

EQUAL BEFORE THE LAW? JUDICIAL DEFERENCE
TO EXECUTIVE POWER IN THE 50 STATES

By

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To my parents, Jesse and Deborah, the hardest working people I know
and
to my amazing grandparents, Beatrice, Jesse, Modupe, and Medahochi, for being with me every
step of the way

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CHAPTER I

INTRODUCTION

In January 2011 newly elected Florida Governor Rick Scott issued his first executive order. This particular executive order put a freeze on all pending agency regulations until undergoing review by Scott and his newly created Office of Fiscal Accountability and Regulatory Reform.¹ However, Scott soon found his executive order challenged in court by a blind Florida resident who argued that Scott's order made it difficult for her to apply for state food assistance. The case eventually reached the Florida State Supreme Court and five out of seven justices agreed that Governor Scott had "overstepped his constitutional authority and violated the separation of powers" in ordering agencies to suspend their rulemaking activities.² Scott responded to the court's decision by issuing a new executive order that removed the suspension of rulemaking, but Scott still required agencies to submit rules to his Office of Fiscal Accountability and Regulatory Reform for review prior to rule publishing. Governor Scott also stated in response to the court decision:

¹ "Executive Order Number 11-01: Suspending Rulemaking and Establishing the Office of Fiscal Accountability and Regulatory Reform." Office of the Governor. http://www.flgov.com/wp-content/uploads/2011/01/scott.eo_.one_.pdf, last accessed February 12, 2012.

² *Whiley v. Scott*. 2011.79 So. 3d 702.

You know, think about it. The secretaries of these agencies report to me. They work for me at will, then I'm not supposed to supervise them? It doesn't make any sense.³

As illustrated by the above quote, Governor Scott expected a certain degree of latitude and autonomy when directing the activity of subordinate executive branch actors. However, the Florida state supreme court was explicit in reminding the governor that there are clear limits to his authority. This recent Florida case is illustrative of clashes that can occur between executive and judicial power over legal questions of executive authority and administrative control. In the U.S. context executive and judicial power work in clear conjunction. Courts adjudicate legal disputes and clarify the law, and the executive ensures that the decisions of courts come to fruition. Questions over power boundaries can lead to serious legal and political conflicts when courts and executives differ on the direction of the law.

The executive's power in relation to the court goes beyond the implementation of court decisions. At the federal and state level executives have the ability to select judges that serve on courts. And in some states, executives (and/or the state legislature) have the power to decide whether or not judges will remain on the bench. In the Florida example discussed above, the state supreme court took an assertive stance and decided to strike down the challenged executive action. State supreme court justices in Florida are selected by a judicial nominating commission, which submits names to the governor for appointment. At the end of their terms, Florida state justices face a yes or no vote in a non-competitive retention election. Would a court be less likely

³ Alvarez. Lizette. 2011. "Facing Flurry of Lawsuit, a Governor Loses a Round." August 17. *The New York Times*. http://www.nytimes.com/2011/08/17/us/17florida.html?_r=1, last accessed November 4, 2011.

to rule against the executive (in a case similar to the Florida example) if the executive had direct control over the selection and/or retention of the court's judges? Additionally, although Governor Scott announced his intention to comply with the court order, he still maintained substantial control over agency activity given his subsequent executive order that requires agency rules to undergo review by his office. If Governor Scott's office is able to delay and prevent the publication of agency rules he finds adverse, has Scott used his institutional privileges to circumvent the court's decision?

In this dissertation I analyze how variation in executive institutional and political power contributes to judicial deference on legal questions of executive branch policy and executive authority. The U.S. states provide an ideal environment to examine the interaction between courts and executives because of the variation present in state judicial and executive institutions, and in state political environments. In addition to the fact that state courts handle over 95 percent of litigation that takes place in the U.S., analysis of state institutions allows for examination of theories and hypotheses that are difficult to investigate at the federal level due to a lack of institutional variation. Claims regarding the effect of differences in judicial selection and retention on judicial behavior cannot be tested using federal institutions given the fact that all Article III judges are subject to political appointment and granted life tenure. State supreme courts, the highest level of court in each state, are selected and retained under a variety of methods that include political appointment, political retention, and judicial elections. Historically, states have re-adjusted selection and retention mechanisms for state supreme court justices because of concerns regarding judicial independence and judicial political insulation.

In the pre- and post-revolutionary war periods, a dominant concern was to protect judges from the excessive influence of the sovereign (i.e. executive) and thus legislatures played a role

in the appointment process (Sheldon and Maule 1997). However, during the economic crises of the pre-Civil War period, which coincided with the rise of Jacksonian democracy, reformers and state constitutional conventions granted judges more independence from political officials who were blamed for economic failures. With a rise in judicial elections during this era, state judges become more accountable to the will of state citizens (Shugerman 2010). Elections, however, were dominated by partisan politics and in particular, political machines. Thus the second wave of reform focused on further insulating judges from political influence through the use of either nonpartisan elections (for selection and retention) or nonpartisan judicial selection commissions with retention elections (Sheldon and Maule 1997, Bonneau and Hall 2009, Phillips 2009). While disagreement exists over the optimal way to select state justices, maintaining a balance between judicial independence and accountability has been a central goal of reformers.

Limitations also exist in investigating claims regarding presidential power in relation to judicial decision-making at the federal level. Given the presence of a single federal executive branch, it is difficult to analyze how federal courts respond to variation in the constitutional powers an executive is allowed to yield in a given era. However, state executives across the country vary in the extent of bureaucratic and institutional control they exercise over the state executive branch. Differences in gubernatorial power reflect competing aspirations on the part of state policy-makers for an executive capable of effective management versus an executive with limited capability to abuse her political office.

During the colonial era and beyond, fear of tyrannical executive power motivated the development of a weak and/or restricted executive in many states (Lipson 1949, Graves 1956, Beyle 1999). However, state executives soon faced problems similar to those of the president in regards to their ability to manage their state executive branch. Many states looked toward the

national level when initiating their own reorganization. In the twentieth century, many state governments reformed their executive branch structure to provide governors with greater managerial control over executive branch agencies and policy (Contant 1988). In the state environment multiple factors, such as limited appointment power, increase agency autonomy while simultaneously undermining “executive coordination and control” (Choi, Cho, and Wright 2004, 378). However, during multiple waves of executive branch reorganizations state executives saw dramatic increases in institutional power (i.e. appointment power, veto, budget) and were granted extensive powers similar to, and sometimes beyond, those of the president (i.e. line-item veto). Despite the general increase in gubernatorial power, there currently exists substantial variation in executive authority across states in areas such as appointment power, budgetary control, and state line-item veto power.⁴ Some state executives have the power to appoint the majority of agency officials within the executive branch, whereas in other states the executive presides over a highly fragmented executive branch with agency officials facing elections or appointment by someone other than the governor.

Researchers have examined the interaction between courts and the executive using federal institutions, however the general structure of federal institutions have, to a great extent, remained constant overtime. Using the U.S. states allows for the simultaneous analysis of 50 unique “separation of powers” institutional systems. The benefit from a state level analysis is not simply an increase in numbers and variation, however. By investigating multiple judicial and executive institutions under various specifications during the same time period, researchers are able to gain a more comprehensive understanding of judicial deference in relation to a court’s executive environment. For example, are courts less deferential to governors who oversee a

⁴ *Book of the States*. 2010. Lexington, KY: The Council of State Governments.

fragmented executive branch where gubernatorial authority is diffused? Also, are courts more likely to rule in favor of executive branch agencies when the governor (and/or legislature) decides judicial retention? Additionally, does judicial deference to executive branch actors vary depending on the executive's ability to unilaterally retaliate against the court? The state environment is highly conducive to investigation of the above questions. Importantly, the ability to explore the behavior of political actors under different institutional specifications increases the validity and reliability of our knowledge regarding current conceptualizations of judicial decision-making.

Chapter Two of this dissertation examines state supreme court decision-making on executive branch agencies in all fifty states. The focus of this chapter is to determine how differences in state judicial structures affect court decision-making on administrative agency cases. I explain that executive branch agencies are more likely to win court challenges when political elites (governor/legislature) have increased control over judicial selection and retention of state supreme court justices. Justices will not only be responsive to the threats from tenure retaliation, but selection mechanisms allow political elites to select justices with a greater propensity to rule in favor of government litigants. I examine this relationship using cases involving state executive branch agencies adjudicated between 1995 and 1998 from the Brace and Hall State Supreme Court Data Project. I find that state supreme courts are more likely to rule in favor of executive branch agencies in environments where political elites decide judicial selection and retention. Cases involving administrative agencies are typically lower in visibility as compared to other legal disputes (i.e. cases involving death penalty, abortion policy). However, these results show that when the executive branch is a litigant in court, deference to

agency litigants is substantially influence by the degree of tenure control exercised by state policy-makers.

Chapter Three examines judicial decision-making in relation to variation in executive branch structures. Using cases from the Brace and Hall State Supreme Court Data Project, I analyze how judges respond to variation in state executive control over the entire executive branch, and variation in state executive control over individual administrative agencies. I explain that in environments where the executive has increased mechanisms of bureaucratic control, concerns regarding enforcement of judicial decisions and executive retaliation will cause judges to show higher support of state executive branch agencies in court. My findings show that courts are in fact responsive to the executive's degree of institutional control over the executive branch, specifically gubernatorial appointment power and rule review power. Less evidence exists in this analysis that courts are responsive to executive retaliation, as measured by gubernatorial state budgetary control, against the court when ruling on cases involving executive branch agencies. When considering the possibility that the likelihood of executive enforcement resistance results in strategic behavior on the part of judges, scholars must take into account how the institutional capabilities of the state (or federal) executive affects his or her control over government policy.

Finally, working within the theoretical framework established in Chapter Two and Chapter Three, Chapter Four examines judicial decision-making on cases involving direct legal challenges to state executive power. In this chapter I collect an original dataset of cases that involve challenges to state executive power adjudicated in multiple areas of executive power between 1980 and 2010. I explain that justices will be responsive to threats against judicial institutions and institutional legitimacy when ruling on cases involving executive power. In environments where the executive's capacity to retaliate against the court is high, state justices

will exhibit a higher propensity to rule in favor of state executive power. My results indicate that courts are more likely to rule in favor of executive power in environments where political elites have increased control over judicial retention and in environments where the executive has high levels of public support. In contrast to the findings in Chapter Three, I find that courts are responsive to variation in executive capacity for institutional retaliation when ruling on cases challenging executive power. Specifically courts are more likely to rule in favor of executive power in environments where the executive has increased capability to reduce the state budget. As executive power increases, an assertive court may be essential to ensure that executives do not abuse their institutional authority. However, if courts are vulnerable to institutional retaliation or enforcement resistance, courts seemingly prefer avoiding a legal and political battle with their state executive.

CHAPTER II

EQUAL BEFORE THE LAW? STATE SUPREME COURT REVIEW OF ADMINISTRATIVE AGENCIES

Introduction

Independence from political reprisal gives judges some measure of freedom to make difficult, and many times unpopular, legal decisions. Independence is defended on the normative grounds that judges should make decisions based on legal precedent and case facts, irrespective of outside political or extralegal considerations. Alexander Hamilton relied on the legal and constitutional protections that an independent judiciary can provide when arguing in favor of a central national government.⁵ More recently, U.S. Supreme Court Justice Stephen Breyer stated that judicial independence is “the rock upon which judicial institutions rest.”⁶ Because federal judges are granted life tenure, the threat of removal based on majoritarian or political elite pressures in response to judicial decision-making is tremendously reduced.

While lifetime appointment helps insulate the *federal* judiciary from political pressure, state supreme court justices are selected and retained by a variety of means. Once taking office they often serve at the pleasure of elected officials or the public. Granting justices limited terms provides for greater accountability in regards to their decision-making. Justices face retention decisions by governors and legislatures, or elections where state voters decide justices’ fate. However, these various selection and retention methods can threaten the independence of state

⁵ Federalist Paper # 78. “The Judiciary Department.” June 14, 1788.

⁶ Stephen Breyer, September 28, 2006, Judicial Independence Remarks by Justice Breyer, Georgetown University Law Center, Hart Auditorium, Washington, D.C.

supreme courts. Political pressures from state policymakers may induce state supreme court justices to act strategically to avoid retaliation for unpopular decisions.

In this paper, I analyze the impact of selection and retention methods on state supreme court decision-making in cases involving state executive branch agencies. I find that state supreme court justices show increased support to state agencies when they are either appointed or retained by political elites. This finding holds true across a variety of policy areas and suggests that institutional design of courts influences the level of deference accorded to executive branch agencies in the states.⁷

This paper proceeds as follows: first I explain how judicial selection and retention methods influence judicial behavior. Next I present my central argument; courts where political elites control judicial selection and retention will be most supportive of administrative agencies in court. Then I present a model of state supreme court review of state agency decisions and test that model with a dataset of 2200 cases involving executive branch agency litigants. Finally, I conclude by considering the implications of my findings for judicial independence in state high courts.

State Supreme Court Selection and Retention

While some state court judicial systems mirror the federal system with executive nomination and legislative confirmation of state justices, this is not the norm (Sheldon and

⁷ Legal deference granted to an administrative agency is highly dependent on the standard of review (i.e. de novo, abuse of discretion) utilized by the court reviewing agency decision-making. In this analysis, I use the term deference broadly to indicate judicial support for the decision-making and policy actions of executive branch litigants in court.

Maule 1997). States have four basic ways of selecting state supreme court justices: partisan election, nonpartisan election (party affiliation does not appear on the ballot), political appointment, and merit selection.⁸ Currently eight states select their justices using partisan elections.⁹ Fourteen states select their state supreme court justices using nonpartisan elections and eight states utilize gubernatorial and/or legislative appointment to select state supreme court justices. Merit selection appointment systems are used in 21 states. Merit selection, first proposed in 1913, typically utilizes a judicial selection committee whose members are selected by the governor, legislature, and the state/county bar association (Martin 1993, Sheldon and Maule 1997). The committee deliberates and then submits a list of judicial candidates to the governor. The governor then appoints a justice from the list provided.¹⁰

For some states, the retention method for state supreme court justices is identical to the selection method. All states that use non-partisan elections to select their justices use non-partisan elections to retain them. However, there is variation among retention methods for judges who face partisan elections, political appointment, and merit selection. For example, politically

⁸A small number of states utilize district elections instead of statewide elections (Hall 1992a).

⁹ “Judicial Merit Selection: Current Status.” 2011. *American Judicature Society*. http://www.judicialselection.us/uploads/documents/Judicial_Merit_Charts_0FC20225EC6C2.pdf .., last accessed January 22, 2012.

“Judicial Selection in the States; Appellate and General Jurisdiction Courts.” 2009. *American Judicature Society*. <http://www.ajs.org/selection/docs/Judicial%20Selection%20Charts.pdf>, last accessed November, 12, 2011.

¹⁰ In some instances, the judicial nominee selected by the governor must be approved by the state legislature (Phillips 2009).

appointed judges in California face non-partisan, non-competitive retention elections after their initial term. While many state justices chosen through merit selection face retention elections at the end of their initial term (Sheldon and Maule 1997, Phillips 2009), in some states that utilize merit selection, the governor decides whether the justice will be retained.

The Impact of Selection and Retention Method on Judicial Behavior

Although scholars have examined the impact of institutional design on judicial decision-making (Nagel 1961, Brace and Hall 1993, Brace and Hall 1995, Choi, Gulati, and Posner 2008, Caldarone, Canes-Wrone, and Clark 2009), few have specifically analyzed the relationship between state supreme courts and their state executive branch (Frank 1980, Miller 2009). Variation in state supreme court selection and retention methods condition the effect of legal facts, personal policy preferences, citizen and elite preferences, and political environment on state judicial decision-making (Brace and Hall 1995). Particularly, appointed and elected judges are both attentive to the preferences of those who play a role in their selection, and those who determine their retention (Brace and Hall 1997, Brace and Boyea 2008, Caldarone, Canes-Wrone, and Clark 2009).

While many states have moved toward judicial elections, some still utilize political appointment and political retention for their state supreme courts. Previous analyses have been mixed as to the effect of selection and retention method on state court review of state agencies (Swanson 2001, Shepherd 2009). However, research examining state supreme court decision-making more broadly suggests that political elite control over judicial selection and retention should significantly influence the adjudication of cases involving the state executive branch.

Judicial Selection Method and Judicial-Behavior

Compared to appointed judges, elected judges are highly sensitive to public opinion (Brace and Boyea 2008) and this concern for public opinion particularly affects their decision-making on issues of crime and punishment (Brace and Boyea 2008, Huber and Gordon 2004). Appointing judges may free them from electoral pressures, but this manner of selection can open them up to the influence of political elites (governor and legislature). A key goal of a political official with the power of appointment is to select judges who possess congruent policy preferences (Segal, Howard, and Timpone 2000, Epstein, Martin, Quinn, and Segal 2007). When viewed from a principal-agent perspective, an executive desires a judicial appointee whose behavior is more likely to reflect executive preferences. When political elites are successful in selecting judges with the desired jurisprudence, the need to rely on retention mechanisms to prevent policy drift, due to judicial decision-making, is reduced.¹¹ Despite the impact of selection method on judicial behavior, however, the form of retention plays an important role in understanding the type of constraints that justices may face. The influence of judicial retention method is felt whether or not their method of *selection* appears to afford them increased decision-making freedom.

Judicial Retention Method and Judicial-Behavior

Similar to the electoral sanctions that elected justices can face from the public, justices who rule against the preferences of political actors with the power of reappointment can also face the danger of “expulsion from the bench” (Bonneau and Hall 2009, 5). Federal and state court scholars have considered how executive and legislative preferences can constrain judicial

¹¹ Although presidents are very successful in nominating judges who appear to have proximate policy preferences, scholars find that judicial preferences are not always stable and can drift over time (Segal, Timpone, Howard 2000, Epstein, Martin, Quinn, and Segal 2007).

decision-making (Spiller and Gely 1992, Epstein and Knight 1999, Langer 2002). State justices whose terms must be renewed by other political officials face the possibility of retention retaliation based on their judicial decisions. When state supreme courts are in an environment where other political elites have divergent preferences and play a role in judicial retention, there exist strong incentives to alter decision-making behavior at the agenda-setting stage and the decision on the merits stage (Brace, Hall, and Langer 1999, Langer 2002). The preferences of political elites can be an important factor particularly in cases involving governmental actors and issues of inter-branch conflict (Langer 2002). Specifically, Brace, Hall, and Langer (1999) find that judges subject to legislative and gubernatorial retention are less likely to hear challenges to state abortion statutes. Similarly, Langer (2002) finds that justices retained by the governor and legislature are less likely to docket cases concerning campaign and election law, an issue considered salient to political officials.

State Supreme Courts and State Administrative Agencies

Few researchers specifically examine the interaction between state high courts and state executive branch agencies. Research that does exist has produced mixed results regarding the impact of selection and retention method on the adjudication of cases involving agency activity (Hanssen 1999, Swanson 2001, Shepherd 2009).¹² Hanssen (1999) asserts that politically

¹² One potential reason for the occurrence of various results is that researchers typically either focus on selection method or retention method, making it difficult to directly compare results. Hanssen codes state supreme courts justices based on selection method (appointed versus elected) and Miller (2009) and Graves (2004) code state supreme court justices based on retention method (i.e. partisan election, nonpartisan election, retention election, political elite retention).

appointed judges should exhibit more independent behavior when ruling on cases involving state public utility commissions. However, Hanssen does not account for the effect of judicial retention in his analysis. Similarly, Swanson (2001) argues that justices who face elections are more sensitive to public opinion and therefore will vote in a manner that reflects the ideology of state citizens. The lack of clear support for his hypothesis, however, leads Swanson to conclude that public ideology and selection mechanisms have very little (or no) effect on state supreme court oversight of agencies. Other scholars argue that judges who face political retention will exhibit more constrained behavior in cases involving state government (Miller 2009, Shepherd 2009). Shepherd (2009) examines state supreme court decision-making on cases involving all three branches of state government. Her results show that judicial retention method influence state court decision-making on cases involving the state executive branch, however her analysis does not empirically, or theoretically, distinguish between types of executive branch cases (i.e. cases involving administrative agencies versus cases directly involving the governor). This distinction is important given that differences in case type and salience will influence how justices respond to their institutional and political environment, particularly in cases involving government officials (Langer 2002). Below I discuss how and why judicial selection and retention method influences state court review of state executive branch agencies.

The Influence of Inter-Branch Dynamics on Judicial Decision-Making

The duty of a judge is to hear and decide cases in a court of law. It is safe to assume that judges want to make legally sound judicial decisions based on existing law, legal precedent, and the specific case facts regarding the litigants who appear in court. Judges, however, are influenced by a number of extralegal factors when making legal decisions. Researchers have

developed multiple models of decision-making to understand how extralegal factors influence judicial behavior (Epstein and George 1992, Brace and Hall 1993, Epstein and Knight 1999, Segal and Spaeth 2002, Langer 2002). Life tenure gives federal judges, and some state judges, increased decision-making freedom from political retaliation aimed at their tenure. But state judges who are selected and retained by political elites and citizens may find their decisional freedom constrained by their political environment because of the desire to retain office. Whether judges are primarily concerned with furthering policy goals or maintaining political power, retaining judicial office is obviously necessary to further their objectives.

Government Litigants and Why Litigant Type Matters

Ideally, litigants should be treated impartially in court, regardless of differences in resources and political status, during the disposition of cases. Compared to other types of litigants, however, government litigants, including administrative agencies, have greater resources, more experience, and increased technical expertise when appearing in court (Canon and Giles 1972, Galanter 1974, Crowley 1987, Spriggs 1996, Farole 1999, Caruson and Bitzer 2004).¹³ These factors are significantly linked to success in court. Particularly, state government litigants have a higher rate of success compared to many different categories of litigants (Wheeler, Cartwright, Kagan, Friedman 1987, Farole 1999). This advantage holds whether the state government litigant is the appellant or respondent (Farole 1999).

¹³ Advantages in resources such as money and legal assistance allow government agencies to put forth higher quality legal defenses in court. Also, state agencies with jurisdiction over technically complex issues possess an informational advantage over justices. Courts may be more willing to defer to agencies in matters where administrative agencies possess expertise (Caruson and Bitzer 2004).

Beyond the advantage in resources and expertise of agencies, courts are clearly aware that they are making decisions on another branch of their own state government (Wheeler, Cartwright, Kagan, and Friedman 1987). Many times judges require the cooperation of agencies to implement decisions (Straussman 1986, Spriggs 1996). A court which consistently takes a hostile posture towards agency activity may incur increased resistance from officials whose agreement and cooperation is required to successfully implement judicial decisions (Johnson 1979, Moe and Howell 1999a).

