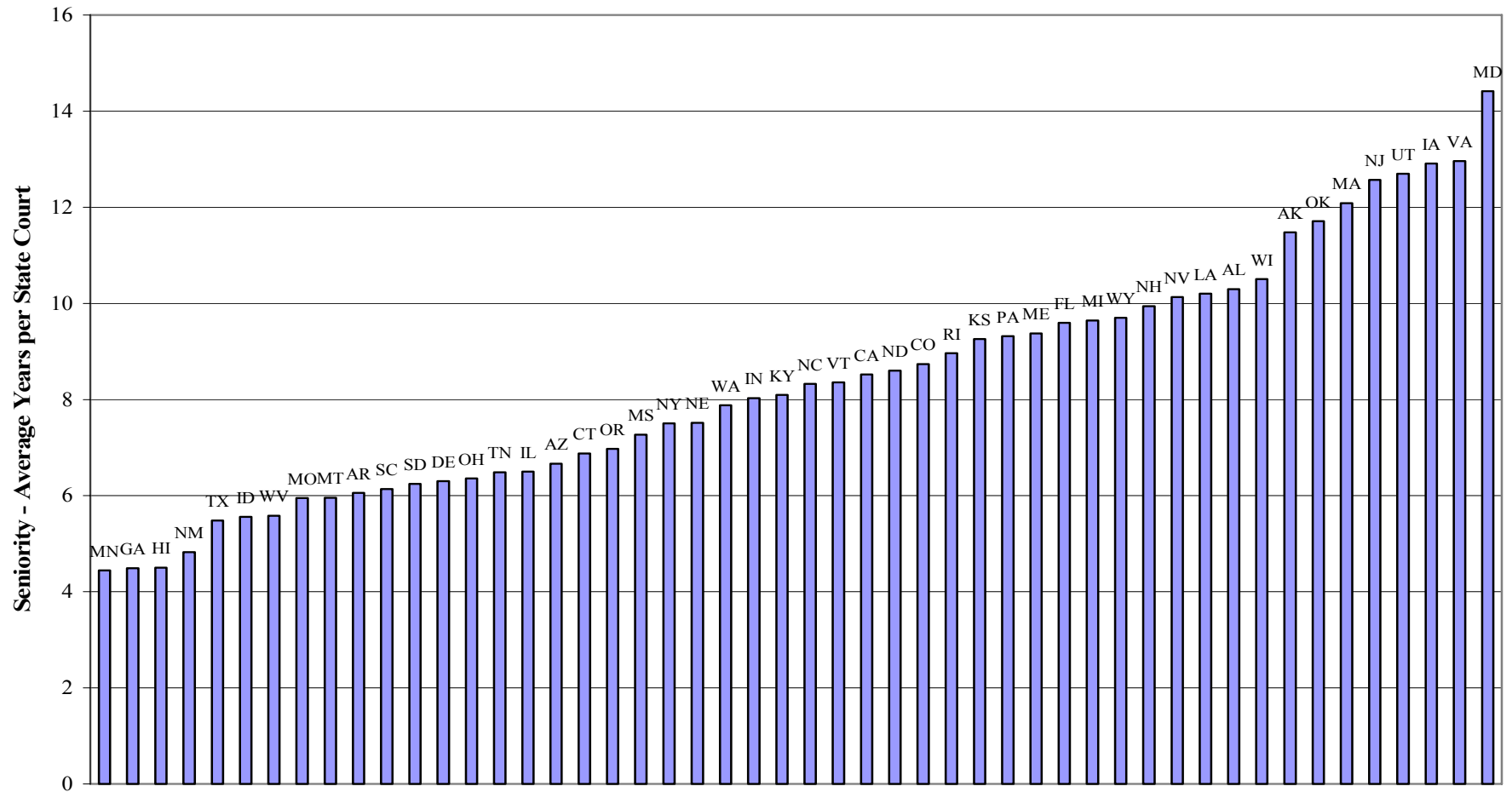
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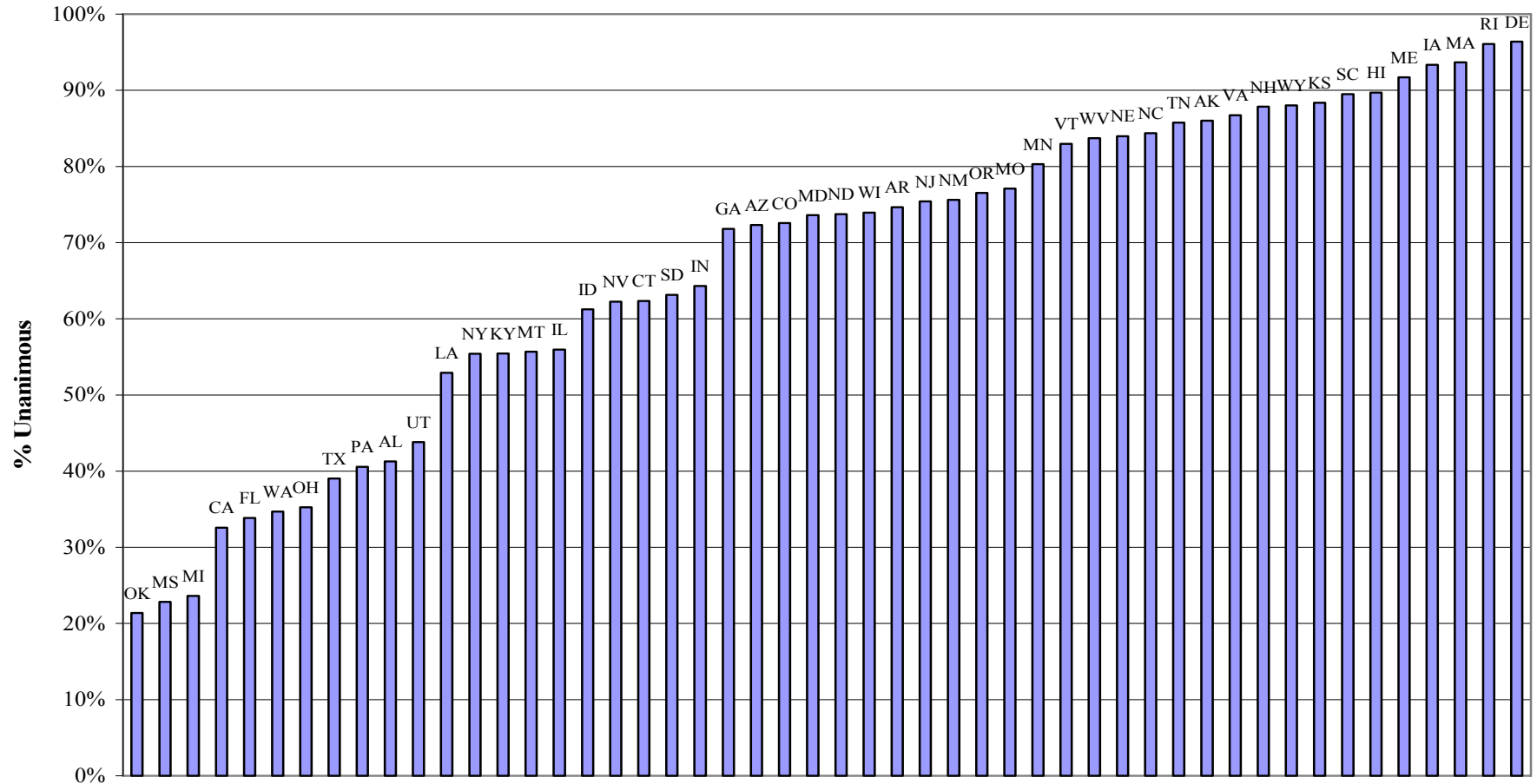
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Figure 1
Seniority in State Supreme Courts