Potential Repercussions for Judicial Decision-Makers

The type of litigant and case outcomes are clearly important because they can impact whether justices experience certain forms of repercussions. Judges are subject to two key forms of punishment from those dissatisfied with their rulings; one form targeted at the court as a whole, and another targeted at individual judges (Ferejohn 1999). The first type of punishment, typically instigated by political elites, is directed at the judiciary as an institution. Political actors can change court jurisdiction or alter a court's operating budget (Ferejohn 1999, Langer 2002, Clark 2009). Reductions in budgets can obviously make the job of judges more difficult if they lack adequate staff and resources to adjudicate cases. Legislatures can also pass legislation to restrict the power of judicial actors (Ignagni and Meernik 1994, Langer 2002, Hettinger and Zorn 2005). For example, the Ohio state legislature proposed a constitutional amendment that would require a 5 vote "supermajority" in order for the state supreme court to find state legislation unconstitutional (Bierman 2002, 862).¹⁴ Legislators in New Hampshire and Florida also

¹⁴ According to Bierman (2002, 863), the representative who proposed this constitutional change stated that a supermajority requirement would allow "a little more accountability, a little more stability and a little more confidence with respect to the courts."

proposed changes that would reduce court authority and increase legislative authority over court rulemaking (2002, 863). According to Hanssen (2000) and Tiller (1998), if administrative agencies view judicial intervention as a threat, they will adopt high cost decision-making procedures to implement agency policy in order to make judicial monitoring of their activity more difficult. In fact, Hanssen (2000) finds evidence that agencies in states with “independent” courts are more likely to attempt to insulate their activity from court interference.

Removal of court jurisdiction, reversal of rulings, and resistance to implementation has important implications for the legitimacy of the judiciary as an institution (Clark 2009). Institutional legitimacy is particularly important for the judiciary (Gibson 2008) because most court rulings are not self-enforcing. Judges must rely on other political actors and the public to enforce and adhere to judicial rulings (Carrubba and Zorn 2010). If judicial rulings, or the institution itself, are viewed as illegitimate there is the increased potential for attacks upon judicial independence or disregard for judicial decisions (Gibson 1989, Clark 2009).

Punishments directed at the institution for unpopular rulings are a potential risk for all judges, regardless of selection and retention method. However, political elite retaliation aimed at tenure is directly salient for judges where the institutional rules dictate that political elites decide whether they remain in office. The institutional design of courts affects their susceptibility to attacks on judicial tenure. Dissatisfied political elites can decide not to retain appointed justices. Anecdotal evidence provides multiple examples of state judges who have faced political elite reprisal aimed at their tenure as a result of their decision-making.¹⁵ For example, in May 2010,

¹⁵ Although her term was renewed, South Carolina Justice Jean Toal faced a threat of not being retained by the state legislature in 1996 (Langer 2002). The state legislature was apparently

Governor Christopher Christie of New Jersey decided not to renew the term of Justice John E. Wallace. Apparently, Governor Christie wanted to appoint someone who would “show the restraint that was missing from the court.”¹⁶ Also, in many states, dissatisfied voters can refuse to vote for elected state supreme court justices in the next election. Similarly, voters and interests groups can run campaigns against state judges and thereby force judges to actively defend their judicial records.

The Influence of State Supreme Court Selection and Retention Method on the Review of Administrative Agency Activity

Political elites (governors and legislators) want justices responsive to elite preferences. Across the states, political elites have more or less control over the selection and retention of justices.¹⁷ Political elite control over judicial selection and retention can make it more likely that judges in favor of state administrative agencies for multiple reasons.

“dissatisfied with her willingness to vote out-of-sync with the state legislature, and governor” (Langer 2002, 39).

¹⁶ Richard Perez-Pena, “Christie, Shunning Precedent, Drops Justice From Court,” May 3, 2010, The New York Times, accessed September 2, 2010, <http://www.nytimes.com/2010/05/04/nyregion/04christie.html>. According to Perez-Pena: “He [Governor Christie] described the historically liberal court as “out of control” over the last three decades, usurping the roles of the governor and the Legislature in setting social and tax policies.”

¹⁷ Governors play an important role in the composition of courts even in states that use public elections to select their state supreme court justices. Many times it is the governor who fills vacancies that occur on elected supreme courts (Nase 1996).

In regards to selection, executives and others with the power of appointment can obtain their preferred judges on the court through careful screening. Screening of the agent by the principal takes place to ensure that the agent will carry out directives in a manner reflective of the preferences of the principal (Krehbiel 1991, Bendor, Glazer, Hammond 2001). Screening leads to increased support for state agencies in court because governors and legislators have selected justices who view cases and the role of the state similarly. Therefore, support for state agencies results by way of policy agreement between state supreme courts and political elites.

Whether a judge is liberal or conservative, political officials prefer justices who possess a jurisprudence that entails support for the exercise of state power. Regarding the appointment of federal justices, Moe and Howell (1999b, 872) argue that a major goal of presidents (of any ideology) is to appoint federal judges “who will uphold and promote the power of the presidency.” This rationale can be transferred to the state level because, understandably, state governors and legislatures want to select justices more likely to uphold the institutional authority of their respective branches of state government in general. Consider a hypothetical situation where Democratic Governor Smith is faced with the choice of Judge A or Judge B. Judge A has a liberal voting record whereas Judge B has more of a moderate voting record. However, on issues of state executive power, Judge B votes in favor of expansion of state executive power 85 percent of the time, whereas Judge A votes in favor of state executive power approximately 50 percent of the time. Because of the consistent support of executive power, Justice B may be the more attractive choice for Governor Smith.¹⁸ If political elites are successful in selecting justices

¹⁸ This brief example may at least partially explain the recent nomination of Elena Kagan by President Barack Obama. Some journalists noted that Kagan was more moderate compared to others on President Obama’s list of potential nominees. However, Kagan is known for espousing

supportive of state policy power, politically appointed justices should exhibit the most support for state agencies. Consequently, agencies in states with appointed state supreme courts will have the highest probability of success when they appear in court.

H1: *As political elite control over judicial selection increases, state supreme court support for state agencies increases*

While the screening that takes place during selection may increase state supreme court support for state agencies that appear in court, retention concerns also influence the decision-making of state justices. Politically retained justices may fear retaliation for rulings unfavorable to the preferences of the state executive and legislature. The deference resulting from potential threats to the court's legitimacy or a judge's career is not necessarily a behavior that will manifest itself in one or two high profile decisions, but rather will be reflected in their overall jurisprudence toward state activity. Judges may not be "single-minded seekers of reelection" (Mayhew 1974), but accepting a position as a state supreme court justice clearly indicates a desire to hold public office. And repeated opposition to state policy could endanger a justice's chances for retention.

Therefore, justices subject to political retention will be the most supportive of state agencies compared to justices who face retention elections or lifetime tenure. Comparatively, the degree of support from justices who face partisan and nonpartisan elections will fall in between that of politically retained justices and justices who face retention elections or have lifetime tenure. Although elected justices are independent from the retention decisions of political elites, potentially elected judges (particularly judges who face partisan elections) who depend on the

a legal philosophy that is particularly supportive of increased presidential control over the executive branch (Kagan 2001).

support of their state party and political leaders during campaigns may also show increased deference toward administrative agencies.¹⁹ Also, because most state supreme court justices are chosen from the same constituency that selects the governor and legislature, their preferences should not necessarily diverge greatly from state policymakers.

H2: *As political elite control over judicial retention increases, state supreme court support for state agencies increases*

For both hypotheses, political elites include courts retained by the governor and/or legislature. Legislatures clearly have a stake in the outcome of cases involving state administrative agencies given that the policies that agencies implement are typically crafted from statutes developed by the state legislature. So when ruling on cases involving administrative agencies, courts retained by legislatures are subject to similar retention pressures as those retained by the state executives. In total, courts whose judges' selection and retention is determined by political officials will exhibit increased support for state administrative agencies that appear as litigants in court. In the next section, I describe the data used to test my hypotheses and the empirical results of my analysis.

Data, Variables, and Methods

The data for my analysis of state supreme court decision-making on cases involving state agencies comes from the Brace and Hall State Supreme Court Data Project. The Brace and Hall

¹⁹ Vining and Wilhem (2011) find that gubernatorial endorsements do in fact significantly influence the outcome of state supreme court judicial elections.

database contains information on state supreme court cases decided between 1995 and 1998.²⁰ The database includes categories for various types of litigants (i.e. private, local government, state government). The Brace and Hall database also contains many cases that involve state agencies. Some of the policy categories involve environmental policy, taxes, utility regulation, and human/social welfare services.²¹ For my analysis, I use a sample of cases from the Brace-Hall Database that involve executive branch agencies, listed as either the first petitioner or the first respondent. I remove all cases where both the petitioner and respondent are a state agency. Removing these cases leaves a sample of 2,222 cases for my analysis.

State agencies are very successful when appearing in state supreme court, winning 64 percent of their cases. Based on the results of a difference of means analysis, state agencies in states with politically appointed courts have a win rate of 67 percent (compared to 63 percent for agencies in all other states). State agencies in states with politically retained courts win 71 percent of their cases (compared to a win rate of 63 percent for agencies in other states).²² Below, I describe the variables used in my analysis to examine state agency success in a multivariate context.

²⁰*State Supreme Court Data Project*. <http://www.ruf.rice.edu/~pbrace/statecourt/index.html>, last accessed April 3, 2012.

²¹ See Appendix A for state supreme court selection and retention methods between 1995 and 1998.

²² Differences of means results for politically retained courts (versus all other courts) are statistically significant at the 0.01 level (one-tailed test). The p-value for politically appointed courts (versus all other courts) is just shy of the traditionally accepted level of statistical significance ($p=0.11$).

Key Independent Variables

The dependent variable, state supreme court support or opposition to the state agency, is operationalized as a court outcome in favor (1) or against (0) a state agency. The unit of analysis is the individual case. Because the data are binary, I estimate a series of logit models where the key independent variables are state supreme selection method, retention method, and finally selection and retention methods combined. To operationalize selection method, I utilize a series of ranked indicator variables. The different forms of judicial selection are ranked from least politically autonomous to most politically autonomous (from political elite control): Political Appointment > Merit Selection > Partisan Elections > Non-Partisan Elections. I expect the probability of success for agencies in states with merit selected judges to fall in between that of politically appointed judges and judges who face elections. Although judicial candidates are screened by judicial selection committees within the states that utilize merit selection, political elites (usually governors) still play a prominent role in the nomination and eventual confirmation of state supreme court justices. In this model courts that face nonpartisan elections, which historically were utilized to reduce partisan influences in elections, serve as the base (excluded) category. To operationalize retention method I rank the methods of retention from least politically autonomous to most politically autonomous: Politically Retained > Partisan Elections > Non Partisan Elections > Retention Election > Lifetime Tenure. Justices who have lifetime tenure are the base category (excluded) in this estimation.²³ Unlike justices in partisan and nonpartisan elections, justices in retention elections run unopposed (they face a yes or no

²³ All models are estimated using standard errors clustered by state and controlling for regional effects (Northeast, Midwest, West, South). The Northeast region serves as the base category for all models.

vote for retention) and therefore do not have to campaign against judicial challengers. Justices with lifetime tenure are removed from retention decisions from both political officials and the public.

Including separate hypotheses for judicial selection and judicial retention may appear redundant because it is difficult to empirically disentangle the impact of judicial selection versus judicial retention on judicial behavior. My reasoning for the inclusion of separate hypotheses is two-fold. Most states use different methods for selecting and then retaining their justices. For example, Illinois and Pennsylvania use partisan election for initial selection, and both states switch to retention elections for subsequent judicial terms. Some states that use merit selection use political elite approval to decide retention, whereas many others use retention elections.

A second reason for separate analyses concerns observational equivalence. Judges selected and retained in various ways may behave similarly, however, as explained above, there are distinct theoretical reasons why selection method and retention method will increase or decrease state supreme court support of state administrative agencies. Some justices may face selection in a way thought to increase independence, but their retention method may actually have a constraining influence on their decision-making. Although different selection and retention methods may produce similar outcomes, it is important to acknowledge the different theoretical reasons that selection method and retention method influence state supreme court behavior.

Table 1.1 Variable Descriptions

Variable	Mean	Std. Dev.	Min.	Max.
Politically Appointed Courts	0.14	0.34	0	1
Merit Selection Courts	0.41	0.49	0	1
Partisan Elected Courts	0.16	0.37	0	1
NonPartisan Elected Court	0.29	0.46	0	1
Politically Retained Courts	0.15	0.36	0	1
Partisan Elected Courts (Retention)	0.10	0.30	0	1
NonPartisan Elected Courts (Retention)	0.29	0.46	0	1
Retention Elected Courts	0.36	0.48	0	1
Lifetime Tenure Courts	0.10	0.29	0	1
Summary Statistics for Model Variables	0.07	0.26	0	1
Merit Selected Courts and Politically Retained Courts	0.07	0.27	0	1
Strong Rule Review	0.16	0.37	0	1
Moderate Rule Review	0.36	0.48	0	1
Weak Rule Review	0.47	0.50	0	1
Governor-Court Party ID	0.47	0.50	0	1
Weak Non-Delegation Doctrine	0.13	0.34	0	1
Moderate Non-Delegation Doctrine	0.46	0.50	0	1
Strong Non-Delegation Doctrine	0.41	0.49	0	1
Legislative Professionalism	0.19	0.11	0.03	0.57
Administrative Docket Discretion	0.26	0.44	0	1
Divided Government	0.53	0.50	0	1
Agency Petitioner	0.34	0.47	0	1
State Government Opponent	0.02	0.15	0	1
Business Opponent	0.27	0.44	0	1
Environmental Policy	0.03	0.17	0	1
Taxes	0.19	0.39	0	1
Utility	0.05	0.20	0	1
Welfare	0.10	0.30	0	1
Midwest	0.32	0.47	0	1
Northeast	0.27	0.44	0	1
South	0.20	0.40	0	1
West	0.21	0.41	0	1

Control Variables

My analysis also controls for a variety of political, environmental, and case factors that also play an important role in state supreme court decision-making. The congruence of policy preferences between state justices and state policymakers should influence the probability that state supreme court justices rule for or against state executive branch agencies. To capture policy agreement between the state supreme court and the state executive branch, I measure the party

congruence between the majority of justices on the court and the governor.²⁴ Using party identification provides a conservative and parsimonious measure of political elite preferences. When there is partisan alignment between the governor and the majority of the state supreme court justices, the probability of success for state agencies in court should increase. If the majority of justices on the court and the governor are of the same party, they receive a coding of (1); if majority of the court and the governor are of opposite parties, they receive a coding of (0). I also take into account the presence of **divided** or unified government. State supreme court justices may be more wary of ruling against a politically unified state government because it is more feasible for a unified government to respond and/or retaliate to state supreme court rulings (Langer 2002).

Previous empirical analysis of state supreme court decision-making fails to account for variance in state supreme court receptivity to **delegation** of decision-making authority to administrative agencies. Whereas federal court precedent allows broad delegation of decision-making authority to federal agencies, many state supreme courts have established “strict” standards for assessing the validity of delegated legislative authority to administrative agencies (Greco 1994, Rossi 1999). Some states require that agencies must be given “adequate standards” (Greco1994, 580) from state legislative statutes to guide their activity, whereas other state supreme courts simply require that agencies have procedural safeguards in place when

²⁴ Langer, Laura. National Science Foundation CAREER Grant, SES #0092187 “Multiple Actors and Competing Risks: State Supreme Court Justices and the Policymaking (Unmaking) Game of Judicial Review.” Washington, D.C., (May 2001-May 2006). ; Lindquist, Stefanie. State Politics and the Judiciary Database. National Science Foundation Grant SES #0550618, “Predictability and the Rule of Law: Overruling Decisions in State Supreme Courts.” February 2007.

implementing legislative policy (Greco 1994). I expect that state supreme courts with more stringent guidelines for delegation of authority will show less deference to state administrative agencies that appear in court (Rossi 1999). Using the categorization of state supreme court adherence of the non-delegation doctrine developed by Greco (1994) and Rossi (1999), I create three indicator variables by dividing states into three distinct categories, “strong”, “moderate”, and “weak.” “Strong” indicates a stricter adherence to the non-delegation doctrine, whereas “weak” indicates a state supreme court with more liberal standards for monitoring delegation of authority to state administrative agencies (Rossi 1999). States with a “weak” non-delegation doctrine serve as the base category.

For state political environment, I also control for **legislative professionalism**. In terms of legislative professionalism, states with legislatures that have higher levels of professionalism may indicate that these legislatures are better equipped to oversee and monitor the activity of state administrative agencies. Agencies in states subject to increased control and oversight from their state legislature could potentially receive increased deference in court if state supreme courts perceive a decreased need for judicial error correction and intervention into agency activity. Conversely, state legislatures with reduced institutional capacity of oversight may prefer aggressive judicial monitoring of state administrative activity. I use a measure devised by Peverill Squire (2007) to measure legislative professionalism. Squire’s measure of legislative professionalism takes into account features such as session length and staff resources (Squire

2007). Legislative professionalism is measured on a 0 to 1 scale with increasing scores indicating increased legislative professionalism.²⁵

Also, state supreme courts with increased **docket discretion** may be less likely to hear routine challenges and more likely to select more salient cases or cases in which they intend to reverse a lower court decision or importantly, overturn the decision-making of a state agency. While most previous research controls docket discretion regarding all case types, my analysis controls specifically for state supreme court docket discretion for administrative agency cases. A dichotomous variable is used to measure docket discretion; (0) for a discretionary docket and (1) for a mandatory docket.

I also control for variables related to aspects of individual cases. Previous research finds that **appellants** have increased success in court compared to appellees (George and Epstein 1992). In regards to large governmental units, such as state agencies, Farole (1999) and Wheeler et al (1987) find that state governments have increased success when they appear as the appellant as compared to other litigants who appear in court. Because of increased experience and resources, state agencies will be selective in the cases that they bring before state supreme courts and be more likely to bring cases before the court if they feel they can win (Farole 1999). Hence, I expect that state agencies should have increased success when they appear as the appellant as compared to the appellee.

²⁵ Lindquist, Stefanie. State Politics and the Judiciary Database. National Science Foundation Grant SES #0550618, “Predictability and the Rule of Law: Overruling Decisions in State Supreme Courts.” February 2007, Sole PI.

Table 1.2 State Supreme Courts and Executive Branch Agency Litigation

		Model 1		Model 2	
Variable		Coefficient (std. error)	P-Value	Coefficient (std. error)	P-Value
Court Selection	Appointment	0.460 (0.281)	0.05	-----	
	Merit Selection	0.114 (0.170)	0.25	-----	
	Partisan Election	0.244 (0.187)	0.10	-----	
Court Retention	Political Retention	-----		0.408 (0.264)	0.06
	Partisan Election	-----		0.197 (0.367)	0.30
	NonPartisan Election	-----		-0.214 (0.286)	0.23
Political Environment	Retention Elections	-----		-0.131 (0.209)	0.27
	Governor-Court Party ID	0.172 (0.109)	0.06	0.100 (0.114)	0.19
	Divided Government	0.220 (0.128)	0.04	0.118 (0.135)	0.19
Administrative Environment	Strong Non-Delegation Doctrine	-0.492 (0.253)	0.03	-0.509 (0.269)	0.03
	Moderate Non-Delegation Doctrine	-0.175 (0.259)	0.25	-0.248 (0.272)	0.18
	Legislative Professionalism	-0.427 (0.597)	0.25	-0.286 (0.554)	0.30
	Administrative Docket Discretion	0.355 (0.133)	0.00	0.286 (0.135)	0.01
Litigant Status	Agency Petitioner	0.274 (0.143)	0.03	0.287 (0.144)	0.02
Regional Controls	South	-0.150 (0.205)	0.23	-0.137 (0.310)	0.33
	Midwest	0.156 (0.145)	0.14	0.263 (0.228)	0.13
	West	-0.036 (0.156)	0.41	0.115 (0.239)	0.32
	Constant	0.417 (0.331)		0.643 (0.351)	
Wald χ^2		(13) 46.02		(14) 71.57	
N		2222		2222	

Note: Dependent variable is whether the agency is the winning party (1) or losing party (0) Tests are one-tailed. Standard errors are clustered by state.

Table 1.3 State Supreme Courts and Executive Branch Agency Litigation: Change in Predicted Probabilities

Variable	Model 1		Model 2	
	Coefficient (std. error)	P- Value	Coefficient (std. error)	P-Value
Appointment	0.10	16%	-----	
Merit Selection	-----		-----	
Partisan Election	0.05	9%	-----	
Political Retention	-----		0.08	12%
Partisan Election	-----		n.s.	
NonPartisan Election	-----		n.s.	
Retention Elections	-----		n.s.	
Governor-Court Party ID	0.04	6%	n.s.	
Divided Government	0.05	9%	n.s.	
Strong Non-Delegation Doctrine	-0.12	-23%	-0.12	-23%
Moderate Non-Delegation Doctrine	n.s.		n.s.	
Legislative Professionalism	n.s.		n.s.	
Administrative Docket Discretion	0.08	12%	0.06	9%
Agency Petitioner	0.06	10%	0.06	9%
South	n.s.		n.s.	
Midwest	n.s.		n.s.	
West	n.s.		n.s.	
N	2222		2222	

Note: Changes in predicted probabilities calculated for variables statistically significant variables. For continuous variables, changes in predicted probability calculated as change from one standard deviation below the mean to one standard deviation above the mean. For indicator variables, change in predicted probability calculated as change from 0 to 1. Continuous variables held at their mean and indicator variables at their mode for calculation of predicted probabilities.

Results

The results of the models suggest selection and retention methods play a significant role in state supreme court review of state administrative agencies. In Model 1 in Table 1.2, state supreme courts are characterized according to method of judicial selection. In Model 2, state supreme courts are characterized according to method of judicial retention. In Model 1, politically appointed courts are more likely to vote in favor of administrative agencies, (statistically significant at the 0.05 level). Substantively, when appointed state supreme court justices are ruling on cases involving state agencies, the likelihood of state agency success increases by approximately 16 percent.²⁶ The results also show that partisan elected courts are more likely to vote in favor of state agencies as compared to the base category (nonpartisan courts). The probability of success in courts that face partisan elections increases by 9 percent as compared to nonpartisan courts. Partisan elected judges, who run under a party label, perhaps have the greatest *electoral* connection to executives and legislators. These courts are apparently less willing to overturn the decisions of executive branch agencies as compared to courts that face nonpartisan elections, which are supposedly more politically insulated.²⁷ The results for merit selected justices are not estimated precisely in Model 1; directionally however the results

²⁶ The results are consistent when compared against merit selected courts or partisan elected courts as the base category (see Appendix B, Table B1).

²⁷ It is important to note however, that although some states have implemented non-partisan elections for increased political insulation of the judiciary, research indicates that state supreme court judges in non-partisan states are still attentive to the partisan preferences of their constituencies in their decision-making on high salience issues such as abortion policy (Caldarone, Canes-Wrone, and Clark 2009).

suggest that merit selected justices are less likely to rule in favor of state agencies than nonpartisan justices (the base category).

Model 2 in Table 1.2 estimates the effect of state supreme court retention method on state agency success in court. According to the results in Table 1.2 courts subject to political retention from governors and legislatures are more likely to rule in favor of state administrative agencies in court. In fact, the probability of success for administrative agencies in states with politically retained courts increases by 12 percent when compared to the base category (courts with lifetime tenure).²⁸ These findings support the hypothesis that politically retained courts are sensitive to retention vulnerabilities when ruling on cases involving executive branch policy.

²⁸ These findings are consistent when politically retained courts are directly compared to multiple base categories. Politically retained courts are more likely to rule in favor of executive branch agencies as compared to courts retained by nonpartisan elections and retention elections (see Appendix B, Table B1.2). The estimates comparing politically retained courts to partisan election courts does not achieve the traditional level of statistical significance, however the results are in the hypothesized direction.

Table 1.4 State Supreme Courts and Executive Branch Agency Litigation: Judicial Selection and Retention

		Model 3	
Variable		Coefficient (std. error)	P-Value
<i>Court Selection & Retention</i>	Politically Appointed and Politically Retained	0.693 (0.419)	0.05
	Merit Selection and Politically Retained	0.101 (0.136)	0.23
<i>Political Environment</i>	Governor-Court Party ID	0.171 (0.097)	0.04
	Divided Government	0.159 (0.117)	0.09
<i>Administrative Environment</i>	Strong Non-Delegation Doctrine	-0.476 (0.244)	0.03
	Moderate Non-Delegation Doctrine	-0.190 (0.246)	0.22
	Legislative Professionalism	-0.187 (0.470)	0.35
	Administrative Docket Discretion	0.296 (0.119)	0.01
<i>Litigant Status</i>	Agency Petitioner	0.293 (0.142)	0.02
	South	-0.152 (0.205)	0.23
<i>Regional Controls</i>	Midwest	0.084 (0.152)	0.30
	West	-0.055 (0.182)	0.38
	Constant	0.534 (0.296)	
Wald χ^2		(12) 60.46	
N		2222	

Note: Dependent variable is whether the agency is the winning party (1) or losing party (0). Tests are one-tailed. Standard errors are clustered by state.

Table 1.5 State Supreme Courts and Executive Branch Agency Litigation: Judicial Selection and Retention Predicted Probabilities

	Model 3	
Variable	Coefficient (std. error)	P-Value
Politically Appointed and Politically Retained	0.14	21%
Merit Selection and Politically Retained	n.s.	
Governor-Court Party ID	0.04	6%
Divided Government	0.04	6%
Strong Non-Delegation Doctrine	-0.11	-21%
Moderate Non-Delegation Doctrine	n.s.	
Legislative Professionalism	n.s.	
Administrative Docket Discretion	0.06	10%
Agency Petitioner	0.06	10%
South	n.s.	
Midwest	n.s.	
West	n.s.	
N	2222	

Note: Changes in predicted probabilities calculated for variables statistically significant variables. For continuous variables, changes in predicted probability calculated as change from one standard deviation below the mean to one standard deviation above the mean. For indicator variables, change in predicted probability calculated as change from 0 to 1. Continuous variables held at their mean and indicator variables at their mode for calculation of predicated probabilities.

In order to investigate the joint impact of judicial selection and retention, I estimate an additional model that isolates state supreme courts that are subject to appointment and political

retention (see Table 1.4).²⁹ In this model I also include a separate variable for courts where justices are selected by merit selection and are politically retained. As expected, the results show that state agencies' success increases substantially in courts where the state justices are both politically appointed and politically retained. Compared to other selection and retention methods, the probability of success for state agencies increases by 21 percent in courts where justices are politically appointed and politically retained (see Table 1.5). Although the estimate is in the hypothesize direction, surprisingly the variable for courts which are merit selected and politically retained does not achieve statistical significance.³⁰ These findings suggest that researchers must also take into account the way in which selection and retention methods work together to influence court outcomes. Overall, in states where political elites (governors and legislatures)

²⁹ Creating indicator variables to capture all combinations of judicial selection and retention methods creates difficulties for my analysis given the limited degrees of freedom (50) and the variety of selection and retention methods that states use. Nine separate indicator variables are required to estimate each combination of selection and retention and some states like California, where courts face political appointment and retention elections, are singular outliers in terms of combined selection and retention method.

³⁰ Although all models in this analysis control from regional effects, it is important to note that the states in the “merit selection and politically retained category” are all Northeastern states: Connecticut, New York, and Vermont. Caution should be exercised in interpreting the results from the Merit Selection-Political Retention variable given the potential difficulties in disentangling the impact of judicial institutional design versus the effect of regional characteristics.

play a significant role in the selection and retention of state justices, state agencies enjoy a higher rate of success in court.³¹

Control Variables

Across all models, agencies in states where the state supreme court adheres to a strict non-delegation doctrine have a lower probability of success than agencies in state with more lax non-delegation doctrines. Specifically, when moving from a state with a “weak” non-delegation doctrine to a state with “strong” non-delegation doctrine, the probability of success for state agencies drops by as much as 23 percent (see Table 1.3). This finding is important because no previous research has empirically analyzed the impact of state non-delegation doctrine standards on state supreme court decision-making. While researchers at the federal level declare the non-delegation doctrine “dead”, many state supreme courts take a strict posture towards issues concerning the boundaries of agency authority.³²

As hypothesized, the results in Model 1 and Model 3 show that partisan agreement between the court and state executive influences court decision-making. The estimates show that

³¹ In addition to controlling for regional effects, all models were estimated to control for individual state effects. The results presented in this analysis are consistent controlling for individual state effects, however when controlling for the effect of the Maine, the estimates are less precise (although still in the hypothesized direction). Courts in Maine are subject to political appointment and political retention and the success rate for agencies in Maine (86 percent) is greater than the success rate for the remaining sample (64 percent).

³² In Appendix B (Table B1.3, B1.4 I estimate expanded models which control for litigant type (state government litigant, business litigant). In the expanded model I also control for policy issues involved (taxes, utility, environmental policy, welfare).

courts are more supportive of executive branch policy when a majority of the court shares the partisan identification of the governor (statistically significant at the 0.10 and 0.05 level). If a majority of the courts' judges and the governor are of the same party, the probability of success for state agencies increases by six percent. The variable estimates for court-governor partisan agreement lack precision in Model 2. The results also indicate that state agencies are careful to appeal cases which they have a greater chance of winning. Consistent with previous scholarship, state agencies that appear as the appellant in court increase their likelihood of success by approximately 10 percent (Table 1.2, 1.3).

Similarly, agencies in states where courts have mandatory dockets from administrative agency cases are more likely to win in court. If courts lack docket discretion they potentially have to entertain comparatively weak legal claims against state agencies. This fact seemingly increases the win rate for agencies in states with mandatory dockets. Results from Model 1 and Model 3 show that divided government has a statistically significant effect on court outcomes (0.05 and 0.10 level respectively). Surprisingly, the results are opposite to the hypothesized direction. According to model estimates, state agencies are more successful in environments of divided government. Perhaps the presence of unified government is more likely to encourage deferential behavior on the part of state justices when ruling on cases that involve constitutionality of legislation. Clearly joint action by the state legislature and governor are required to re-legislate in response to court action overturning state legislation. However in cases involving administrative agencies, a bigger threat to the court may be non-enforcement or policy resistance on part of the governor. Therefore in cases involving executive branch agencies, partisan agreement between the court and the executive would be of greater consequence to court

outcomes than partisan and policy differences between the governor and the legislature. The estimates for legislative professionalism lack statistical significance across all model estimates.

Discussion and Conclusion

This research examines the interaction of the judiciary and the executive branch by examining the effect of judicial selection and retention method on case outcomes. Many existing analyses of state supreme court decision-making focus on high salience issues such as the death penalty or abortion to investigate judicial decision-making. While the importance of these issues is beyond dispute, citizens and interest groups are much more likely to personally encounter state administrative rules and decisions in their daily lives. The fact that state supreme court justices have the final word on the legality of state policy gives state supreme courts a tremendous amount of authority. State supreme courts have declared acts of delegation to administrative agencies invalid and have even settled disputes over whether the governor has primary legal authority over the executive branch.³³

Using models that estimate the impact of judicial selection and retention method, I find that justices who face political appointment and political retention decisions are most likely to rule in favor of executive agencies. These findings are consistent when comparing political elite control over judicial tenure against multiple categories of judicial selection and retention methods State agencies in environments where there is policy agreement between the court and executive, and where the court enforces a weak non-delegation doctrine, are also more likely to win their challenges in court.

³³*Perdue v. Baker*, 2003 Ga. LEXIS 700 (Ga., September 4, 2003). Accessed March 10, 2010. http://swdb.berkeley.edu/resources/Court_Cases/georgia/PERDUEetal_v_BAKER_91503.pdf.

The results presented here also produce additional questions regarding the relationship between state justices' decision-making and state administration agencies. If justices are strongly influenced by the degree of control political elites have over judicial institutions, perhaps they are also potentially influenced by the amount of control that policy-makers have over the activity of state administrative agencies. Future research regarding the interaction between state justices and state agencies should take into account how differences in the institutional design of the state executive branch affects the level of influence governors and legislatures hold over administrative policy. The level of influence political elites possess in relation to administrative structures potentially impacts the deference they receive from state justices.

Preserving judicial independence while maintaining judicial accountability has been an important justification for the evolving structure of state courts. When adjudicating cases, legal facts and precedent are clearly essential in the decision-making process of judges. However, this analysis shows that altering the manner in which justices are selected and retained will influence the deference that justices show executive branch agencies. Because the vast majority of state supreme court justices do not have the independence that comes with lifetime tenure, extralegal factors such as the institutional powers of governors and legislatures continue to emerge as an important influence on judicial behavior.

APPENDIX A

Table A1.1. State Supreme Court Selection

State Supreme Court Selection Methods: 1995-1998 ³⁴			
Political Appointment	Partisan Election	Non-Partisan Election	Merit Selection
California (G)	Alabama	Georgia	Alaska
Delaware (G)*	Arkansas	Idaho	Arizona
Maine (G)	Illinois	Kentucky	Colorado
Massachusetts(G)*	Louisiana	Michigan	Connecticut
New Hampshire (G)*	New Mexico	Minnesota	Florida
New Jersey (G)	North Carolina	Mississippi	Hawaii
South Carolina (L)	Pennsylvania	Montana	Indiana
Virginia (L)	Texas	Nevada	Iowa
	West Virginia	North Dakota	Kansas
		Ohio	Maryland
		Oregon	Missouri
		Washington	Nebraska
		Wisconsin	New York
			Oklahoma
			Rhode Island
			South Dakota
			Tennessee
			Utah
			Vermont
			Wyoming
			Missouri

³⁴ In **Delaware**, **Massachusetts**, and **New Hampshire** (since 2000), governors have utilized executive orders to create judicial nominating commissions similar to those in merit selection states. However, in these states the state executive exercises a substantial degree of control over the membership and procedures of the nominating commissions. For example in Massachusetts the members of the commission serve at the discretion of the governor. “Judicial Merit Selection: Current Status.”

American Judicature Society. http://www.judicialselection.us/uploads/documents/Judicial_Merit_Charts_0FC20225EC6C2.pdf , last accessed April 18, 2012.

In 2002, **North Carolina** passed the Judicial Campaign Act which required that partisan elections for state supreme court justices transition to nonpartisan elections (effective 2004). “History of Reform Efforts.” *American Judicature Society*.

http://www.judicialselection.us/judicial_selection/reform_efforts/formal_changes_since_inception.cfm?state=NC, last accessed April 20, 2012.

In 1994, the **Mississippi** legislature passed the Nonpartisan Judicial Campaign Act which changed state supreme court elections from partisan to non-partisan. “History of Reform Efforts.” *American Judicature Society*.

http://www.judicialselection.us/uploads/Documents/jsreform_1185395742450.pdf, last accessed April 20, 2012.

In **Michigan** and **Ohio**, partisan affiliation does not appear on the ballot, however in **Michigan** candidates are selected in party conventions and in **Ohio**, candidates in partisan primaries.

Table A2.1 State Supreme Court Retention

State Supreme Court Retention Methods:1995-1998 ³⁵				
Political Retention	Partisan Election	Non-Partisan Election	Retention Election	Lifetime Retention
Connecticut	Alabama	Georgia	Alaska	Massachusetts
Delaware	Arkansas	Idaho	Arizona	New Hampshire
Maine	Louisiana	Kentucky	California	Rhode Island
New Jersey*	New Mexico	Michigan	Colorado	
New York	North Carolina	Minnesota	Florida	
South Carolina	Texas	Mississippi	Illinois	
Vermont	West Virginia	Montana	Indiana	
Virginia		Nevada	Iowa	
		North Dakota	Kansas	
		Ohio	Maryland	
		Oregon	Missouri	
		Washington	Nebraska	
		Wisconsin	Oklahoma	
			Pennsylvania	
			South Dakota	
			Tennessee	
			Utah	
			Wyoming	
			Hawaii	

*If New Jersey justices are reappointed by the governor after their initial term, they can serve until the age of seventy.

³⁵ In **New Jersey**, state justices initially serve a term of seven years after gubernatorial appointment. At the end of their seven year term, state justices are subject to gubernatorial reappointment upon which they can serve until they are seventy. Because the majority of justices on the New Jersey state supreme court have lifetime tenure (5 out of 7) between 1995 and 1998, I include New Jersey in the lifetime tenure category for my analysis. **New Mexico**: New Mexico utilizes a mix of merit selection, partisan and retention elections to select and retain state justices. After their initial appointment by the governor, state justices in New Mexico must run in a partisan election. Winners of the partisan election run in retention elections in subsequent elections (Behrens and Silverman 2002). **Hawaii**: a nonpartisan Judicial Selection Committee decides retention. Hawaii is a singular outlier in terms of retention method. In my empirical analysis Hawaii is included within the category of retention elections for two reasons. First, retention elections and the retention process in Hawaii is noncompetitive (the justices do not have to run in a campaign against another candidate). Second, retention elections and the retention decision in Hawaii both have nonpartisan aspects; retention elections are typically nonpartisan and the retention decisions in Hawaii are made by a nonpartisan committee retention committee. However, estimates presented in Table 2 are consistent when Hawaii is categorized as either a politically retained court or retention election court. **Massachusetts and New Hampshire**: Once taking office, justices in Massachusetts and New Hampshire can serve until age 70.

Table A1.3 State Supreme Court Selection and Retention Methods (1995-1998)

Selection Methods

		Political Appointment	Partisan Election	Non-Partisan Election	Merit Selection	Total
Retention Methods	Political Retention	5 States	0 States	0 States	3 states	8 states
	Partisan Election	0 States	6 States	0 States	0 states	6 states
	Non-Partisan Election	0 States	0 states	13 States	0 states	13 states
	Retention Election	1 State	3 States	0 states	16 states	20 states
	Lifetime Tenure	2 states ³⁶	0 states	0 states	1 States	3 states
	Total	8 states	9 states	13 states	20 states	50 states
						50 states

³⁶ New Jersey included in this category.

Table A1.4. State Executive/Administrative Agency Categories

State Executive/Administrative Agency Category	Plaintiff	Respondent	Total
Secretary of State	6	39	45
Other Executive Officer ³⁷	36	60	96
Police	7	27	34
Taxation	128	248	376
Human Services, welfare, health agency	149	336	485
Streets and Highways	21	21	42
Transportation	100	107	207
Public Utilities	12	87	99
Elections	4	18	22
Environment	33	82	115
Market	13	16	29
Communications	1	8	9
Labor-Management	53	121	174
Zoning/land use	12	11	23
Building and Housing	4	11	15
Personnel	16	26	42
Other ³⁸	167	242	409
Total	762	1460	2222

³⁷ This category includes cases involving various state-level departments such as Treasury, State Retirement Board, Insurance Commission, Education, and Public Utilities.

³⁸ This category includes cases from state administrative agencies that cannot be classified using the above categories. Similar to the category of “Other Executive Officer,” this category includes a variety of state agencies and policy issues. Some categories of state agencies which appear in cases in this category are departments of Natural Resources, Education, Finance, Alcoholic Beverage Control Board, and Consumer Protection, and State Lottery Commissions.

Table A1.5. Case Distribution by State

State	Number	Percentage
Alabama	25	1.13
Alaska	67	3.02
Arizona	12	0.54
Arkansas	49	2.21
California	19	0.86
Colorado	39	1.76
Connecticut	62	2.79
Delaware	5	0.23
Florida	31	1.40
Georgia	20	0.90
Hawaii	19	0.86
Idaho	52	2.34
Illinois	35	1.58
Indiana	23	1.04
Iowa	53	2.39
Kansas	44	1.98
Kentucky	32	1.44
Louisiana	32	1.44
Maine	96	4.32
Maryland	39	1.76
Massachusetts	61	2.75
Michigan	18	0.81
Minnesota	33	1.49
Mississippi	47	2.12
Missouri	66	2.97
Montana	40	1.80
Nebraska	70	3.15
Nevada	35	1.58
New Hampshire	21	0.95
New Jersey	36	1.62
New Mexico	20	0.90
New York	46	2.07
North Carolina	24	1.08
North Dakota	101	4.55
Ohio	146	6.57
Oklahoma	34	1.53
Oregon	47	2.12
Pennsylvania	80	3.60
Rhode Island	84	3.78
South Carolina	45	2.03
South Dakota	31	1.40
Tennessee	21	0.95
Texas	21	0.95
Utah	44	1.98
Vermont	66	2.97
Virginia	21	0.95
Washington	31	1.40
West Virginia	78	3.51
Wisconsin	51	2.30
Wyoming	50	2.25
Total	2222	100

APPENDIX B

Table B1.1 State Supreme Courts and Executive Branch Agency Litigation: Judicial Selection (Various Base Categories)

		Model 2		Model 1	
Variable		Coefficient (std. error)	P-Value	Coefficient (std. error)	P-Value
Court Selection	Appointment	0.346 (0.272)	0.10	0.216 (0.264)	0.20
	Merit Selection			-0.129 (0.185)	0.24
	Partisan Election	0.129 (0.185)	0.24	-----	
	NonPartisan Election	-0.114 (0.170)	0.25	-0.244 (0.187)	0.10
Political Environment	Governor-Court Party ID	0.172 (0.109)	0.06	0.172 (0.109)	0.06
	Divided Government	0.220 (0.128)	0.04	0.220 (0.128)	0.04
Administrative Environment	Strong Non-Delegation Doctrine	-0.492 (0.253)	0.03	-0.492 (0.253)	0.03
	Moderate Non-Delegation Doctrine	-0.175 (0.259)	0.25	-0.175 (0.259)	0.25
	Legislative Professionalism	-0.427 (0.620)	0.25	-0.427 (0.620)	0.25
	Administrative Docket Discretion	0.355 (0.133)	0.00	0.355 (0.133)	0.00
Litigant Status	Agency Petitioner	0.274 (0.143)	0.03	0.274 (0.143)	0.03
Regional Controls	South	-0.150 (0.205)	0.23	-0.150 (0.205)	0.24
	Midwest	0.156 (0.145)	0.14	0.156 (0.145)	0.14
	West	-0.036 (0.156)	0.41	-0.036 (0.156)	0.41
	Constant	0.531 (0.323)		0.661 (0.323)	
	Wald	(13) 46.02		(13) 46.02	
N		2222		2222	

Note: Dependent variable is whether the agency is the winning party (1) or losing party (0). Tests are one-tailed. Standard errors are clustered by state.

Table B1.2. State Supreme Courts and Executive Branch Agency Litigation: Judicial Retention (Varied Base Categories)

Variable	Model 1		Model 2		Model 3		
	Coefficient (std. error)	P-Value	Coefficient (std. error)	P-Value	Coefficient (std. error)	P-Value	
<i>Court Retention</i>	Political Retention	0.211 (0.380)	0.29	0.622 (0.309)	0.02	0.538 (0.278)	0.03
	Partisan Election	----- -0.411 (0.250)	0.05	0.411 (0.250)	0.05	0.327 (0.275)	0.12
	NonPartisan Election	-0.327 (0.275)	0.12	0.083 (0.163)	0.31	-0.083 (0.163)	0.30
	Retention Election	-0.197 (0.367)	0.30	0.214 (0.286)	0.23	0.131 (0.209)	0.27
	Governor-Court Party ID	0.100 (0.114)	0.19	0.100 (0.114)	0.19	0.100 (0.114)	0.19
	Divided Government	0.118 (0.135)	0.19	0.118 (0.135)	0.19	0.118 (0.135)	0.19
<i>Political Environment</i>	Strong Non-Delegation Doctrine	-0.509 (0.269)	0.03	-0.509 (0.269)	0.03	-0.509 (0.269)	0.03
	Moderate Non-Delegation Doctrine	-0.248 (0.272)	0.18	-0.248 (0.272)	0.18	-0.248 (0.272)	0.18
	Legislative Professionalism	-0.286 (0.554)	0.30	-0.286 (0.554)	0.30	-0.286 (0.554)	0.32
<i>Administrative Environment</i>	Administrative Docket Discretion	0.286 (0.135)	0.02	0.286 (0.135)	0.02	0.286 (0.123)	0.02
	Agency Petitioner	0.287 (0.144)	0.02	0.287 (0.144)	0.02	0.287 (0.144)	0.02
<i>Litigant Status</i>	South	-0.137 (0.310)	0.33	-0.137 (0.310)	0.32	-0.137 (0.310)	0.32
	Midwest	0.263 (0.228)	0.13	0.263 (0.228)	0.13	0.263 (0.228)	0.13
<i>Regional Controls</i>	West	0.115 (0.239)	0.32	0.115 (0.239)	0.13	0.115 (0.239)	0.32
	Constant	0.839 (0.425)		0.429 (0.341)		0.512 (0.311)	
	Wald χ^2	(17) 71.57		(17) 71.57		(14) 71.57	
N	2222		2222		2222		

Note: Dependent variable is whether the agency is the winning party (1) or losing party (0). Tests are one-tailed. Standard errors are clustered by state.

Table B1.3. State Supreme Courts and Executive Branch Agency Litigation: Extended Model

	Model 1		Model 2	
	Coefficient (std. error)	P-Value	Coefficient (std. error)	P-Value
	0.455 (0.277)	0.05	-----	
<i>Court Selection</i>	0.113 (0.170)	0.25	-----	
	0.249 (0.185)	0.09	-----	
			0.407 (0.266)	0.06
<i>Court Retention</i>			0.207 (0.361)	0.28
			-0.202 (0.284)	0.24
			-0.119 (0.206)	0.28
<i>Political Environment</i>	0.172 (0.108)	0.06	0.100 (0.113)	0.19
	0.218 (0.127)	0.04	0.117 (0.133)	0.19
<i>Administrative Environment</i>	-0.480 (0.253)	0.03	-0.494 (0.270)	0.03
	-0.171 (0.258)	0.25	-0.242 (0.271)	0.18
	-0.403 (0.619)	0.26	-0.262 (0.560)	0.32
	0.363 (0.132)	0.00	0.293 (0.137)	0.03
<i>Case Facts</i>	-0.168 (0.251)	0.25	-0.188 (0.255)	0.23
	-0.157 (0.128)	0.11	-0.165 (0.130)	0.10
	0.276 (0.144)	0.03	0.290 (0.146)	0.02
<i>Policy Issues</i>	0.250 (0.348)	0.24	0.211 (0.350)	0.27
	0.120 (0.160)	0.23	0.106 (0.160)	0.25
	0.003 (0.195)	0.50	0.034 (0.202)	0.43
	0.002 (0.178)	0.50	-0.012 (0.175)	0.47
<i>Regional Controls</i>	-0.151 (0.203)	0.23	-0.143 (0.304)	0.32
	0.146 (0.149)	0.16	0.247 (0.228)	0.14
	-0.054 (0.159)	0.37	0.088 (0.238)	0.36
	0.430 (0.335)		0.654 (0.353)	
Wald χ^2	19(65.14)		(20)91.99	
N	0.017		2222	

Note: Dependent variable is whether the agency is the winning party (1) or losing party (0). Tests are one-tailed. Standard errors are clustered by state.