Source: Langer, Laura (2001-2006). "Multiple Actors and Competing Risks: State Supreme Court Justices and the Policymaking (Unmaking) Game of Judicial Review." National Science Foundation.

Figure 2
Unanimity in State Supreme Courts
Taxation Decisions



Source: Paul Brace & Melinda Gann Hall (2000-2002). "Collaborative research on state supreme courts." National Science Foundation.

Table 1
 OLS Analysis of Seniority†

Dependent Variable – Average Seniority among Judges

Variables	Coefficient	robust s.e.	t	Expectation
Elected Method of Retention	-1.965	.406	-4.84*	$\beta < 0$
Vacancy Appointments	3.146	.438	7.18*	$\beta > 0$
Retirement	.590	.384	1.54	$\beta < 0$
Term Length	.164	.052	3.17*	$\beta > 0$
Court Size	.632	.141	4.49*	$\beta < 0$
Professionalization	-.017	.182	-.09	$\beta > 0$
Electoral Competition	.078	.021	3.73*	$\beta < 0$
Constant	-3.796	1.406	-2.70*	
R ²				.33
F-test (d.f. - 10)				13.07*
N				184

Note: Statistically significant parameter estimates are denoted by * ($p \leq .05$).

†Regional controls for Northeast, Midwest, South, and West regions are included within the analysis.

Table 2
 Appointed State Supreme Court Consensus
 GEE Analysis of Consensus within Capital Cases††

Dependent Variable – Event of Unanimity

Variables	Coefficient	robust s.e.	z	ΔPr	Expectation
Seniority	-.084	.034	-2.48*	-25%	β<0
Court Size	.441	.117	3.78*	-	β<0
Intermediate Appeals Court	-.965	.297	-3.25*	-15%	β<0
Random Opinion Assignment	-.058	.220	-.26	-	β<0
Ideological Extremism	.019	.024	.79	-	N.E.
Electoral Competition	-.019	.011	-1.65	-	N.E.
Amicus Curiae	-.656	.277	-2.37*	-13%	β<0
Appeal Complexity	-.114	.093	-1.23	-	β<0
Constant	.420	.842	.50		
Chi-square (d.f. - 11)					34.61*
N					561

Note: Statistically significant parameter estimates are denoted by * ($p \leq .05$).

††Year controls for 1995, 1996, 1997, and 1998 are included within the analysis.

Table 3
 Elected State Supreme Court Consensus
 GEE Analysis of Consensus within Capital Cases†††

Dependent Variable – Event of Unanimity

Variables	Coefficient	robust s.e.	z	ΔPr	Expectation
Seniority	-0.113	0.067	-1.68*	-	N.E.
Court Size	-0.211	0.128	-1.65	-28%	$\beta < 0$
Intermediate Appeals Court	-1.024	0.481	-2.13*	-23%	$\beta < 0$
Random Opinion Assignment	-0.695	0.335	-2.08*	-24%	$\beta < 0$
Ideological Extremism	-0.004	0.039	-0.10	-	$\beta > 0$
Electoral Competition	0.006	0.009	0.67	-	$\beta > 0$
Amicus Curiae	-0.538	0.340	-1.58	-	$\beta < 0$
Appeal Complexity	-0.409	0.152	-2.68*	-68%	$\beta < 0$
Constant	4.239	1.095	3.87*		
Chi-square (d.f. - 11)					42.76*
N					374

Note: Statistically significant parameter estimates are denoted by * ($p \leq .05$).

†††Year controls for 1995, 1996, 1997, and 1998 are included within the analysis.

Appendix A

Variable Descriptions for Model of Seniority in State Supreme Courts (Table 1)

Variable	Variable Description
<i>Dependent Variable</i>	
Seniority	= 2.85 to 18.9, observed seniority by state supreme court from 1995 to 1998
<i>Explanatory Variables</i>	
Elective Retention Method	= 1 if state has a partisan or nonpartisan election 0 if state has an appointive retention method or retention election
Vacancy Appointments	= 1 if state has executive authority to fill vacancies 0 otherwise
Mandatory	= 1 if state has a mandatory retirement age restriction 0 otherwise
Term Length	= 6 to 14 years for limited terms, difference between mean US life expectancy and mean entry age for lifetime terms
Court Size	= 5 to 9, permanent positions
Court Professionalization	= -5 to 5, higher values representing greater professionalization, factor score
Electoral Competition	= 0 to 100, level of congressional district competition

Appendix B

Variable Descriptions for Models of Consensus in State Supreme Courts (Tables 2 and 3)

Variable	Variable Description
<i>Dependent Variable</i>	
Consensus	= percentage of justices in the majority coalition
<i>Explanatory Variables</i>	
Seniority	= 2.85 to 18.9, observed seniority by state supreme court from 1995 to 1998
<i>Structural Control Variables</i>	
Court Size	= 5 to 9, permanent positions
Lower Appellate Court	= 1 for states with an lower appellate court 0 otherwise
Random Opinion Assignment	= 1 for state supreme courts with non-discretionary forms of opinion assignment 0 otherwise
<i>Contextual Control Variables</i>	
Ideological Extremism	= 0 to 15, distance from the national state mean of public liberalism
Electoral Competition	= 0 to 100, level of congressional district competition
<i>Case Characteristic Control Variables</i>	
Amicus Curiae	= 1 for cases with a third party amicus curiae brief 0 otherwise
Appeal Complexity	= number of appellate issues