Table B1.4. State Supreme Courts and Executive Branch Agency Litigation: Extended Model

		Model 1	
Variable		Coefficient	P-Value
		(std. error)	
<i>Court Selection & Retention</i>	Politically Appointed and Politically Retained	0.689 (0.417)	0.05
	Merit Selection and Politically Retained	0.091 (0.134)	0.25
<i>Political Environment</i>	Governor-Court Party ID	0.171 (0.096)	0.06
	Divided Government	0.156 (0.116)	0.04
<i>Administrative Environment</i>	Strong Non-Delegation Doctrine	-0.464 (0.245)	0.03
	Moderate Non-Delegation Doctrine	-0.186 (0.247)	0.25
	Legislative Professionalism	-0.161 (0.473)	0.26
	Administrative Docket Discretion	0.305 (0.118)	0.00
<i>Case Facts</i>	State Gov't Opponent	-0.186 (0.246)	0.25
	Business Opponent	-0.166 (0.128)	0.11
	Agency Petitioner	0.296 (0.144)	0.03
<i>Policy Issues</i>	Environmental Policy	0.227 (0.344)	0.24
	Taxes	0.113 (0.159)	0.23
	Utility	0.038 (0.199)	0.50
	Welfare	-0.003 (0.175)	0.50
	South	-0.153 (0.201)	0.22
<i>Regional Controls</i>	Midwest	0.072 (0.157)	0.32
	West	-0.076 (0.183)	0.34
	Constant	0.551 (0.291)	
Wald χ^2		(18) 72.43	
N		2222	

Note: Dependent variable is whether the agency is the winning party (1) or losing party (0). Tests are one-tailed Standard errors are clustered by state.

CHAPTER III

JUDICIAL DEFERENCE AND EXECUTIVE CONTROL OVER ADMINISTRATIVE AGENCIES

Introduction

Judges have the power to make decisions that can weaken or overturn executive policy; however judges must rely on the executive branch for implementation of court decisions. Do judges defer to strong executives for fear of retaliation or enforcement resistance? After all, executives must enforce judicial decisions. One way to answer this question is to examine how courts treat executive branch litigants. Executive branch agencies play a key role in the policy implementation process and aggressive judicial review of executive branch activity, where the government is a litigant, could be viewed as a threat to executive power and met with negative response from the executive and subordinate executive officials.

Executives possess many formal tools that affect their ability to influence executive branch activity and policy outcomes. Executive means of bureaucratic control include appointment power, rule review, budgetary control, and the ability to reorganize executive branch structures (Lewis 2005, Woods and Baranowski 2007, Wiseman 2009). The U.S. states provide an ideal setting to examine how variation in executive control influences judicial decision-making. State executives enjoy many institutional capabilities similar to those of the president; however there is substantial variation in gubernatorial institutional control across states. For example, in many states executive branch officials are elected by the public or appointed by someone other than the governor. Also some state executives have the power to review rules before and after they have taken affect.

In this paper I examine whether judges defer more to agencies in states where executives have increased formal influence over the executive branch. I begin by discussing existing research regarding the relationship between executive power and judicial decision-making. Next, I discuss executive mechanisms of administrative control. I then explain how judicial concerns regarding enforcement and institutional retaliation result in increased judicial deference towards executive branch agencies in environments where executives have heightened institutional privileges. I evaluate the empirical relationship between state executives and judicial decision-making using cases from the Brace and Hall State Supreme Court Data Project. I conclude by discussing the implications that ever-increasing boundaries of executive authority have on court power and decision-making.

Administrative Agencies, Executive Control, and Judicial Decision-Making

Almost all of what we know regarding executive and judicial branch interaction comes from research at the *federal* level, and the results of whether judges respond to variation in executive control are decidedly mixed (Sheehan 1992, Yates 2002, Stephenson 2004, Smith 2007). Researchers have examined whether federal agency success in court varies depending on whether the agency under review is an executive agency (such as Agriculture, Commerce, and other departments whose heads serve on the Cabinet) or an independent agency (such as the Federal Communications Commission). The president has greater control over hiring and firing, budgets, rulemaking, and reorganization in executive agencies (Moe 1982, Sheehan 1992, Lewis 2008.) Moreover, decision-making in independent commissions follow a more “judicialized” process (Moe 1982, Sheehan 1992, Caruson and Bitzer 2004) that limits presidential influence on agency activities. Because the president has more authority in executive agencies than

independent agencies, the policy outputs of executive agencies are expected to more closely reflect the preferences of the sitting president (Cohen and Spitzer 1996, Smith 2007).

Scholars have suggested that the proximity of agencies to presidential control will influence judicial decision-making. Particularly, judges may apply greater scrutiny to executive branch agencies because of concerns regarding decision-making driven by partisan politics (Stephenson 2004). While Sheehan (1992) finds some evidence that the U.S. Supreme Court exhibits more support for independent agencies than executive agencies, Caruson and Bitzer (2004) find no significant difference between the judicial treatment of independent and executive agencies. One reason for the divergent findings may be the relative ideology of agencies and the courts. Because presidents have greater influence over executive agencies, the success rate of executive agencies may be dependent upon the congruence between the president and the ideological preferences of the justices (Cohen and Spitzer 1996, Smith 2007). Cohen and Spitzer (1996) argue that if executive branch policy begins to shift under a new presidential administration, the U.S. Supreme Court will signal to lower courts to be more supportive of the new agency policy direction. However, an important component of their theory is the proximity of the policy preferences of the median justice to that of the sitting president (Reagan in the case of their analysis). Similarly, Smith (2007) finds that ideological distance between justices and the president, under whom the policy under question was *enacted*, has a greater role in cases involving executive branch agencies. He also finds that federal justices overall are more likely to vote in favor of executive branch agencies versus independent agencies. Yates (2002) also uncovers evidence that U.S. Supreme Court justices are more supportive of executive agencies; however this relationship is conditional upon levels of presidential approval. As presidential

approval increases, justices are more likely to vote in favor of executive branch agencies (Yates 2002).

While existing literature addresses questions involving executive control and judicial deference at the federal level, no such research utilizes state institutions to examine this relationship and states are arguably the best places to examine this question. Analysis of executive and judicial control at the state level is necessary and beneficial for multiple reasons. First, examining executive power at the state level not only allows for analysis of variation across agencies, but also variation in executive influence over administrative agencies across states. Also, examining the states allows for analysis of how variation in judicial institutional design, such as differences judicial selection and retention, affects court decision-making on issues involving the executive branch. Finally, assessment of executive power in the states allows researchers to compare, and if necessary reassess, previous conclusions regarding judicial deference to executive control gleaned from examination of federal institutions.

Institutional Tools of Administrative Control

Executive branch agencies interpret and implement government policy so it is understandable that an executive desires a high degree of control of the rules, regulations, and policy that emerge from administrative agencies. Executives have many institutional mechanisms that aid their control over bureaucratic structures. Whereas agencies staffed with independent commissioners can limit executive managerial control, increased appointment powers allow executives to create an administrative structure responsive to executive preferences (Howell and Lewis 2002, Woods and Baranowski 2007). Heightened executive appointment power also helps reduce the information disadvantage that the executive may have in relation to

other executive and legislative branch officials (Ferguson 2003, 165). In addition to appointment powers, executives are equipped with the power to reorganize executive branch structures, and the capability to review agency regulations before they are published. Rules created by administrative agency officials implement law and policy developed by legislatures “and provide the technical detail so often missing in statutes” (Kerwin 2003, 7). Multiple presidents have issued executive orders that have implemented centralized review and management of agency policy through the Office of Management and Budget (OMB) (Wiseman 2009).³⁹ Rules are reviewed for multiple purposes such as ensuring their legality or analyzing their economic impact (Hahn 2000). Although one stated goal of various executive rule review programs is to examine the economic impact of regulations, presidents are able to utilize their review mechanism to alter, or delay publication of, rules that may be adverse to executive preferences.⁴⁰ Presidents are also able to reorganize the federal executive branch in order to make it more responsive to presidential influence (Howell and Lewis 2002). In particular presidents have used

³⁹ Some of the executive orders include President Carter’s Executive Order 12044 that created the Regulatory Analysis Review and a regulatory council to allow for executive coordination of government rulemaking (Kerwin 2003, 119). Carter also sought to increase public involvement in the rulemaking process through his reforms (Kerwin 2003). Reagan’s Executive Order 12291 required agencies to submit regulatory goals to the OMB and “explain how they are consistent with the Administration’s regulatory principles” (Croley 2003). Similarly, Clinton’s Executive Order 12866 required Office of Information and Regulatory Affairs (OIRA) review of pending agency rules and cost-benefit analysis assessments (Kerwin 2003, Croley 2003).

⁴⁰ Wiseman finds that OIRA review of agency activity produces “changes in nearly 70 percent of the agency rules it reviews” (Wiseman 2009, 1002).

their authority to create federal agencies when facing legislative resistance to executive preferences from Congress. Scholars find that presidentially created are subject to greater executive influence and control as compared to other federal agencies (Howell and Lewis 2002).⁴¹ State executives possess many powers of institutional control comparable to those of the president. However, there exists much variation in the U.S. states regarding the degree of institutional privileges state executives are afforded.

State Executive Branch and Gubernatorial Power

Throughout the twentieth century, state executives made significant gains in managerial control over state bureaucracies. Historically, many state governments were established with a fragmented executive branch (Lipson 1949, Graves 1956, 743; Beyle and Dalton 1981, Beyle 1999). Some of the specific organizational problems faced by state executives were the existence of agencies governed by boards and commissions outside of the purview of the governor, limits on gubernatorial appointment power, separate agencies performing overlapping functions, and an overall lack of “planned growth” of the state executive branch (Garnett 1980, Beyle and Muchmore 1983, Blair 1983, Conant 1988). States pursued different paths and methods to reorganize their state executive branch, however, a common goal of executive branch reorganizations was to increase gubernatorial formal powers (Beyle and Muchmore 1983, Woods

⁴¹ For example Howell and Lewis (2002) find that presidentially created executive agencies are more likely to be headed by presidential appointees without terms limits as compared to agencies created by Congress.

2004) and create “new gubernatorial authority where none existed before” (Beyle and Muchmore 1983, 18).⁴²

For example in 1955, there were 709 separately elected executive branch officials across “12 major offices in the states.”⁴³ Fifty years later this number was reduced to 308. Still significant state by state variation exists regarding levels of gubernatorial appointment power over agency officials. Many southern states such as Florida, Georgia, and Alabama, elect many of their top officials such as treasurer, agriculture commissioner, and insurance commissioner (Rossi 1999, 2001). In other states such as New Jersey, Pennsylvania, and Alaska, the governor is responsible for the selection of a high proportion of top executive branch officials.⁴⁴ A governor’s influence over the executive branch is closely tied to her control of the selection of executive branch officers (Brudney and Herbert 1986, Woods and Baranowski 2007). However, state executive officials that are elected have a base of power independent from the governor. Also, many executive branch officials are appointed by someone other the governor, and consequently, the governor usually has minimal (or no) control over the tenure and removal of officials he or she did not appoint. Thus, if governors gain the power to appoint top agency officials, they also increase their political control over that agency (Blair 1983, 118).

⁴² Between 1965 and 1987, twenty-two states undertook comprehensive reorganization of their state executive branch (Conant 1988). During the waves of executive branch reorganization, the number of states which utilized a cabinet system of government increased from twenty-six to forty between 1969 and 1982 (Beyle and Muchmore 1983, 13). The cabinet system of government greatly concentrates executive power (Garnet 1980, Conant 1988).

⁴³ *Book of the States*. 2006. Lexington, KY: The Council of State Governments.

⁴⁴ *Book of the States*. 2010. Lexington, KY: The Council of State Governments.

Formal rule review power varies greatly across the states. Lack of rule review power provides agencies with extra insulation from political interference (Poggione and Reenock 2009); however, with the power of rule review governors are able to monitor and direct agency rulemaking activity within the executive branch. Some governors have the power to review all proposed and existing rules, but according to Grady and Simon (2002) nearly half of state executives have no formal power of rule review. In a small number of states, the governor is required to approve proposed rules before they take effect (Grady and Simon 2002, 657). Reviewing rules before they are published allows state executives to take preemptive action to halt the implementation of rules they find undesirable. If agency officials are aware that their rulemaking is subject to oversight by political officials, the potential for promulgation of agency rules adverse to political elite preferences can be reduced (Gerber, Maestas, and Dometrius 2005). Scholars also find that the extent of executive resources (such as executive appointment power and rule review capabilities) affect the executive's influence over rule content, budgetary allocations, and "major policy changes" in administrative policy (Wood and Baranowski 2007, 1222).

The research discussed above clearly shows that executive institutional tools influence executive management and policy outcomes in the administrative state. Executive institutional powers will also affect how judges adjudicate cases involving executive branch activity. Below I discuss the implications that increased executive control of the administrative agencies has for judicial decision-making.

Why should Executive Institutional Power Induce Deference amongst Judges?

Courts wield important authority to review the rules and behavior of bureaucrats. Judicial intervention is often required to settle disputes involving the activity of administrative agencies. Plaintiffs may question whether the legislature could delegate its powers to an executive agency, argue that an agency's actions were beyond its authority, or challenge rulemaking activities (Greco 1994, Rossi 2001, Grady and Simon 2002). Administrative, legislative, and executive officials expend time, money, and effort to comply with court orders, and as a result, may become hostile to judicial intervention (Johnson 1979a, Straussman 1986, Ferejohn 1987, Tiller and Spiller 1999).⁴⁵ An unsupportive or antagonistic executive branch can prove costly for the judiciary.⁴⁶ The effort required to reform policies and procedures under court order can sometimes make agencies unreceptive to interventions by courts (Johnson 1979a, Straussman 1986, Tiller and Spiller 1999). When executives have increased formal control over agency activity, executive branch policy and activity should closely reflect executive preferences (Cohen and Spitzer 1996, Stephenson 2004, Lewis 2008). In examining the interaction between courts and executive agencies, judges will be more deferential to agencies controlled by institutionally

⁴⁵ Scholars suggest that agencies will adopt high-cost decision-making procedures (i.e. deciding disputes on a case by case basis instead of promulgating a generally applicable rule) which make it difficult for courts to closely monitor the procedures used by agencies (Spiller and Tiller 1997, Hanssen 2000). Also, Johnson (1979a) argues that agency preference for the status quo and the likelihood of court sanctions are two important factors that determine whether an agency will attempt to evade a court ruling.

⁴⁶ Not all court intervention is unwelcome. Court orders can provide bureaucrats with leverage when making budget request from the governor and legislature (Straussman 1986).

strong executives for two key reasons; the desire to have their decisions enforced and prevention of executive retaliation.

Enforcement Resistance

Judges hold the power to say what the law means but not the power to enforce or make the law (Carrubba and Zorn 2010). Executive and legislative officials can, in various ways, undermine the power of the judiciary (Ferejohn 1999, Howell 2003, Clark 2009). Bureaucrats and others responsible for executing judicial decisions can choose not to enforce them. Legislators can pass statutes to blunt or even overturn court rulings. And, agencies can promulgate rules or procedures which sidestep a court's holding. Executives can become resistant to enforcement responsibilities if court decisions are perceived as antagonistic to the executive branch (Moe and Howell 1999b).

Because others enforce their decisions, judges are strategic and consider how their decisions will be received by those in power (Epstein and Knight 1998, Langer 2002, Segal, Westerland, and Lindquist 2011). Specifically, judges will be more deferential in environments where enforcement resistance may be a concern. Howell (2003) identifies characteristics of the political environment (i.e. interest group activity, divide government, presidential approval) which can affect whether the executive non-enforcement may occur in cases involving executive power. In cases involving executive agencies, the executive's institutional environment also has implications for enforcement resistance. Formal tools of bureaucratic oversight allow an executive to impose her preferences upon the administrative structure and shift any pre-existing policy status quo closer to her policy preferences. These same managerial tools that allow a governor to influence the bureaucracy can aid the executive in resisting judicial attempts to unfavorably alter executive branch policy.

Agency officials appointed by an executive can work to ensure that judicial intervention does not unfavorably disrupt a gubernatorial or presidential policy agenda. In fact Johnson (1979a, 39) finds that the agency interpretation of the state supreme court decisions regarding agency activity depended highly on “the attitudes of top-level agency management.” Johnson does not provide information regarding how these individuals are selected (appointed or elected), however throughout many states, the governor selects individuals for top agency positions.⁴⁷ A state executive with increased appointment power can place more like-minded policy officials in important positions throughout the executive branch. Many high-profile examples exist regarding executive use of bureaucratic tools to resist judicial implementation. For example, commentators argue that President George W. Bush was largely able to resist implementation of environmental judicial decisions through the use of appointees that supported the Bush Administration’s environmental platform. High ranking appointees were able to ensure that policy emanating from Environmental Protection Agency (EPA) was in line with Bush Administration policy preferences, even over the objections of EPA careerists and scientists.⁴⁸ Obama Administration appointees have also been accused of resisting implementation of court

⁴⁷ *Book of the States*. 2010. Lexington, KY: The Council of State Governments.

⁴⁸ Herbert, Josef H. 2007, “EPA won’t specify global warming plans,” April 4, *USA Today*. http://www.usatoday.com/news/washington/2007-04-24-4209920482_x.htm, last accessed January 25, 2012.

United States House of Representatives Committee on Oversight and Government Reform. December 2007. *Political Interference with Climate Change Science Under the Bush Administration*. 110th Congress, 1st Session. <http://www.hsdl.org/?view&did=481710>, last accessed April 20, 2012.

rulings that diverged with the preferences of the Obama Administration in relation to the 2010 Gulf oil spill crisis.⁴⁹ Bureaucratic resistance can occur in many types of agency settings. However certain institutional structures such as independent commissions can insulate agencies from executive driven policy control and influence. Therefore presidential or gubernatorial enforcement resistance to judicial intervention perceived as adverse to executive policy preferences may be more difficult in agencies where top-level agency authority is diffused, and executive control is reduced. In fact some legal scholars argue that fragmentation and diffusion of executive branch structures is necessary to check and prevent “dangerous” concentrations of executive control in separation of power systems (Katyal 2006, Marshall 2006). If executive control over agency personnel increases executive influence over agency policy, executives can use this increased control over policy outputs to resist attempts by the judiciary to unfavorably alter executive branch policy. Therefore judges will act to pre-empt enforcement resistance by showing increased deference to executive branch policy.

Other executive mechanisms of institutional control may also affect judicial deference. In regards to courts and executive enforcement, rule review can potentially influence judicial decision-making in two ways. First executive centralized rule review can signal detailed and specific information to other policy officials, in this case judges, regarding specific policies that the executive prefers. For example, OMB review of agency regulations by the Reagan and Bush I Administrations signaled, and enforced, a clear executive preference for deregulation in many policy areas (Crowley 2003).

⁴⁹Hargreaves, Steve, 2011. “Court orders Obama to act on drilling permits,” February 21, *CNNMoney.com*, http://money.cnn.com/2011/02/18/news/economy/oil_drilling_permits/index.htm, last accessed January 25, 2012.

Second, and important for executive enforcement, executives can use rule review power to block divergent policy from emanating from the executive branch.⁵⁰ For example, if the executive prefers liberal policy outcomes, she can use her review capabilities to prevent the implementation of administrative policies and judicial decisions that attempt to shift policy outcomes in a conservative direction. Awareness of executive preferences in environments with rule review creates incentive for bureaucrats to create policy consistent with executive preferences (Seidenfeld 2001). Similarly, in environments where the executive has centralized rule review capabilities judges will exhibit restraint in unfavorably altering executive branch policy.⁵¹

⁵⁰ For example, in 2011 Rick Scott issued an executive order that essentially required that rules receive his approval before being published. Scott issued an executive order that established his Office of Fiscal Accountability and Regulatory Reform and required all agencies to suspend agencies rulemaking. In addition to creating his rule review office, the executive order stated that “the Secretary of State shall not publish rulemaking notices in the Florida Administrative Weekly except at the direction of the Office of Fiscal Accountability and Regulatory Reform.” “Executive Order Number 11-01: Suspending Rulemaking and Establishing the Office of Fiscal Accountability and Regulatory Reform.” Office of the Governor. http://www.flgov.com/wp-content/uploads/2011/01/scott.eo_.one_.pdf, last accessed February 12, 2012.

⁵¹ Legal scholars have also examined the subject of judicial review in the wake of increased executive control. Particularly, some scholars who express concern regarding increased presidential control advocate for decreasing presidential intervention in the rule making process (McGarity 1986). Judicial review is seen as a potential check on presidential rule review that potentially circumvents statutory directives (Diver 1987, Eskridge and Ferejohn 1992, Araiza

I must note that an important argument (or counterargument) is that bureaucratic resistance from administrative agencies may be an issue in the regardless of executive power or executive preferences. Although bureaucratic resistance can be a constant threat to judicial enforcement in many environments, scholars suggest that political and resource support from the executive can provide important assistance for bureaucrats who are resistant to judicial intervention (Johnson 1979a, Spriggs 1996). Spriggs states:

They [presidents] represent a resource agencies can draw upon to justify and legitimate policy choices and to resist Court decisions (Bullock and Lamb 1984, 11-2). Presidents can invite legislation, pass Executive Orders, and provide political support for agencies confronting adverse judicial decisions. On the other hand, presidents can attempt to compel agency implementation of Court opinions.

As Sprigg's quote illustrates, resistance to judicial intervention can require more than non-action, resistance (or circumvention) can require outside resources and policy support, which an executive with extensive mechanisms of bureaucratic control can facilitate. The executive can also provide political cover for agencies to resist court intervention thereby elevating the dispute from "the court versus the bureaucracy" to a dispute between the "court and the executive." If political actors or the public views judicial power as intrusive or illegitimate, the motivation of political officials to ensure that judicial decisions are properly implemented

2002, 618). Other scholars argue more favorably for judicial deference towards presidential review of agency action because of perceived benefits such as increased accountability of agency rulemaking and the belief that executive agencies are more qualified than courts to "resolve statutory ambiguities" (Kagan 2001, Sunstein 2006, 2603).

will understandably diminish (Gibson 1989).⁵² Judges care about whether and how their decisions are enforced because the acceptance and proper enforcement of judicial decisions has important implications for judicial legitimacy (Howell 2003, Gibson 2008, Clark 2009). Lack of enforcement from the executive branch can render judicial decisions meaningless and weaken the power of the judiciary as an institution. To prevent enforcement resistance courts will be more likely to rule in favor of executive policy in environments where the state executive has increased institutional privileges.

Hypothesis 1: *As executive powers of administrative control increase, the probability of success for executive agencies in court increase.*

Retaliation

In addition to enforcement concerns, courts will be more deferential in environments with stronger executives because of concerns over institutional retaliation. Executive and legislative officials can both work to reduce the power of the judiciary as an institution (Ferejohn 1999, Howell 2003, Clark 2009). Governors are typically considered the chief policy maker within their state (Barrilleaux 1999). Aggressive judicial intervention and monitoring from state justices in states where gubernatorial influence over administrative policy is high can be perceived not only as a challenge to administrative authority, but also a challenge to *executive power*. In fact, Smith notes that “justices understand that administrative policy is significantly a reflection of the

⁵² In fact, the perception that a court is “activist” can actually reduce public support for the judiciary (Caldiera 1986).

president's policy preferences" (Smith 2007, 6).⁵³ Intrusion into executive authority and policy that the executive prefers can invite retaliatory response.

A direct way to respond to judges is affecting their retention. Governors can also impose costs upon judicial selection and retention. In the U.S. states, supreme courts are selected and retained in variety of ways. Many states use elections to select and retain justices, and some states use political appointment and retention (by the governor and/or legislature) to fill the state high court. Political officials with tenure control of the bench can decide not to reappoint jurists who take an aggressive stance against state policy making power or officials can decide to only appoint judges with a record of deference to government authority. Previous research confirms courts appointed and retained by political officials are more likely to rule in favor of state executive branch litigants (Johnson 2011a).

In the face of undesirable judicial intervention, political elites can also take action to restrict the power of the judiciary (Ferejohn 1999). Attempts to restrict judicial decision-making include jurisdiction stripping, altering the size of a court, and the imposition of budgetary restrictions (Gunther 1984, Ferejohn 1999, Ferejohn and Kramer 2002, Langer 2002, Clark 2009).⁵⁴ Executives with enhanced control over state budgetary resources seemingly have

⁵³ In analyses of judicial decision-making on federal agencies, multiple scholars use the president's party identification as a proxy for agency ideology when examining agencies where the president's institutional authority and policy control is greater (Stephenson 2004, Smith 2007).

⁵⁴ By analyzing attempts at jurisdiction-stripping between 1877 and 2006, Clark (2009) finds that the threat of court curbing by Congress can have a constraining effect on judicial decision-

enhanced capability to take punitive budgetary action towards the court (Wheeler 1988, Douglas and Hartley 2001, 2003). This could take the form of either restricting resources for the court (i.e. facilities and staff support) or withholding resources required to implement court decisions (Douglas and Hartley 2001, Ferejohn and Kramer 2002). To prevent retaliation from the executive, courts will be more supportive of agencies in environments where the executive has increased unilateral control over state resources.

Hypothesis 2: *As executive budget institutional privilege increases, the probability of success for executive agencies in court increases.*

Although legislatures are many times viewed as a court's greatest institutional adversary, state executives also have the institutional capability to respond against an aggressive or "activist" court. Heightened institutional privileges such as personnel control increase the executive's influence over administrative agencies and policy. In these environments, administrative agency decisions should exhibit increased congruence with executive preferences and courts will therefore be less likely to overturn executive policy because of concerns regarding enforcement resistance and executive retaliation. Because of this increased deference, agencies in states with strong governors should have a higher rate of success in court compared to agencies in states with institutionally weaker executives.

Data, Variables, and Method

To evaluate whether courts defer more to administrative agencies in states with strong governors, I use data from the Brace and Hall Data Project that includes cases decided between making (Clark 2009). For examples of attempts to restrict judicial power in the states see Johnson (2011).

1995 and 1998.⁵⁵ I examine all cases where an executive branch agency is listed as the plaintiff or respondent. I remove all cases where both the respondent and litigant are a state agency. Removing these cases leaves me with a sample of 2,222 cases for my analysis. The dependent variable, state supreme court support or opposition to the state agency, is operationalized as a court outcome in favor (1) or against (0) a state agency. I estimate all models using logit analysis with standard error estimates clustered by state. Among the 2,222 cases, 64% (1,430) were decided in favor of state agencies.

Key Independent Variables: State Executive Administrative Control and Resource Control

Governors have a number of different means of influencing administrative agencies, although some are more influential and visible than others (Woods and Baranowski 2007). Appointment power is continually linked with gubernatorial influence over executive branch (Brudney and Hubert 1986, Woods and Baranowski 2007). Also, rule review power allows the executive to exert direct control over agency policy that emanates from executive branch agencies (Wiseman 2009). To measure gubernatorial power I examine appointment power and rule review power. If state agencies have a higher rate of success in states where the governor has greater appointment power and rule review power, this is important evidence that the degree of executive control over the bureaucracy significantly influences judicial behavior.

⁵⁵ The database includes categories for various types of litigants (i.e. private, local government, state government). Under the “state government” category there are categories listed as “executive/administrative” and this category contains most of the cases that involve state-level administrative agencies. These cases involve issues such as environmental policy, taxes, utilities, and human/social welfare services.

To measure gubernatorial appointment power I compare gubernatorial appointment power of agency leadership in all states across fifteen agencies.⁵⁶ For each agency, I determine whether or not the governor appoints agency leadership. If the governor has appointment authority, a score of one (1) is given for each particular agency.⁵⁷ If the agency official is elected or someone else appoints the agency leadership, a score of zero (0) is given for each particular agency. Therefore if a governor cannot select any officials in the fifteen categories, her total appointment score is zero. If a governor can appoint all categories of administrative officials, her appointment score is fifteen. Higher scores indicate governors with more extensive appointment power throughout the executive branch. The mean score for state-level gubernatorial appointment power in my sample is 8.26.

To measure rule review power I divide states into three broad categories; “Strong Rule Review”, “Moderate Rule Review”, and “Weak Rule Review.” Strong Rule Review states are states where the governor can review all proposed rules and at *least* some existing rules (Grady

⁵⁶ I use *The Book of the States* (1995-1998) to collect information regarding the selection method of state agency officials. The *Book of the States* lists the method of selection for administrative officials in charge of various administrative functions. The fifteen administrative categories chosen for this analysis are agriculture, budget, corrections, education, environmental protection, health, insurance, labor, personnel, public utilities, revenue, social services, secretary of state, transportation, and treasury. These agencies were chosen to ensure policy area comparability across all fifty states.

⁵⁷ This includes agencies where the governor alone has appointment authority and where the governor appoints and someone else (i.e. a legislature, board, or commission) approves her appointment.

and Simon 2002). Moderate Rule Review states are states where the governor can review some proposed and some existing or can only review one category (proposed or existing). Finally, in Weak Rule Review states, the governor has no formal rule review power (Grady and Simon 2002). The variables for rule review power are constructed as three dichotomous variables, with Weak Rule Review as the base (excluded category). Forty-seven percent of states are in the Weak Rule Review category. Thirty-seven percent of states are categorized as Moderate Rule Review States and sixteen percent of states are categorized as Strong Rule Review states.

To operationalize the capacity for threat of executive retaliation I measure whether the state executive has the power to reduce the budget without legislative approval.⁵⁸ States where the executive can reduce the budget without legislative approval are coded as (1) and states where executives do not have this authority are coded as (0). Empirical evidence lends support to using this measure of executive budget control to capture the threat of executive retaliatory action in response to court rulings. In their analysis of court budgeting in the states, Douglas and Hartley (2003) conduct a survey of chief court administrators, legislative budget officials, and executive budget officials. They find that executive budget officials and court administrators most frequently mentioned “reducing the funding of the judiciary in the executive budget” as a

⁵⁸ Information for state executive control over the budget taken from *Budget Processes in the States* 1989, 1992, 1995, 1997, 1999, 2002, 2008. The National Association of State Budget Officers. <http://www.nasbo.org/publications-data/budget-processes-in-the-states>, last accessed November 11, 2011. This budget reduction capability includes the ability to reduce appropriations, reduce expenditures, and/or withhold allotments.

gubernatorial action used against the courts (Douglas and Hartley 2003, 448).⁵⁹ Their survey also finds that chief court administrators rated “rulings which have a direct impact upon the governor personally” as one of the actions by the court most likely to incur executive action against the judiciary’s budget (Douglas and Hartley 2003, 448).

Control Variables

Variation in judicial deference is also caused by a number of political, environmental, and case factors that may be correlated with my key independent variables of interest. Variation in state supreme court selection and retention method has an important impact on state supreme court behavior (Langer 2002, Shepherd 2009, Johnson 2011a). Previous research has found that state justices are quite responsive to those responsible for their selection and retention on the bench, particularly when ruling on cases involving state executive branch agencies (Johnson 2011a). Courts selected by political appointment should be more likely to rule in favor of administrative agencies if political elites are able to select justices whose jurisprudence reflects deference for state and governmental policy. Because politically retained courts are subject to tenure control from state policy-makers, I also expect that courts retained by governors and legislatures will be most supportive of administrative agencies in court. To control for the effects of judicial selection and retention I estimate separate models that characterize state supreme courts by selection method, retention method, and combined selection and retention method.

⁵⁹ According to Douglas and Hartley (2003, 444): “Reducing the funding of the judiciary in the executive budget-meaning reducing judicial requests-appears to be used more than any other gubernatorial budget power to influence court rulings and policies. Four executive budget officers (8.9 percent of 45) and seven court administrators (17.1 percent of 41) indicated that governors in their states had used this power to influence the courts.”

I expect that as political elite control over judicial selection increases, state courts should be more likely to vote in favor of administrative agencies. I create 4 indicator variables to capture various selection methods of state supreme courts: Politically Appointed>Merit Selection>Partisan Election>Nonpartisan Election. Nonpartisan elected courts serve as the base category in this analysis. Similarly as political elite control over judicial retention increases, state courts should be more likely to vote in favor of state administrative agencies. I create 5 indicator variables to capture state supreme court retention method: Politically Retained>Partisan Election>Nonpartisan Election>Retention Election>Lifetime Tenure. Lifetime tenure courts serve as the base category in this analysis. Finally, state justices who are both appointed and retained by political officials should be most supportive of state administrative in court. I create two indicator variables for courts that are subject to appointment and political retention and all other courts serve as the base category: Politically Appointed and Politically Retained> Merit Selected and Politically Retained.

The congruence of policy preferences between state justices and state policymakers should influence the probability that state supreme court justices rule for or against state executive branch agencies. To capture policy agreement between the state supreme court and the state executive branch, I measure the party congruence between the majority of justices on the court and the governor.⁶⁰ When there is partisan alignment between the governor and the

⁶⁰ Langer, Laura. National Science Foundation CAREER Grant, SES #0092187 “Multiple Actors and Competing Risks: State Supreme Court Justices and the Policymaking (Unmaking) Game of Judicial Review.” Washington, D.C., (May 2001-May 2006). ; Lindquist, Stefanie. State Politics and the Judiciary Database. National Science Foundation Grant SES #0550618, “Predictability and the Rule of Law: Overruling Decisions in State Supreme Courts.” February 2007.

majority of the state supreme court justices, the probability of success for state agencies in court should increase. If the majority of justices on the court and the governor are of the same party, they receive a coding of one (1); if majority of the court and the governor are of opposite parties, they receive a coding of zero (0). I also take into account the presence of **divided** or unified government. State supreme court justices may be more wary of ruling against a politically unified state government because it is more feasible for a unified government to respond and/or retaliate to state supreme court rulings (Langer 2002).

Whereas federal court precedent allows broad **delegation** of decision-making authority to federal agencies, many state supreme courts have established “strict” standards for assessing the validity of delegated legislative authority to administrative agencies (Greco 1994, Rossi 1999). Some states require that agencies must be given “adequate standards” (Greco1994, 580) from state legislative statutes to guide their activity, whereas other state supreme courts simply require that agencies have procedural safeguards in place when implementing legislative policy (Greco 1994). State supreme courts with more stringent guidelines for delegation of authority will show less deference to state administrative agencies that appear in court (Rossi 1999). Using the categorization of state supreme court adherence of the non-delegation doctrine developed by Greco (1994) and Rossi (1999), I create three indicator variables by dividing states into three distinct categories, “Strong”, “Moderate”, and “Weak.” “Strong” indicates a stricter adherence to the non-delegation doctrine, whereas “Weak” indicates a state supreme court with more liberal standards for monitoring delegation of authority to state administrative agencies (Rossi 1999). States with a “Weak” non-delegation doctrine serve as the base category.

For state political environment, I also control for **legislative professionalism**. States with legislatures that have higher levels of professionalism may indicate that these legislatures are

better equipped to oversee and monitor the activity of state administrative agencies. Agencies in states subject to increased control and oversight from their state legislature could potentially receive increased deference in court if state supreme courts perceive a decreased need for judicial error correction and intervention into agency activity. Conversely, state legislatures with reduced institutional capacity of oversight may prefer aggressive judicial monitoring of state administrative activity. I use a measure devised by Peverill Squire (2007) to measure legislative professionalism. Squire's measure of legislative professionalism takes into account features such as session length and staff resources (Squire 2007). Legislative professionalism is measured on a 0 to 1 scale with increasing scores indicating increased legislative professionalism.⁶¹

Also, state supreme courts with increased **docket discretion** may be less likely to hear routine challenges and more likely to select more salient cases or cases in which they intend to reverse a lower court decision or importantly, overturn the decision-making of a state agency. While most previous research controls docket discretion regarding all case types, my analysis controls specifically for state supreme court docket discretion for administrative agency cases. A dichotomous variable is used to measure docket discretion; (0) for a discretionary docket and (1) for a mandatory docket.

I also control for variables related to aspects of individual cases. Previous research finds that appellants have increased success in court compared to appellees (George and Epstein 1992). In regards to large governmental units, such as state agencies, Farole (1999) and Wheeler et al (1987) find that state governments have increased success when they appear as the appellant

⁶¹ Lindquist, Stefanie. State Politics and the Judiciary Database. National Science Foundation Grant SES #0550618, "Predictability and the Rule of Law: Overruling Decisions in State Supreme Courts." February 2007, Sole PI.

as compared to other litigants who appear in court. Because of increased experience and resources, state agencies will be selective in the cases that they bring before state supreme courts and be more likely to bring cases before the court if they feel they can win (Farole 1999). Hence, I expect that state agencies should have increased success when they appear as the appellant as compared to the appellee.⁶²

Table 2.1 Descriptive Statistics

Summary Statistics for Model Variables				
Variable	Mean	Std. Dev.	Min.	Max.
Gubernatorial Appointment Power	8.26	3.12	0	14
Gubernatorial Appointment Power (Unilateral)	3.01	3.59	0	13
Strong Rule Review	0.16	0.37	0	1
Moderate Rule Review	0.36	0.48	0	1
Weak Rule Review	0.48	0.50	0	1
Gubernatorial Budget Power	0.76	0.43	0	1
Politically Appointed Courts	0.14	0.34	0	1
Merit Selected Courts	0.41	0.49	0	1
Partisan Elected Courts	0.16	0.37	0	1
NonPartisan Elected Courts	0.30	0.46	0	1
Politically Retained Courts	0.15	0.36	0	1
Partisan Elected Courts (Retained)	0.10	0.30	0	1
NonPartisan Elected Courts (Retained)	0.30	0.46	0	1
Retention Elections	0.36	0.48	0	1
Lifetime Tenure	0.09	0.29	0	1
Politically Appointed and Politically Retained Courts	0.08	0.26	0	1
Merit Selected and Politically Retained Courts	0.08	0.27	0	1
Governor-Court Party ID	0.47	0.50	0	1
Weak Non-Delegation Doctrine	0.13	0.34	0	1
Moderate Non-Delegation Doctrine	0.46	0.50	0	1
Strong Non-Delegation Doctrine	0.41	0.49	0	1
Legislative Professionalism	0.19	0.11	0.03	0.57
Administrative Docket Discretion	0.26	0.44	0	1
Divided Government	0.53	0.50	0	1
Agency Petitioner	0.34	0.47	0	1
State Government Opponent	0.02	0.15	0	1
Business Opponent	0.27	0.44	0	1
Taxes	0.19	0.39	0	1
Zoning	0.01	0.12	0	1
Utility	0.05	0.20	0	1
Welfare	0.10	0.30	0	1
Attorney General Salary	77767	16539	50000	115600
Attorney General Budget	3.45e+07	4.54e+07	2.73e+07	3.59e+08
Attorney General Budget as Proportion of State Expenditures	0.003	0.002	0.001	0.011
Midwest	0.32	0.47	0	1
Northeast	0.27	0.44	0	1
South	0.20	0.40	0	1
West	0.21	0.41	0	1

Table 2.2 State Executive Branch Control and Agency Success in Court

	Model 1		Model 2		Model 3		
	Coefficient (std. error)	P-Value	Coefficient (std. error)	P-Value	Coefficient (std. error)	P-Value	
<i>Executive Power</i>	Executive Appointment Power	0.044 (0.023)	0.03	0.038 (0.023)	0.05	0.030 (0.022)	0.08
	Strong Rule Review	0.413 (0.204)	0.02	0.296 (0.209)	0.08	0.380 (0.212)	0.04
	Moderate Rule Review	0.232 (0.128)	0.04	0.172 (0.157)	0.14	0.281 (0.113)	0.00
	Executive Budgetary Control	-0.074 (0.164)	0.33	-0.170 (0.178)	0.17	-0.025 (0.147)	0.43
<i>Court Selection</i>	Appointment	0.332 (0.221)	0.07	-----	-----	-----	-----
	Merit Selection	-0.139 (0.175)	0.21	-----	-----	-----	-----
	Partisan Election	0.046 (0.192)	0.40	-----	-----	-----	-----
<i>Court Retention</i>	Political Retention	-----	-----	0.167 (0.289)	0.28	-----	-----
	Partisan Election	-----	-----	-0.011 (0.385)	0.49	-----	-----
	NonPartisan Election	-----	-----	-0.255 (0.265)	0.17	-----	-----
<i>Selection & Retention</i>	Retention Election	-----	-----	-0.369 (0.265)	0.08	-----	-----
	Political Appointed and Politically Retained	-----	-----	-----	-----	0.736 (0.357)	0.02
	Merit Selection and Politically Retained	-----	-----	-----	-----	-0.191 (0.174)	0.14
<i>Political Environment</i>	Governor-Court Party ID	0.213 (0.092)	0.01	0.095 (0.110)	0.19	0.241 (0.094)	0.01
	Divided Government	0.364 (0.121)	0.00	0.217 (0.122)	0.04	0.301 (0.123)	0.01
<i>Administrative Environment</i>	Strong Non-Delegation Doctrine	-0.470 (0.256)	0.03	-0.531 (0.270)	0.02	-0.451 (0.253)	0.04
	Moderate Non-Delegation Doctrine	-0.056 (0.244)	0.41	-0.211 (0.257)	0.21	-0.080 (0.237)	0.37
	Legislative Professionalism	-1.021 (0.678)	0.07	-0.749 (0.602)	0.11	-0.456 (0.550)	0.20
	Administrative Docket Discretion	0.392 (0.129)	0.00	0.339 (0.128)	0.00	0.406 (0.123)	0.00
<i>Litigant Status</i>	Agency Petitioner	0.261 (0.141)	0.03	0.271 (0.144)	0.03	0.274 (0.140)	0.03
<i>Regional Controls</i>	South	-0.062 (0.172)	0.36	0.011 (0.276)	0.48	-0.138 (0.167)	0.21
	Midwest	0.245 (0.156)	0.06	0.348 (0.233)	0.07	0.146 (0.153)	0.17
	West	-0.028 (0.165)	0.43	0.152 (0.218)	0.24	-0.091 (0.195)	0.32
	Constant	0.019 (0.398)	-----	0.460 (0.376)	-----	0.008 (0.330)	-----
	Wald χ^2	(17) 65.95	-----	(18) 99.55	-----	(16) 60.16	-----
N	2222	-----	2222	-----	2222	-----	

Note: Dependent variable is whether the agency is the winning party (1) or losing party (0). Tests are one-tailed. Standard errors are clustered by state.

Results

Table 2.2 includes estimates from three models that examine the influence of gubernatorial power on judicial decision-making. Model 1 includes state courts categorized according to selection method. In Model 2 state supreme courts are categorized by retention method and in Model 3 state supreme courts are categorized according to selection and retention method. The results across all models suggest that state supreme courts are more deferential to state agencies in environments where the governor has increased formal power. Specifically, the results from each model in Table 2.2 show that as gubernatorial control over appointment and rule review increases, state courts are more likely to rule in favor of state agencies (statistically significant at the 0.05 and 0.10 level). As gubernatorial appointment power increases, the probability of success for state agencies in court increases by as much as 11 percent (see Table 2.3). This indicates that state agencies in states where gubernatorial appointment power is high have a higher probability of success in court compared to agencies in states where the governor oversee a highly fragmented executive branch (i.e. Georgia, which elects many of its top agency officials such as Insurance Commissioner, Attorney General, Superintendent of Education).⁶³

⁶³ In Appendix C, I estimate additional models using an alternate measure of state executive environmental appointment power. I create an indicator variable that captures whether the state executive has *unilateral* appointment control (meaning the governor appoints alone with no outside approval required), or lacks unilateral appointment control over executive branch leadership. The estimates in Appendix C (Table C2.1, C2.2) mirror those reported in Table 2.2, however the estimates for the key independent variables are more precise.

State agencies in states where the governor has moderate and strong rule review powers are also more likely to win in court. The variable for Strong Rule Review is statistically significant across all models (at the 0.05 and 0.10 level). In Model 1 and Model 3 the Moderate Rule Review variable is statistically significant at the 0.05 level. Substantively, when moving from a state where the governor has no formal rule review power to a state where the governor has moderate rule review powers, the probability of winning for state agencies increases by 9 percent in Model 1 and eleven percent in Model 3 (Table 2.3). The influence of Strong Rule Review on state supreme court decision-making has an even larger effect. Compared to a weak rule review state, the probability of success for state agencies increases by a maximum of 15 percent in a state where the governor has strong rule review powers (Table 2.3). As noted previously, executive rule review can signal to gubernatorial preferences to other state officials and judges. Awareness of the policy preferences of state policy-makers allows justices to adjust their decision-making behavior to prevent a negative or retaliatory response based upon judicial rulings. Overall, the results from the appointment power and rule review variables support the hypothesis that state supreme court justices will be more supportive of state agencies in environments where the governor has more control over the state executive branch.

The variable for executive budget control, which captures the threat of executive resource retaliation against the court, is not estimated at the traditional levels of statistical significance. Surprisingly, the sign for the coefficient estimate is opposite of the hypothesize direction. It is possible that for this analysis, unilateral budget reduction capabilities do not accurately capture the threat of retaliation from the executive against the court. It is also plausible that courts are less sensitive to retaliation from political elites in response to rulings on cases involving administrative agencies as compared to arguably higher salience cases involving constitutionality

of legislation, morality policy (death penalty, religious issues), or direct challenges to executive/legislative power.

Table 2.3 State Executive Branch Control and Agency Success in State Supreme Court: Change in Predicted Probabilities

Variable	Model 1		Model 2		Model 3	
	Δ	%	Δ	%	Δ	%
Executive Appointment Power	0.06	11%	0.05	8%	0.05	8%
Strong Rule Review	0.09	15%	0.06	9%	0.09	14%
Moderate Rule Review	0.05	9%	n.s.		0.06	11%
Executive Budgetary Control	n.s.		n.s.		n.s.	
Appointment	0.07	12%	----		----	
Merit Selection	n.s.		----		----	
Partisan Election	n.s.					
Political Retention	----		n.s.		----	
Partisan Election	----		n.s.		----	
NonPartisan Election	----		n.s.		----	
Retention Election			0.09	-13%		
Political Appointed and Politically Retained	----		----		0.16	25%
Merit Selection and Politically Retained	----		----		.	
Governor-Court Party ID	0.05	8%	n.s.		0.06	9%
Divided Government	0.08	17%	0.05	8%	0.07	14%
Strong Non-Delegation Doctrine	0.11	-23%	0.13	-23%	0.11	-22%
Moderate Non-Delegation Doctrine	n.s.		n.s.		n.s.	
Legislative Professionalism	0.05	-9%	n.s.		n.s.	
Administrative Docket Discretion	0.09	14%	0.07	11%	0.09	15%
Agency Petitioner	0.06	10%	0.06	9%	0.06	10%
South	n.s.		n.s.		n.s.	0.21
Midwest	0.06	9%	0.07	11%	n.s.	0.17
West	n.s.		n.s.		n.s.	0.32
Constant						
N	2222		2222		2222	

Note: Changes in predicted probabilities calculated for variables statistically significant variables. For continuous variables, changes in predicted probability calculated as change from one standard deviation below the mean to one standard deviation above the mean. For indicator variables, change in predicted probability calculated as change from 0 to 1. Continuous variables held at their mean and indicator variables at their mode for calculation of predicted probabilities.

Control Variables

The control variables provide insight into the multiple influences on state supreme court review of their state executive branch. State supreme court selection and retention method has consistently been shown to be an important influence on state supreme court behavior, and the results in Table 2.2 show this as well. Politically appointed state courts (Model 1) are more likely to rule in favor of state agencies as compared to the base category. Substantively, the probability of agency success in states with politically appointed courts increases by approximately 12 percent. The variable for politically retained courts is in the hypothesize direction, however the estimates lack precision. The variable for retention elections is the only variable that achieves statistical significance and the coefficient is negative. However the estimates for the political retention variables may be an artifact of the choice of base category. Courts with lifetime tenure are clearly free from retention pressures that accompany political retention and elections, but courts in these states face appointment selection (either political appointment or merit selection).⁶⁴ Appointment by political officials (in this instance the governor) may make these courts, even though they have life tenure, more likely to rule in favor of government litigants than courts. In Model 3, the results show that courts subject to political appointment and political retention are more likely to rule in favor of state agencies. Substantively, the probability of

⁶⁴ In Appendix C, Table C2.3 I estimate models that vary the base category for state supreme court retention method. The results show that the statistical significance for political retention in varies depending on the base category in the model. Specifically, the political retention variable is positive and statistically significant (0.01 level) when compared against the base category of retention elections.

success for state agencies in these courts increases by 25 percent (Table 2.3).⁶⁵ The variable for courts subject to merit selection and political retention is not statistically significant.

Also, state agencies in states where the court adheres to a more strict non-delegation doctrine have a lower probability of success (statistically significant at the 0.05 level). When moving from a state with a “weak” non-delegation doctrine to a “strong” non-delegation doctrine, the probability of success for state agencies decreases by approximately twenty-three percent (see Table 2.3). Overall, the results suggest that state supreme courts in states with more stringent non-delegation doctrines engage in more aggressive oversight of state agency activity. The variable for “moderate” non-delegation doctrine is estimated less precisely and does not reach traditional levels of statistical significance.

As expected, state agencies are more successful in states that have a mandatory administrative docket. The probability of success for agencies that appear in courts with mandatory administrative dockets is approximately fifteen percent (Table 2.3). This suggests that courts with discretionary dockets are more likely to accept cases where correction of agency activity is necessary, compared to court with mandatory dockets who must sometimes entertain weak (or even frivolous) challenges to agency decision-making. Also, when state agencies are the petitioner in court their probability of success increases by approximately ten percent (Table

⁶⁵ The results for the executive appointment power variable and the rule review variables are consistent when controlling for individual state effects. However, the estimates for the court selection and retention variables are less precise when controlling for the effects of Maine. The results remain in the hypothesized direction. Courts in Maine are subject to political appointment and political retention and the success rate for state agencies in Maine (86 percent) is substantially higher than the remaining states in the sample (64 percent).

2.3). State agencies are apparently more selective in their decision to appeal cases to their state supreme court and are more likely to appeal cases in which they have a higher probability of success.

The presence of divided government also has a statistically significant effect on state supreme court decision-making. However the results show that agencies are more likely to win court challenges in periods of divided government. This finding is counter to the idea that courts are more willing to rule against a divided government because retaliation from a divided (as opposed to unified government) is more difficult. Possibly, the presence of unified government is more likely to increase deferential behavior from judges when they must rule on the constitutionality of state legislation. The threat of re-legislation in response to court decision is potentially higher in environments where the government is unified. The variable for legislative professionalism is statistically significant in Model 1 (at 0.10 level) and suggests that agencies in environments with more professional legislatures do not have an advantage in court because their probability of success decreases in environments with more professional legislatures. The variable is estimated with less precision in Model 2 and Model 3 and does not achieve the traditional level of statistical significance.⁶⁶

Agency Level Analysis

The results from the preceding analysis show that justices are in fact responsive to variation in executive control of the executive branch. However, the appointment power measure used in the above analysis is a measure of state executive “environmental” power in that it measures variation in appointment power across the state executive branch. In order to examine

⁶⁶I also explore the alternative hypothesis that the legal capacity of the state environment is driving the success rate of agencies in court. See Appendix D for discussion and results.

how judicial decision-making is influenced by variation in control in the individual agency that is a litigant in court, I create an additional measure of appointment power that captures how agency leadership of the agency litigant is selected. This measure is similar to studies by Sheehan (1992) and Yates (2002) which categories agencies according to whether they are executive branch agencies or independent agencies where the president's appointment and removal power faces greater restrictions. Relying on state codes and titles, individual agency websites, and the *Book of the States* I code for the selection method of agency leadership in 1300 cases. Many cases are excluded because of a lack of reliable data regarding the selection of agency leadership during the period under analysis (1995-1998). I also attempted to focus on agency types that appear across most states (i.e. education, revenue, public utility commissions) for increased comparability. The results of this analysis are presented below in Table 4. I create an indicator variable accounting for the selection and structure of agency leadership. Agencies where the administrative leadership is chosen by the governor are coded as one (1) and agencies where leadership is elected or chosen by someone other than governor are coded as zero. Agencies whose leadership consists of elected commissions or commissions where the executive's appointment power is restricted are also coded as zero (0).

Table 2.4 State Executive Branch Control and Agency Success in Court: Agency-Level Analysis

		Model 1		Model 2		Model 3	
Variable		Coefficient (std. error)	P-Value	Coefficient (std. error)	P-Value	Coefficient (std. error)	P-Value
<i>Executive Power</i>	Gubernatorial Appointee-Lead Agency	0.253 (0.146)	0.04	0.219 (0.143)	0.06	0.249 (0.145)	0.04
	Strong Rule Review	0.348 (0.316)	0.14	0.269 (0.295)	0.18	0.327 (0.287)	0.13
	Moderate Rule Review	0.062 (0.191)	0.37	0.045 (0.198)	0.41	0.166 (0.177)	0.17
	Executive Budgetary Control	-0.174 (0.190)	0.18	-0.228 (0.190)	0.12	-0.007 (0.167)	0.48
	Appointment	0.055 (0.299)	0.43	-----	-----	-----	-----
<i>Court Selection</i>	Merit Selection	-0.284 (0.246)	0.12	-----	-----	-----	-----
	Partisan Election	-0.072 (0.248)	0.39	-----	-----	-----	-----
<i>Court Retention</i>	Political Retention	-----	-----	0.157 (0.333)	0.32	-----	-----
	Partisan Election	-----	-----	-0.116 (0.460)	0.40	-----	-----
	Nonpartisan Election	-----	-----	-0.257 (0.407)	0.26	-----	-----
	Retention Election	-----	-----	-0.554 (0.375)	0.07	-----	-----
<i>Selection & Retention</i>	Political Appointed and Politically Retained	-----	-----	-----	-----	0.916 (0.340)	0.00
	Merit Selection and Politically Retained	-----	-----	-----	-----	-0.295 (0.260)	0.05
<i>Political Environment</i>	Governor-Court Party ID	0.141 (0.146)	0.17	0.038 (0.163)	0.40	0.209 (0.155)	0.06
	Divided Government	0.403 (0.189)	0.02	0.206 (0.191)	0.14	0.308 (0.185)	0.05
<i>Administrative Environment</i>	Strong Non-Delegation Doctrine	0.001 (0.316)	0.50	-0.140 (0.300)	0.32	-0.085 (0.270)	0.15
	Moderate Non-Delegation Doctrine	0.223 (0.296)	0.23	-0.003 (0.286)	0.50	0.118 (0.260)	0.32
	Legislative Professionalism	-1.120 (0.699)	0.06	-0.897 (0.676)	0.09	-0.495 (0.685)	0.24
	Administrative Docket Discretion	0.486 (0.212)	0.00	0.431 (0.204)	0.02	0.572 (0.201)	0.00
<i>Litigant Status</i>	Agency Petitioner	0.252 (0.159)	0.06	0.289 (0.165)	0.04	0.278 (0.157)	0.04
	South	-0.357 (0.226)	0.06	-0.199 (0.335)	0.28	-0.354 (0.216)	0.05
<i>Regional Controls</i>	Midwest	-0.091 (0.229)	0.35	0.163 (0.310)	0.30	-0.100 (0.243)	0.34
	West	-0.249 (0.252)	0.16	0.070 (0.338)	0.42	-0.223 (0.302)	0.23
	Constant	0.371 (0.505)	-----	0.695 (0.468)	-----	0.010 (0.420)	-----
Wald χ^2		(17)36.10		(18) 28.95		(16) 43.88	
N		1297		1297		1297	

Note: Dependent variable is whether the agency is the winning party (1) or losing party (0). Tests are one-tailed. Standard errors are clustered by state.

Table 2.5 State Executive Branch Control and Agency Success in Court: Predicted Probabilities for Gubernatorial Appointee-Lead Agencies

Variable	Model 1		Model 2		Model 3	
	Δ	%	Δ	%	Δ	%
Gubernatorial Appointee-Lead Agency	0.06	10%	0.05	8%	6%	11%
N	1297		1297		1297	

Note: Changes in predicted probabilities calculated as change from 0 to 1 for Gubernatorial Appointee-Lead Agency variable. Continuous variables held at their mean and indicator variables at their mode for calculation of predicted probabilities.

Estimates presented in Table 2.4 are consistent with the findings from the previous analysis. Results across Model 1, Model 2, Model 3 state justices are more likely to rule in favor of state agencies when leadership is directly chosen by the state executive as compared to leadership chosen by other means, and alternative agency structures. When an executive-appointed controlled agency appears as a litigant in court, the probability of success for the agency increases by as much 11 percent compared to other agencies (see Table 2.5). These results show that agencies in environments under high executive control have a clear advantage in court. Courts show increased deference to executive branch litigants when the state executive is equipped with enhanced tools of bureaucratic control.

Discussion and Conclusion

In 1984, the U.S. Supreme Court’s *Chevron* decision marked an important shift in judicial decision-making on cases involving agency rulemaking.⁶⁷ The case involved a Reagan Administration Environmental Protection Agency (EPA) regulation. In their majority opinion the Court directed federal courts to defer to “reasonable” agency interpretation of legislative statutes that were “silent or ambiguous with respect to the specific question.” The Court also stated:

⁶⁷ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (1984). 467 U.S. 837.

an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, *properly rely upon the incumbent administration's views of wise policy to inform its judgment.*⁶⁸

Scholars have discussed at the length the role of various legal doctrines, judicial ideologies, and policy intricacies in explaining the Court's landmark decision that urged increase deference on the part of federal judges. However, viewed within the framework established in my preceding analysis, perhaps the *Chevron* Court was also responding to shifting dynamics in executive control over agency policy largely driven by the Reagan Administration. In other words the *Chevron* pronouncements (and their justifications) are endogenous to the expanded administrative authority wielded by the president. Although the executive branch was not granted any additional constitutional powers during the Reagan Administration, the Administration did use existing institutional powers to dramatically increase its political control over agency decision-making, particularly through appointment strategy and centralized rule review (Kerwin 2003). The actions of the Reagan Administration communicated Reagan's clear policy preference for conservative policy outcomes and federal deregulation. Judicial attempts to undermine the Reagan policy agenda through aggressive judicial review could have precipitated an unwelcome conflict between the Court and the Reagan Administration. When faced with a challenge to executive branch policy, the Court therefore showed significant deference to executive interpretation, and consequentially, executive control.

While I do not attempt to draw substantive conclusions from one case involving the U.S. Supreme Court, empirical analysis of state executive power allows me systematically examine judicial responsiveness to executive power in various environments. Scholars have discussed at

⁶⁸ Emphasis added.

length how executives have used their institutional powers to enhance their control over executive branch policy. However, scholars had yet to address whether judicial decision-making (and anticipation of executive non-enforcement) may be motivated by executive institutional dominance of the administrative structure. The results from the current analysis show that when making decisions involving administrative agencies, courts are more deferential to agency decision-making in environments where the executive has enhanced mechanisms of bureaucratic control. Heightened state executive power results in increased support for executive agencies even when controlling for many political, institutional, and legal factors. In states where the executive has more extensive appointment power and rule review power, state agencies have a higher probability of winning when they appear before their state supreme courts. Courts are not only responsive to the executive power across the executive branch, but they are also influenced by variation in executive control within individual administrative agencies.

These results help shed light on an ongoing debate concerning judicial responsiveness to executive power. Judicial independence is championed as a normative value, but the power of the judiciary is clearly linked with the actions and preferences of other state institutional actors. Federal research has examined the relationship between judicial decision-making and executive power, however empirical limitations in institutional variation exist when testing theories of institutional conflict using federal institutions. Although previous results have been mixed, my analysis shows that judges are responsive to variation in executive power.

Judicial institutions in federal and state governments were designed to be co-equal wielders of governmental power. However, in the twentieth century state executives have seen dramatic increases in their institutional power, particularly in their powers of bureaucratic control and oversight. An important question is whether increasing the authority of one

institutional actor, in this instance state executives, places the judiciary at a disadvantage in exerting its' own institutional power. As state executives gain more institutional powers, will they become increasingly resistant towards the interference of outside litigants and judicial intervention? The ability to clarify institutional boundaries of power and "correct" legal missteps gives courts a tremendous amount of influence in the policy-making process. However, the reality of executive branch enforcement potentially places judges in a precarious position if they have to make legal decisions that seemingly encroach upon executive authority.

APPENDIX C

Table C2.1. State Executive Branch Control and Agency Success in Court: Unilateral Appointment Power

		Model 1		Model 2		Model 3	
Variable		Coefficient (std. error)	P-Value	Coefficient (std. error)	P-Value	Coefficient (std. error)	P-Value
<i>Executive Power</i>	Executive Unilateral Appointment Power	0.029 (0.016)	0.04	0.027 (0.015)	0.03	0.029 (0.014)	0.02
	Strong Rule Review	0.442 (0.217)	0.02	0.302 (0.203)	0.07	0.426 (0.205)	0.02
	Moderate Rule Review	0.267 (0.127)	0.02	0.171 (0.153)	0.13	0.325 (0.121)	0.00
	Executive Budgetary Control	-0.144 (0.174)	-0.21	-0.221 (0.178)	0.11	-0.088 (0.149)	0.28
	Appointment	0.454 (0.255)	0.04	----	----	----	----
<i>Court Selection</i>	Merit Selection	-0.053 (0.157)	0.37	----	----	----	----
	Partisan Election	0.168 (0.198)	0.20	----	----	----	----
	Political Retention	----	----	0.374 (0.262)	0.08	----	----
<i>Court Retention</i>	Partisan Election	----	----	0.115 (0.390)	0.38	----	----
	NonPartisan Election	----	----	-0.207 (0.256)	0.21	----	----
<i>Selection & Retention</i>	Retention Election	----	----	-0.229 (0.227)	0.16	----	----
	Political Appointed and Politically Retained	----	----	----	----	0.867 (0.353)	0.01
	Merit Selection and Politically Retained	----	----	----	----	0.069 (0.133)	0.30
<i>Political Environment</i>	Governor-Court Party ID	0.216 (0.094)	0.01	0.091 (0.113)	0.17	0.230 (0.091)	0.01
	Divided Government	0.320 (0.101)	0.00	0.163 (0.108)	0.06	0.258 (0.100)	0.01
<i>Administrative Environment</i>	Strong Non-Delegation Doctrine	-0.510 (0.289)	0.04	-0.573 (0.298)	0.02	-0.502 (0.269)	0.03
	Moderate Non-Delegation Doctrine	-0.060 (0.263)	0.41	-0.222 (0.276)	0.22	-0.096 (0.242)	0.35
	Legislative Professionalism	-0.677 (0.646)	0.15	-0.424 (0.559)	0.22	-0.238 (0.508)	0.32
	Administrative Docket Discretion	0.343 (0.108)	0.00	0.271 (0.110)	0.01	0.327 (0.092)	0.00
<i>Litigant Status</i>	Agency Petitioner	0.261 (0.141)	0.03	0.275 (0.143)	0.03	0.279 (0.140)	0.02
	South	-0.173 (0.176)	0.16	-0.098 (0.276)	0.34	-0.197 (0.165)	0.12
<i>Regional Controls</i>	Midwest	0.215 (0.150)	0.08	0.286 (0.227)	0.10	0.139 (0.141)	0.16
	West	-0.053 (0.163)	0.37	0.108 (0.217)	0.22	-0.096 (0.173)	0.29
	Constant	0.283 (0.414)	----	0.681 (0.393)	----	0.227 (0.305)	----
	Wald χ^2	(17) 74.98	----	(18) 81.86	----	(16) 109.34	----
N	2222	----	2222	----	2222	----	

Note: Dependent variable is whether the agency is the winning party (1) or losing party (0). Tests are one-tailed. Standard errors are clustered by state.

Table C2.2 State Executive Branch Control and Agency Success in Court: Unilateral Appointment Predicted Probabilities

Variable	Model 1		Model 2		Model 3	
	Δ	%	Δ	%	Δ	%
Executive Unilateral Appointment Power	0.05	8%	0.04	6%	0.05	8%
Strong Rule Review	0.10	17%	0.07	10%	0.10	16%
Moderate Rule Review	0.06	10%	n.s.		0.07	12%
Executive Budgetary Control	n.s.		n.s.		n.s.	
Appointment	0.10	17%	----		----	
Merit Selection	n.s.		----		----	
Partisan Election	n.s.					
Political Retention	----		0.08	12%	----	
Partisan Election	----		n.s.		----	
NonPartisan Election	----		n.s.		----	
Retention Election			n.s.			
Political Appointed and Politically Retained	----		----		0.18	30%
Merit Selection and Politically Retained	----		----		n.s.	
Governor-Court Party ID	0.05	8%	n.s.		0.05	9%
Divided Government	0.08	15%	0.04	6%	0.06	12%
Strong Non-Delegation Doctrine	0.13	26%	0.14	27%	0.12	26%
Moderate Non-Delegation Doctrine	n.s.		n.s.		n.s.	
Legislative Professionalism	n.s.		n.s.		n.s.	
Administrative Docket Discretion	0.08	13%	0.06	9%	0.07	13%
Agency Petitioner	0.06	10%	0.06	9%	0.06	11%
South	n.s.		n.s.		n.s.	
Midwest	0.05	8%	0.06	9%	n.s.	
West	n.s.		n.s.		n.s.	
N	2222		2222		2222	

Note: Changes in predicted probabilities calculated for variables statistically significant variables. For continuous variables, changes in predicted probability calculated as change from one standard deviation below the mean to one standard deviation above the mean. For indicator variables, change in predicted probability calculated as change from 0 to 1. Continuous variables held at their mean and indicator variables at their mode for calculation of predicted probabilities.

Table C2.3 State Executive Branch Control and Agency Success in Court: Various Retention Base Categories

	Model 1		Model 2		Model 3		
	Coefficient (std. error)	P-Value	Coefficient (std. error)	P-Value	Coefficient (std. error)	P-Value	
<i>Executive Power</i>	Executive Appointment Power	0.038 (0.023)	0.05	0.038 (0.023)	0.05	0.038 (0.023)	0.05
	Strong Rule Review	0.296 (0.209)	0.08	0.296 (0.209)	0.08	0.296 (0.209)	0.08
	Moderate Rule Review	0.172 (0.157)	0.14	0.172 (0.157)	0.14	0.172 (0.157)	0.14
	Executive Budgetary Control	-0.170 (0.178)	0.17	-0.170 (0.178)	0.17	-0.170 (0.178)	0.17
<i>Court Retention</i>	Political Retention	0.178 (0.267)	0.25	0.421 (0.224)	0.28	0.536 (0.213)	0.01
	Partisan Election	-----		0.244 (0.256)	0.49	0.359 (0.270)	0.09
	NonPartisan Election	-0.244 (0.256)	0.17	-----		0.115 (0.174)	0.26
	Retention Election	-0.359 (0.270)	0.09	-0.115 (0.174)	0.17	-----	
	Lifetime Tenure	0.011 (0.385)	0.49	0.255 (0.265)	0.08	0.369 (0.265)	0.08
	<i>Political Environment</i>	Governor-Court Party ID	0.095 (0.110)	0.19	0.095 (0.110)	0.19	0.095 (0.110)
Divided Government		0.217 (0.122)	0.04	0.217 (0.122)	0.04	0.217 (0.122)	0.04
<i>Administrative Environment</i>	Strong Non-Delegation Doctrine	-0.531 (0.270)	0.02	-0.531 (0.270)	0.02	-0.531 (0.270)	0.02
	Moderate Non-Delegation Doctrine	-0.211 (0.257)	0.21	-0.211 (0.257)	0.21	-0.211 (0.257)	0.21
	Legislative Professionalism	-0.749 (0.602)	0.11	-0.749 (0.602)	0.11	-0.749 (0.602)	0.11
	Administrative Docket Discretion	0.339 (0.128)	0.00	0.339 (0.128)	0.00	0.339 (0.128)	0.00
<i>Litigant Status</i>	Agency Petitioner	0.271 (0.144)	0.03	0.271 (0.144)	0.03	0.271 (0.144)	0.03
<i>Regional Controls</i>	South	0.011 (0.276)	0.48	0.011 (0.276)	0.48	0.011 (0.276)	0.48
	Midwest	0.348 (0.233)	0.07	0.348 (0.233)	0.07	0.348 (0.233)	0.07
	West	0.152 (0.218)	0.24	0.152 (0.218)	0.24	0.152 (0.218)	0.24
	Constant	0.450 (0.578)		0.460 (0.376)		0.460 (0.376)	
	Wald χ^2	(18) 99.55		(18) 99.55		(18) 99.55	
	N	2222		2222		2222	

Note: Dependent variable is whether the agency is the winning party (1) or losing party (0). Tests are one-tailed. Standard errors are clustered by state.

APPENDIX D

Legal Capacity Hypothesis

The previous results seemingly confirm my hypotheses regarding judicial deference to administrative agencies in environments with increased executive control. However an alternative hypothesis is that courts are responding the advantages in legal representation of state executive branch agencies. In other words, state agencies in environments with better legal representation will have a higher rate of success in court compared to agencies in other environments. To test this hypothesis I test three sets of models below using different variables to capture “legal capacity.” I use the resources of each state attorney general’s office to measure the legal capacity of the state executive branch. The attorney general’s office defends challenged executive (and legislative) action in court and provides state officials with legal opinions regarding the validity of government policy. In Table D1 I measure legal capacity based on the attorney general’s yearly salary (for 1995-1996). In Table D2 I measure legal capacity based on the attorney general’s yearly office budget (1995-1996). Table D3 measures legal capacity by measuring the attorney general’s budget as a proportion of state general expenditures. Even when controlling for attorney general resources the variables for state executive appointment power and state executive rule review show that state agencies are more successful in environments where the executive has heightened executive institutional powers. Surprisingly there is a negative relationship between attorney general resources and agency success. As attorney general resources increase, the likelihood of agency success in court decreases. One possible explanation for this finding is that agencies in states where the attorney general has fewer

resources are more selective in the choice of cases they choose to litigate. Therefore the increase in litigation selectivity translates into an increase in court win rates.

Table D2.1 State Executive Branch Control and Agency Success in Court: Legal Capacity (AG Salary)

		Model 1		Model 2		Model 3	
Variable		Coefficient (std. error)	P-Value	Coefficient (std. error)	P-Value	Coefficient (std. error)	P-Value
<i>Executive Power</i>	State Executive Appointment Power	0.052 (0.022)	0.02	0.042 (0.023)	0.03	0.036 (0.020)	0.04
		0.424 (0.221)		0.306 (0.221)		0.415 (0.229)	
	Strong Rule Review	0.219 (0.120)	0.03	0.156 (0.155)	0.08	0.262 (0.111)	0.04
	Moderate Rule Review	-0.073 (0.160)	0.03	-0.166 (0.177)	0.16	-0.031 (0.147)	0.01
	Executive Budgetary Control		0.32		0.17		0.42
<i>Court Selection</i>		0.406 (0.213)		-----		-----	
	Appointment	-0.120 (0.169)	0.03	-----		-----	
	Merit Selection	0.006 (0.180)	0.23	-----		-----	
	Partisan Election		0.49				
<i>Court Retention</i>				0.176 (0.280)		-----	
	Political Retention	-----		-0.092 (0.346)	0.27	-----	
	Partisan Election	-----		-0.258 (0.251)	0.40	-----	
	Nonpartisan Election	-----		-0.349 (0.250)	0.15	-----	
<i>Selection & Retention</i>	Retention Election				0.08		
						0.787 (0.315)	0.01
	Political Appointed and Politically Retained	-----		-----		-0.201 (0.162)	0.11
	Merit Selection and Politically Retained	-----		-----			
<i>Political Environment</i>		0.168 (0.094)		0.075 (0.114)		0.214 (0.103)	
	Governor-Court Party ID	0.328 (0.114)	0.04	0.199 (0.124)	0.26	0.274 (0.119)	0.02
	Divided Government		0.00		0.06		0.01
	Strong Non-Delegation Doctrine	-0.532 (0.264)		-0.574 (0.272)		-0.496 (0.252)	
	Moderate Non-Delegation Doctrine	-0.082 (0.245)	0.02	-0.225 (0.260)	0.02	-0.076 (0.242)	0.03
<i>Administrative Environment</i>		-0.267 (0.764)	0.37	-0.283 (0.722)	0.20	0.294 (0.656)	0.38
	Legislative Professionalism	0.395 (0.127)	0.36	0.338 (0.127)	0.35	0.411 (0.120)	0.33
	Administrative Docket Discretion		0.00		0.00		0.00
	Agency Petitioner	0.270 (0.142)	0.03	0.275 (0.144)	0.03	0.281 (0.141)	0.03
<i>Litigant Status</i>							
	Attorney General (Salary)	-7.77e-06 (4.39e-06)	0.04	-4.85e-06 (4.12e-06)	0.12	-7.48e-06 (4.36e-06)	0.04
<i>Legal Capacity</i>							
	Constant	0.424 (0.466)		0.732 (0.455)		0.407 (0.415)	
	Wald χ^2	(18) 85.31		(19) 122.03		(17) 83.52	
	N	2222		2222		2222	

Note: Dependent variable is whether the agency is the winning party (1) or losing party (0). Tests are one-tailed. Standard errors are clustered by state. Model estimated with regional indicator variables; however coefficient estimates not included in above model.

Table D2.2. State Executive Branch Control and Agency Success in Court: Legal Capacity (AG Office Budget)

Variable	Model 1		Model 2		Model 3		
	Coefficient (std. error)	P-Value	Coefficient (std. error)	P-Value	Coefficient (std. error)	P-Value	
<i>Executive Power</i>	State Executive Appointment Power	0.047 (0.023)	0.02	0.040 (0.023)	0.04	0.033 (0.021)	0.06
	Strong Rule Review	0.330 (0.222)	0.07	0.239 (0.228)	0.15	0.327 (0.229)	0.08
	Moderate Rule Review	0.223 (0.126)	0.04	0.158 (0.158)	0.16	0.276 (0.112)	0.01
	Executive Budgetary Control	-0.063 (0.155)	0.34	-0.172 (0.178)	0.17	-0.026 (0.142)	0.43
	Appointment	0.428 (0.220)	0.03	----	----	----	----
<i>Court Selection</i>	Merit Selection	-0.116 (0.174)	0.25	----	----	----	----
	Partisan Election	0.101 (0.189)	0.30	----	----	----	----
	Political Retention	----	----	0.168 (0.290)	0.28	----	----
<i>Court Retention</i>	Partisan Election	----	----	0.005 (0.384)	0.50	----	----
	Nonpartisan Election	----	----	-0.265 (0.267)	0.16	----	----
	Retention Election	----	----	-0.358 (0.262)	0.09	----	----
<i>Selection & Retention</i>	Political Appointed and Politically Retained	----	----	----	----	0.734 (0.366)	0.02
	Merit Selection and Politically Retained	----	----	----	----	-0.210 (0.171)	0.11
<i>Political Environment</i>	Governor-Court Party ID	0.240 (0.091)	0.00	0.105 (0.111)	0.17	0.254 (0.093)	0.00
	Divided Government	0.345 (0.120)	0.00	0.206 (0.125)	0.05	0.294 (0.123)	0.01
<i>Administrative Environment</i>	Strong Non-Delegation Doctrine	-0.506 (0.249)	0.02	-0.551 (0.269)	0.02	-0.470 (0.248)	0.03
	Moderate Non-Delegation Doctrine	-0.097 (0.238)	0.34	-0.239 (0.258)	0.18	-0.107 (0.237)	0.32
	Legislative Professionalism	-0.085 (0.927)	0.46	-0.211 (0.920)	0.41	0.156 (0.861)	0.43
	Administrative Docket Discretion	0.440 (0.132)	0.00	0.362 (0.132)	0.00	0.430 (0.123)	0.00
<i>Litigant Status</i>	Agency Petitioner	0.265 (0.141)	0.03	0.272 (0.144)	0.03	0.276 (0.141)	0.02
<i>Legal Capacity</i>	Attorney General (Office Budget)	-2.96e-09 (1.52e-09)	0.03	-1.65e-09 (1.45e-09)	0.13	-1.94e-09 (1.51e-09)	0.10
Constant	-0.114 (0.369)		0.433 (0.369)		-0.040 (0.314)		
Wald χ^2	(18)78.32		(19) 90.89		(17) 96.18		
N	2222		2222		2222		

Note: Dependent variable is whether the agency is the winning party (1) or losing party (0). Tests are one-tailed. Standard errors are clustered by state. Model estimated with regional indicator variables; however coefficient estimates not included in above model.

Table D2.3. State Executive Branch Control and Agency Success in Court: Legal Capacity (Budget as Proportion of General State Expenditures)

Variable	Model 1		Model 2		Model 3		
	Coefficient (std. error)	P-Value	Coefficient (std. error)	P-Value	Coefficient (std. error)	P-Value	
<i>Executive Power</i>	State Executive Appointment Power	0.042 (0.023)	0.03	0.039 (0.024)	0.05	0.030 (0.021)	0.08
	Strong Rule Review	0.359 (0.215)	0.05	0.239 (0.214)	0.13	0.334 (0.217)	0.06
	Moderate Rule Review	0.222 (0.131)	0.05	0.171 (0.157)	0.14	0.288 (0.112)	0.01
	Executive Budgetary Control	-0.115 (0.169)	0.25	-0.226 (0.180)	0.11	-0.073 (0.147)	0.31
<i>Court Selection</i>	Appointment	0.347 (0.221)	0.06	----	----	----	----
	Merit Selection	-0.123 (0.172)	0.24	----	----	----	----
	Partisan Election	0.060 (0.189)	0.38	----	----	----	----
<i>Court Retention</i>	Political Retention	----	----	0.085 (0.301)	0.39	----	----
	Partisan Election	----	----	-0.056 (0.385)	0.44	----	----
	Nonpartisan Election	----	----	-0.340 (0.271)	0.11	----	----
	Retention Election	----	----	-0.449 (0.282)	0.06	----	----
<i>Selection & Retention</i>	Political Appointed and Politically Retained	----	----	----	----	0.727 (0.346)	0.02
	Merit Selection and Politically Retained	----	----	----	----	-0.300 (0.184)	0.05
<i>Political Environment</i>	Governor-Court Party ID	0.202 (0.094)	0.02	0.079 (0.113)	0.24	0.242 (0.093)	0.00
	Divided Government	0.403 (0.189)	0.00	0.217 (0.121)	0.04	0.319 (0.122)	0.00
<i>Administrative Environment</i>	Strong Non-Delegation Doctrine	-0.516 (0.261)	0.02	-0.592 (0.279)	0.02	-0.498 (0.262)	0.03
	Moderate Non-Delegation Doctrine	-0.069 (0.244)	0.39	-0.230 (0.258)	0.19	-0.073 (0.234)	0.38
	Legislative Professionalism	-0.824 (0.697)	0.12	-0.545 (0.614)	0.19	-0.207 (0.564)	0.36
	Administrative Docket Discretion	0.473 (0.140)	0.00	0.445 (0.150)	0.00	0.526 (0.133)	0.00
<i>Litigant Status</i>	Agency Petitioner	0.263 (0.141)	0.03	0.271 (0.144)	0.03	0.275 (0.140)	0.03
<i>Legal Capacity</i>	Attorney General (Proportion)	-38.632 (29.990)	0.10	-46.656 (31.779)	0.07	-52.820 (29.791)	0.04
Constant	0.143 (0.426)		0.667 (0.410)		0.158 (0.364)		
Wald χ^2	(18) 55.97		(19) 76.52		(17) 63.80		
N	2222		2222		2222		

Note: Dependent variable is whether the agency is the winning party (1) or losing party (0). Tests are one-tailed. Standard errors are clustered by state. Model estimated with regional indicator variables; however coefficient estimates not included in above model.

APPENDIX E

Table E2.1. State Executive Branch Control and Agency Success in Court: Extended Model

		Model 1		Model 2		Model 3	
Variable		Coefficient (std. error)	P-Value	Coefficient (std. error)	P-Value	Coefficient (std. error)	P-Value
<i>Executive Power</i>	Executive Appointment Power	0.044 (0.023)	0.03	0.038 (0.024)	0.05	0.031 (0.021)	0.08
	Strong Rule Review	0.399 (0.203)	0.02	0.284 (0.209)	0.09	0.369 (0.211)	0.04
	Moderate Rule Review	0.225 (0.127)	0.04	0.166 (0.153)	0.14	0.278 (0.113)	0.00
	Executive Budgetary Control	-0.084 (0.158)	0.30	-0.177 (0.170)	0.15	-0.033 (0.141)	0.41
<i>Court Selection</i>	Appointment	0.325 (0.220)	0.07	-----	-----	-----	-----
	Merit Selection	-0.134 (0.174)	0.22	-----	-----	-----	-----
	Partisan Election	0.052 (0.192)	0.40	-----	-----	-----	-----
<i>Court Retention</i>	Political Retention	-----	-----	0.168 (0.289)	0.28	-----	-----
	Partisan Election	-----	-----	0.002 (0.380)	0.50	-----	-----
	NonPartisan Election	-----	-----	-0.245 (0.264)	0.18	-----	-----
<i>Selection & Retention</i>	Retention Election	-----	-----	-0.357 (0.264)	0.09	-----	-----
	Political Appointed and Politically Retained	-----	-----	-----	-----	0.727 (0.355)	0.02
	Merit Selection and Politically Retained	-----	-----	-----	-----	-0.195 (0.175)	0.13
<i>Political Environment</i>	Governor-Court Party ID	0.209 (0.092)	0.01	0.093 (0.109)	0.20	0.238 (0.094)	0.01
	Divided Government	0.358 (0.121)	0.00	0.213 (0.122)	0.04	0.297 (0.123)	0.01
	Strong Non-Delegation Doctrine	-0.461 (0.255)	0.04	-0.519 (0.272)	0.03	-0.442 (0.253)	0.04
	Moderate Non-Delegation Doctrine	-0.058 (0.243)	0.41	-0.209 (0.258)	0.21	-0.082 (0.237)	0.37
<i>Administrative Environment</i>	Legislative Professionalism	-0.985 (0.681)	0.07	-0.716 (0.607)	0.12	-0.430 (0.552)	0.22
	Administrative Docket Discretion	0.400 (0.132)	0.00	0.348 (0.131)	0.00	0.415 (0.124)	0.00
	Agency Petitioner	0.264 (0.143)	0.03	0.275 (0.145)	0.03	0.278 (0.142)	0.03
<i>Case Facts</i>	State Gov. Opponent	-0.195 (0.258)	0.23	-0.211 (0.261)	0.21	-0.202 (0.256)	0.22
	Business Opponent	-0.149 (0.128)	0.12	-0.157 (0.128)	0.11	-0.160 (0.127)	0.10
	Environmental Policy	0.207 (0.352)	0.28	0.194 (0.352)	0.30	0.195 (0.354)	0.30
<i>Policy Areas</i>	Taxes	0.111 (0.149)	0.23	0.113 (0.149)	0.22	0.115 (0.149)	0.22
	Utility	-0.001 (0.198)	0.50	0.032 (0.202)	0.44	0.032 (0.204)	0.44
	Welfare	-0.001 (0.171)	0.50	-0.008 (0.169)	0.48	0.008 (0.173)	0.48
Constant		0.050 (0.404)		0.484 (0.382)		0.036 (0.333)	
Wald χ^2		(23) 85.31		(24) 133.68		(22) 80.33	
N		2222		2222		2222	

Note: Dependent variable is whether the agency is the winning party (1) or losing party (0). Tests are one-tailed. Standard errors are clustered by state. Model estimated with regional indicator variables; however coefficient estimates not included in above model.

Table E2.2 State Executive Branch Control and Agency Success in Court: Unilateral Appointment Power Extended Model

		Model 1		Model 2		Model 3	
Variable		Coefficient (std. error)	P-Value	Coefficient (std. error)	P-Value	Coefficient (std. error)	P-Value
<i>Executive Power</i>	Executive Unilateral Appointment Power	0.029 (0.016)	0.04	0.028 (0.015)	0.03	0.030 (0.014)	0.02
	Strong Rule Review	0.429 (0.214)	0.02	0.292 (0.202)	0.07	0.416 (0.204)	0.02
	Moderate Rule Review	0.260 (0.128)	0.02	0.166 (0.148)	0.13	0.322 (0.122)	0.00
	Executive Budgetary Control	-0.155 (0.169)	0.18	-0.228 (0.171)	0.10	-0.096 (0.146)	0.25
	Appointment	0.447 (0.254)	0.04	----	----	----	----
	Merit Selection	-0.049 (0.156)	0.38	----	----	----	----
	Partisan Election	0.173 (0.196)	0.19	----	----	----	----
	Political Retention	----	----	0.376 (0.259)	0.07	----	----
	Partisan Election	----	----	0.126 (0.382)	0.37	----	----
	NonPartisan Election	----	----	-0.199 (0.252)	0.22	----	----
<i>Selection & Retention</i>	Retention Election	----	----	-0.217 (0.221)	0.16	----	----
	Political Appointed and Politically Retained	----	----	----	----	0.861 (0.351)	0.01
	Merit Selection and Politically Retained	----	----	----	----	-0.069 (0.132)	0.30
<i>Political Environment</i>	Governor-Court Party ID	0.211 (0.093)	0.01	0.088 (0.112)	0.21	0.226 (0.090)	0.01
	Divided Government	0.315 (0.101)	0.00	0.160 (0.107)	0.07	0.254 (0.100)	0.01
	Strong Non-Delegation Doctrine	-0.503 (0.287)	0.04	-0.563 (0.298)	0.03	-0.494 (0.268)	0.03
<i>Administrative Environment</i>	Moderate Non-Delegation Doctrine	-0.062 (0.261)	0.41	-0.221 (0.276)	0.21	-0.097 (0.243)	0.34
	Legislative Professionalism	-0.642 (0.645)	0.16	-0.390 (0.562)	0.24	-0.209 (0.509)	0.34
	Administrative Docket Discretion	0.351 (0.109)	0.00	0.279 (0.110)	0.01	0.333 (0.090)	0.00
	Agency Petitioner	0.264 (0.143)	0.03	0.279 (0.145)	0.03	0.283 (0.142)	0.02
<i>Case Facts</i>	State Gov. Opponent	-0.172 (0.258)	0.25	-0.198 (0.260)	0.22	-0.193 (0.257)	0.02
	Business Opponent	-0.152 (0.127)	0.12	-0.165 (0.128)	0.10	-0.166 (0.127)	0.09
	Environmental Policy	0.231 (0.350)	0.26	0.208 (0.348)	0.28	0.201 (0.349)	0.28
<i>Policy Areas</i>	Taxes	0.120 (0.146)	0.21	0.114 (0.148)	0.22	0.114 (0.148)	0.22
	Utility	0.003 (0.199)	0.50	0.041 (0.201)	0.42	0.043 (0.204)	0.42
	Welfare	-0.017 (0.171)	0.46	-0.022 (0.169)	0.45	-0.014 (0.171)	0.47
	Constant	0.314 (0.417)	----	0.705 (0.395)	----	0.258 (0.304)	----
Wald		(23) 99.66	----	(24) 109.35	----	(22)145.39	----
N		2222	----	2222	----	2222	----

Note: Dependent variable is whether the agency is the winning party (1) or losing party (0). Tests are one-tailed. Standard errors are clustered by state. Model estimated with regional indicator variables; however coefficient estimates not included in above model.

Table F2.1 Descriptive Statistics

Summary Statistics for Model Variables (Agency-Level Analysis)				
Variable	Mean	Std. Dev.	Min.	Max.
Gubernatorial Appointee-Lead Agency	0.67	0.47	0	1
Strong Rule Review	0.18	0.38	0	1
Moderate Rule Review	0.35	0.48	0	1
Weak Rule Review	0.47	0.50	0	1
Gubernatorial Budget Power	0.75	0.43	0	1
Politically Appointed Courts	0.16	0.37	0	1
Merit Selection Court	0.40	0.49	0	1
Partisan Elected Courts	0.17	0.37	0	1
NonPartisan Elected Courts	0.27	0.45	0	1
Politically Retained Courts	0.16	0.37	0	1
Partisan Elected Courts (Retention)	0.12	0.32	0	1
NonPartisan Election Courts (Retention)	0.27	0.45	0	1
Retention Elections	0.35	0.48	0	1
Lifetime Tenure Courts	0.09	0.30	0	1
Politically Appointed and Politically Retained Courts	0.09	0.28	0	1
Merit Selected and Politically Retained Courts	0.09	0.27	0	1
Governor-Court Party ID	0.46	0.50	0	1
Weak Non-Delegation Doctrine	0.13	0.34	0	1
Moderate Non-Delegation Doctrine	0.47	0.50	0	1
Strong Non-Delegation Doctrine	0.38	0.49	0	1
Legislative Professionalism	0.18	0.11	0.03	0.57
Administrative Docket Discretion	0.23	0.42	0	1
Divided Government	0.56	0.50	0	1
Agency Petitioner	0.33	0.47	0	1
State Government Opponent	0.02	0.13	0	1
Business Opponent	0.27	0.44	0	1
Environmental Policy	0.03	0.18	0	1
Taxes	0.29	0.45	0	1
Utility	0.07	0.26	0	1
Welfare	0.08	0.26	0	1
Midwest	0.29	0.45	0	1
Northeast	0.28	0.45	0	1
South	0.21	0.41	0	1
West	0.21	0.41	0	1

CHAPTER IV

COURTS AND EXECUTIVE AUTHORITY: JUDICIAL DECISION-MAKING ON EXECUTIVE POWER CHALLENGES IN THE UNITED STATES

Introduction

When do judges rein in executive power? Executives at the state and federal level are equipped with many powers and privileges that allow them to manage executive branch structures. Their institutional powers facilitate the enforcement of laws and allow executives to influence policy outcomes. Executive institutional capabilities include the use of executive orders, appointment/removal power, and the veto power. Despite the potency of these management tools, it is not uncommon for an executive to find her use of institutional authority challenged in court. Litigants who challenge executive power can argue that the executive has incorrectly utilized her institutional privileges, or that the executive undertook unilateral actions not recognized by the states' constitution. Alternatively, an executive can petition the court and assert that legislators have encroached upon her institutional authority. When faced with these legal disputes, judges must determine the legal boundaries of executive power. Ruling on executive power can place judges in a politically sensitive position given that the executive is responsible for enforcing a ruling that potentially restricts the scope of her own institutional capabilities.

In the federal context, presidents are accorded a great deal of judicial deference in court (Schubert 1957, Howell 2003). Much less is known regarding how courts adjudicate challenges to executive authority across various institutional environments. Do differences in the

institutional design of courts and executive branch structures influence how judges decide cases that involve challenges to executive authority? The variation in the institutional environment of the U.S. states is ideal for examining the interaction of judicial and executive power. State executives possess many powers similar to that of the president; however across states there is considerable variation in gubernatorial use of institutional mechanisms of control (Bowman, Woods, Stark II 2010). For example, some governors have the ability to appoint the majority of agency heads in the executive cabinet, whereas in other states governors oversee a fragmented executive cabinet that includes elected agency heads. Similarly the institutional structure of state courts across the U.S. varies substantially. Some state courts face partisan or nonpartisan elections, whereas other state supreme courts are selected and retained by political officials (governors/legislatures).

In this paper, I examine judicial decision-making on challenges to executive power in the U.S. states. Given the growth in state executive power during the 20th century, it is important to understand state court receptivity to expansive uses of executive authority. When ruling on challenges to executive power, variation in the institutional and political authority of the executive can constrain judicial decision-making and affect whether courts uphold executive action. This paper proceeds as follows: First, I begin by discussing existing literature on judicial decision-making on challenges to federal executive power. I then discuss executive power in the states and explain that court decision-making will be motivated by concerns of preventing institutional retaliation and maintaining institutional legitimacy. Using an original dataset of 237 cases involving challenges to state executive power adjudicated between 1980 and 2010, I empirically analyze the conditions under which state supreme court justices rule in favor state executive power. After presenting the results of my analysis, I conclude by discussing the

importance of understanding how variation in judicial *and* executive branch structures affects judicial deference to executive power.

Executive Power and Judicial Behavior

Scholars have long examined the interaction between executives and judges at the federal level. Although much of this literature focuses on presidential appointments of judicial nominees (Abraham 1992, Binder and Maltzman 2002), many researchers have addressed judicial decision-making on direct legal challenges to presidential power (Schubert 1957, Ducat and Dudley 1989, Yates 2002, Howell 2003). Federal judges have the advantage of serving life tenure and therefore are not subject to retention control by the executive. However, many other factors in their political and institutional environment shape how federal courts respond to executive power challenges (Moe and Howell 1999a). Federal judges are influenced by public opinion (Ducat and Dudley 1989, Yates and Whitford 1998), policy areas (King and Meernik 1999), and enforcement concerns (Carrubba and Zorn 2010) when adjudicating cases involving the president. Schubert (1957) examines U.S. Supreme Court rulings on cases involving executive orders, appointments/removals, public lands, and foreign affairs dating back to the early 19th century. Schubert's (1957) analysis illustrates the complex legal considerations that justices face in delineating the boundaries of executive power and he shows that overall the federal judiciary appears very supportive of executive power. Ducat and Dudley (1989) conduct one of the first empirical analyses of judicial decision-making on executive power. Working within Neustadt's (1980) argument regarding the importance of presidential prestige, Ducat and Dudley (1989) find that federal district judges are more likely to rule in favor of presidential power as presidential approval ratings increase. In a similar analysis, Yates and Whitford (1998)

also uncover a positive relationship between presidential success in the U.S. Supreme Court and upward trends in presidential approval.

Moving away from Neustadt's (1980) focus on presidential power of persuasion, Howell (2003) develops a formal model of presidential unilateral action involving the court. He also empirically analyzes judicial decisions on challenges to executive orders. According to Howell (2003) courts are more likely to rule against presidents in environments where political opposition to the president is greatest; in environments with interest group mobilization and in the presence of divided government. Similar to the findings of Ducat and Dudley (1989) and Yates (2002), Howell (2003) finds that federal courts are more likely to rule in favor of executives in environments with increasing public approval ratings. The results from these studies lend support to Ferejohn's supposition that "the president has been most dangerous to the judicial branch when he was most popular; that is when his connection to the people was the strongest" (Ferejohn 1999, 381). In order to stave off the ire of a popular executive, courts are willing to show increased deference to executive authority.

Scholars have also examined how the public, in conjunction with the executive, works to constrain judicial decision-making on legal disputes outside of cases involving direct challenges to executive power (Carrubba and Zorn 2010, Schorpp, *forthcoming*). Carrubba and Zorn (2010) consider how the threat of public sanction in response to executive non-compliance influences judicial decision-making. They argue that the threat of executive non-compliance limits the Court's discretion where the U.S. government is a party. The public can provide an "indirect enforcement" mechanism (Carrubba and Zorn 2010, 823) whereby the president will comply with a court's ruling if she fears reprisal from the public. Similarly, Schorpp examines state supreme court decision-making on civil and criminal cases and finds that ideological

congruence between the state executive and public can act to constrain state supreme court decision-making, particularly if preference divergence is present between the court and state executive (Schorpp, *forthcoming*).

The specific executive action and policy under review also influences whether judges vote in favor of executive power. Research on court behavior in relation to presidential power seemingly confirms Wildavsky's (1966) two presidencies theses concerning executive autonomy in foreign affairs issues. Multiple analyses show that presidents are far more successful when executive foreign power is challenged in court compared to domestic policy (Ducat and Dudley 1989, Yates and Whitford 1998, King and Meernik 1999, Howell 2003). Lastly, factors such as partisan congruence between judges and the president (Yates and Whitford 1998, Howell 2003) and issue saliency (Howell 2003) also shape the success of presidential power in court.

Although these studies provide valuable information regarding the interaction of judges and the executive branch, a substantial limitation exists in federal level analysis in that federal institutions exists within a single separation of powers system. Examining the judicial decision-making on executive power in the states is beneficial in that it allows for the investigation of court outcomes across a wide variety of court and executive branch institutional arrangements. Comparative institutional analysis provides a more thorough and comprehensive understanding of the factors that underlie judicial deference in cases involving government litigants. Certain claims regarding judicial behavior in relation to the executive environment are difficult to examine utilizing federal institutions. One cannot examine how variation in judicial selection and retention influences federal court decision-making on questions of executive power given that district judges, circuit judges, and U.S. Supreme Court justices face identical selection and retention mechanisms. Give the presence of a single executive branch it is difficult to examine

how differences in executive privileges and executive branch structures directly affect the president's ability to retaliate against the court. Using the "natural laboratory" of the state environment (Hall 2001), I can examine how differences in the balance of institutional power and structural design affect judicial decision-making on issues of executive power. Below I briefly discuss executive power in the states and factors that influence state supreme court decision-making on cases involving government action.

State Executive Power

The power of state executives has increased substantially throughout the 20th century as a result of institutional reforms to increase the efficacy and coordination of executive branch structures (Conant 1988). Most state executives have seen increases in budgetary power, term lengths, veto power, and an overall increase in institutional control over the executive branch (Beyle and Muchmore 1983). The manner in which state executives are able to use their institutional power varies substantially. For example, currently all governors have the ability to veto legislation and the majority of governors (44) have the power of line-item veto.⁶⁹ However the use of the line-item (or partial) veto is not uniform across states. In some states, governors can only use their line-item veto power to appropriations. Also some state executives can only use the item veto to cancel entire legislative provisions whereas a small number of states provide their governors even more enhanced control and allow state executives to veto certain words in

⁶⁹ *Budget Processes in the States: 2008*. National Association of State Budget Officers. <http://nasbo.org/LinkClick.aspx?fileticket=AaAKTnjgucg=&tabid=80.>, last accessed April 2, 2012.

legislation. State executives also use unilateral tools such as executive orders and executive proclamation to direct executive branch activity and call special legislative sessions.⁷⁰

Extensions of state executive power can potentially have direct impacts on the lives of state citizens and the implementation of public policy. For example in 2007 Texas Governor Rick Perry issued a controversial executive order that would have required that girls entering the sixth grade take the Human Papillomavirus Virus (HPV) vaccine.⁷¹ Also, in April 2011 Idaho Governor C.L. Otter issued an executive order forbidding state agencies from implementing any portion of the Patient Protection and Affordable Care Act, the federal healthcare legislation signed by President Obama in 2011.⁷² Specifically, Otter's executive order stated that "no executive branch department, agency, institution or employee of the State shall establish or amend any program or promulgate any rule to implement any provisions of the PPACA."

⁷⁰ According to Ferguson and Bowling (2008), state executives across 49 states issued nearly 3,500 executive orders between 2004 and 2005. The authorization for executive orders varies across states; some state executives have statutory and constitutional authorization to issue executive orders. The capability to issue executive orders is "implied" in the remaining states (Ferguson and Bowling 2008, s22).

⁷¹ The Texas state legislature later overturned Perry's executive order. Gabriel, Trip and Denise Grady. 2011. "In Republican Race, a Heated Battle Over the HPV Vaccine." September 13. *The New York Times*. <http://www.nytimes.com/2011/09/14/us/politics/republican-candidates-battle-over-hpv-vaccine.html>, last accessed April 15, 2012.

⁷² "Executive Order No. 2011-03." The Office of the Governor. April 20, 2011. http://gov.idaho.gov/mediacenter/execorders/eo11/eo_2011_03.html, last accessed April 15, 2012.

State executive authority and institutional privilege also affects gubernatorial influence in various policy arenas. Researchers find that formal powers of appointment, program review, and rule review power increase gubernatorial influence over the state executive branch (Brudney and Hebert 1987, Woods and Baranowski 2007). Also, informal sources of powers such as personal background and public approval increase gubernatorial success and influence in administrative and legislative politics (Dilger, Krause, and Moffett 1995, Dometrius 2002, Ferguson 2003).

My goal is to determine whether these institutional and environmental characteristics translate into executive success in the judicial arena. Studies of judicial decision-making on cases involving state policy-makers provide important evidence regarding how state judges respond to their institutional and policy environment.

State Supreme Courts and State Policy-Makers

Unlike federal judges, most state supreme court justices do not have life tenure. Although a small number of state judges have life tenure, most state judges are subject to partisan and nonpartisan elections, retention elections, and retention decisions from political elites. When ruling on cases involving statutes or state policy-makers, state judges are often concerned with whether their rulings, or their institution, will be the target of political retribution from state officials (Brace, Hall and Langer 1999, Langer 2002, Johnson 2011a, 2011b). Differences in their political and institutional surroundings have substantial influence on state judicial behavior on cases involving state/government litigants. Justices subject to retention decisions from political elites are much more likely to uphold state legislation (Langer 2002). Also, in environments where the threat for institutional retaliation is higher (i.e. in states where it is comparatively easier to revise the constitution) state justices are more likely to uphold challenged statutes (Langer 2002).

Recent findings show that justices are responsive to variation in executive institutional control when ruling on cases involving the state executive branch agencies (Johnson 2011b). Specifically, in environments where executives have increased appointment and rule review powers, executive branch administrative agency litigants are more likely to win their court challenges (Johnson 2011b). In addition to concerns regarding retaliation, judges are willing to retreat from ruling against state policy-makers because the court's institutional legitimacy may suffer in the aftermath of a dispute with government officials (Langer 2002). Similarly, courts will be aware of retaliatory and legitimacy threats directed towards their institution when adjudicating cases involving executive power.

Judges and State Executives in Court

According to Schubert (1957, 317) executive action is typically given the assumption of validity so the "burden of proof" shifts to the challenger to prove that a legal violation has taken place. Features of the state political and institutional environment will substantially influence whether state supreme courts are willing to uphold exertions of executive power. Courts in the U.S. operate in a separation of powers structure where they must rely on the executive for enforcement of court decisions. U.S. courts also depend on the legislature (and executive) to provide the judiciary with adequate operating resources. The institutional dependency of courts, and the preferences of other political actors, can constrain the ability of judges to act in accordance with their sincere policy preferences (Spiller and Gely 1992, Segal, Westerland, Lindquist 2011). In other words, courts that prefer to rule against executive or legislative power may instead alter their decision-making behavior to prevent retaliation from policy-makers. In environments where concern over institutional retaliation and legitimacy are high, and judicial

decision-making is therefore constrained, courts will exhibit a higher propensity to rule in favor of executive power.

Executive and Judicial Institutional Design and Retaliation

Judges are influenced by a myriad of factors such as ideology (Segal and Spaeth 2002), their institutional environment (Brace and Hall 1990, Epstein and Knight 1998), and importantly the identity and status of the litigants (Galanter 1974). Cases involving challenges to executive action can place judges in an undesirable situation. In fact, Howell (2003, 139) argues that when ruling on cases involving executive authority, judicial power is at its most “vulnerable.” In these cases, courts can check the power of the executive, but it is the executive who must then enforce the court ruling. When faced with a case that potentially draws the court into a political dispute with policy officials, judges must be forward thinking regarding political and public response to their decisions. If political officials are discontented with court rulings, judges can encounter threats to their individual tenure, court resources and ultimately court autonomy (Ferejohn 1999). For example, executives in states with judicial elections could withhold endorsements during re-election campaigns if the executive is displeased with a pattern of court rulings. Features of the institutional and political environment will greatly influence how judges respond to the perceived susceptibility of the courts to these threats.

A direct method of retaliation against courts is facilitated through control over judicial tenure. Previous research finds that both selection and retention method of judges influences their decision-making, particularly on cases involving executive branch litigants (Shepherd 2009, Johnson 2011a, 2011b). Specifically, political elites can select judges that have a jurisprudence that reflects a record of voting in favor of executive and government power. However, it is the method of *retention* that will make justices vulnerable to tenure retaliation in response to court

rulings. Political elites disgruntled with aggressive judicial behavior can simply decide not to retain justices for additional terms.⁷³ Judges who are retained by political elites have greater incentive to rule in a manner that favors state policy-makers, as compared to courts not subject to political retention. Therefore judges who face retention decisions from the governor and/or legislature will be most likely to rule in favor of executive power. The argument that courts retained by governors will be hesitant to rule against executive power is quite intuitive. The proposition that courts retained by legislatures are less willing to rule against executive power may be less straightforward. In fact in cases where there is a direct dispute between the governor and legislature, state courts that face legislative retention may understandably be more inclined to rule against the state executive. However, outside of cases involving disputes between the governor and the legislature (where their interests are in clear opposition) there are multiple reasons why justices subject to legislative retention may be wary of ruling against the governors.

In general, state supreme court judges subject to political retention clearly face a different political landscape than other judges. The reality of retention decisions by the governor or legislature forces judges in these environments to be more sensitive overall to the preferences and institutional powers of political officials when compared to judges retained by different

⁷³The most recent example of this occurred in May 2010 when Governor Christopher Christie of New Jersey decided not to renew the term of Justice John E. Wallace. Governor Christie wanted to select a judge who would “show the restraint that was missing from the court.” Richard Perez-Pena. 2010. “Christie, Shunning Precedent, Drops Justice From Court.” May 3.

The New York Times.

<http://www.nytimes.com/2010/05/04/nyregion/04christie.html?adxnnl=1&adxnnlx=1333647598>

-PG0AbR+1gR25X3JByPTBdw, last accessed September 2, 2010.

means (elections or lifetime tenure). In many cases involving executive power, the dispute can be framed in terms of a nongovernment opponent versus a government opponent. When framed in this manner it is reasonable to assume that courts retained by the legislature will be more favorably inclined to rule in favor of government power (given that typically in these cases the interests of the executive and the legislature are not in opposition). Therefore even in environments where courts are subject to legislative retention, courts will show increased deference to executive power when compared to courts in environments where political elites lack retention power.

Hypothesis 1: *As political control over judicial retention increases, the probability of executive power being upheld in court increases.*

In addition to retaliation aimed at the tenure of judges, courts face retaliation aimed against the institution and the enforcement of judicial decisions. This includes attempts to alter the structure of judicial institutions that can weaken the efficacy of judicial decisions or weaken the judiciary as an institution. One way political elites can negatively affect courts is through punitive budgetary action (Wheeler 1988, Douglas and Hartley 2001, 2003). Although the federal government (and some state governments) place restrictions on the ability to reduce the salaries of judges, officials can direct punitive or retaliatory budget actions toward court staff and facility resources (Douglas and Hartley 2001, Ferejohn and Kramer 2002). Also, if court decisions require state funding and resources, executives can resist providing the funding necessary for proper implementation of court decisions (Douglas and Hartley 2001). This allows executive branch officials to essentially circumvent court rulings and reduce the efficacy of the court. Increased unilateral control over state budgets provides executives with a retaliatory tool to respond to unfavorable court rulings. When state executives have expansive control over state

budgets, I expect courts to be sensitive to retaliatory budget threats and exhibit increased deference to executive authority in court.

Hypothesis 2: *As executive budget institutional privilege increases, the probability of executive power being upheld in court increases.*

Institutional Legitimacy and Executive Prestige

In order to engender implementation of its rulings courts depend heavily upon the widespread view that its decisions, and the institution itself, are legitimate. Gibson states, “institutions perceived to be legitimate are those with a widely accepted mandate to render judgments for a political community” (Gibson 2008, 61). Public support is an important component of judicial institutional legitimacy (Gibson and Caldeira 1992, Clark 2009). Specifically, does the public support the continuance of the court as institution even when confronted with decisions they find adverse?

Research confirms that state courts and federal courts (which lack a direct electoral connection) are responsive to public opinion in the course of their decision-making (Fleming and Wood 1997, Brace and Boyea 2008). Given that courts are responsive to public opinion, state supreme courts decision-making will also be affected by the public’s orientation toward the state executive. A court which rules against an executive with high public support could face backlash from the public that can negatively affect the legitimacy and the esteem in which the judiciary is held if the executive attempts to leverage popular support to resist enforcement of court rulings (Howell 2003). If executive approval reflects the mood of the public (Edwards 1976), and judges “behave in anticipation of a lack of public support” (Clark 2009, 974), it follows that judges will be hesitant to rule in a manner that runs counter to public preferences. Court unpopularity could negatively affect court effectiveness in producing compliance with its decisions. However, as

prestige of the executive wanes, this creates an environment where judges can be more aggressive in taking action to restrict executive power (Ducat and Dudley 1989, 101). State executives with increased public standing should be more successful when their authority is challenged in court.

Hypothesis 3: *As state executive prestige increases, the probability of executive power being upheld in court increases*

Data, Variables, and Methods

To test my hypotheses regarding judicial deference and executive power, I used LexisNexis and Westlaw to collect an original dataset of cases involving challenges to executive power between 1980 and 2010 in the areas of appointment/removal power, executive orders/proclamations, executive privilege, and the executive veto power. These executive powers are chosen because they represent multiple arenas of power for the governor. Executive authority involving executive orders and executive privilege are powers typically directed within the executive branch. Alternatively, the veto power can cause power disputes with the state legislature. Also, these powers are similar to the presidential powers examined in federal-level analyses (Ducat and Dudley 1989). My search was restricted to cases where either a litigant claims an exertion of executive power was invalid or cases where the governor (or executive branch subordinate) argues that executive power in one of the aforementioned areas was violated or encroached upon. I focus on cases where the courts reach a decision on the merits of the executive power claim.⁷⁴ The dataset of executive power challenges includes 237 cases across

⁷⁴ For example if a court rules that a gubernatorial appointment to an executive agency is valid, this is coded as (1) to indicate a ruling in favor of executive power. Alternatively, if a court rules

49 states.⁷⁵ Of the 237 cases in my dataset, state supreme courts ruled in favor of executive power in 62 percent of cases (147/237). The case per state average is 4.74. Alabama has the most cases in the dataset (22), whereas ten states have one case appear in the dataset.⁷⁶ Maine is the only state with no cases in the dataset.⁷⁷ The dependent variable in my analysis is whether a state supreme court rules in favor (1) or against (0) executive power. Because the dependent variable is dichotomous I estimate a series of logit models with standard errors clustered by state.

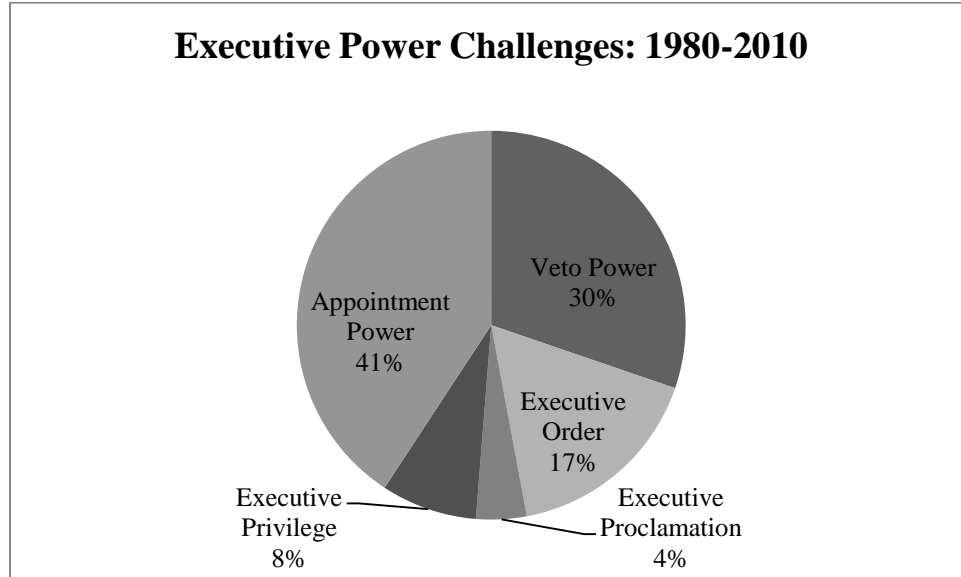
that the governor's item veto of a legislative provision is invalid, this case outcome is coded as (0), indicating a ruling against gubernatorial power.

⁷⁵ Ninety-eight cases in the dataset involve executive appointment/removal powers, 72 cases involve executive vetoes, 40 cases involve executive orders, 19 cases involve executive privilege, and 10 cases involve executive proclamations. Two cases in the dataset involve both executive orders and executive appointments. In the multivariate analysis these cases are categorized as appointment power cases because state supreme courts relied on provisions on executive appointment and removal powers to settle these disputes.

⁷⁶ Connecticut, Idaho, Indiana, Kansas, Louisiana, Missouri, Montana, Nebraska, North Dakota, Texas. See Table F3.1 (Appendix F) for information regarding the distribution of cases by state.

⁷⁷ The lack of cases from the state of Maine does not necessarily indicate that there were no challenges to executive power in the state during the period under analysis. The lack of cases only indicates that there were no challenges to executive power in the Maine state supreme court in the aforementioned executive power areas.

Figure 3.1



Independent Variables

The key independent variables in my analysis are political elite control of judicial retention, executive budgetary control, and executive prestige. I operationalize judicial retention in two ways. First I create a dichotomous measure of political retention; states where political elites retain the court are coded as (1) and states where justices are not subject to political retention are coded as (0).⁷⁸ For my second measure I use ranked indicator variables to allow for

⁷⁸ The state supreme court of New Jersey presents a slight difficulty in coding at the aggregate level. State supreme court justices in New Jersey are appointed by the governor, serve a seven year term, and then face reappointment from the governor. If the governor reappoints the justice he or she serves until the age of seventy. Three cases in my dataset involve the New Jersey State Supreme Court. In order to accurately capture the impact of political retention on aggregate behavior, I estimated models categorizing New Jersey in various ways. I estimated models

greater model specification. States are ordered as followed; Political Retention > Partisan Election > Nonpartisan Election > Retention Election> Lifetime Tenure. Courts with lifetime tenure serve as the base category.⁷⁹

In order to operationalize state executive budget control, I code for whether or not the governor has the power to reduce the state budget without legislative approval.⁸⁰ States where

coding New Jersey as a politically retained state court, and a state court with lifetime tenure. I ultimately decided to categorize New Jersey based upon the tenure of the majority of the judges on the court. Specifically, if the majority of judges serving on the New Jersey court had achieved life tenure, the court was categorized in the life tenure category. If the majority of judges were still subject to political retention, the court was categorized in the political retention category. In two New Jersey cases, the majority of the judges still faced political reappointment, and in the remaining New Jersey case the majority of the justices had life tenure. The results of each model are consistent even under various specifications for New Jersey.

⁷⁹ As mentioned previously direct tenure retaliation for unfavorable rulings is *facilitated* through political elite control over retention and it is this mechanism that induces judicial deference in cases involving executive power. On the other hand, through the use of political appointment, political elites can select judges more likely to rule in favor of government policy. In such a situation where a court is politically appointed, retention mechanisms need not be present for justices to support governmental action in court. Although empirical limitations exist in the state environment when attempting to disentangle the effect of judicial selection versus judicial retention I estimate a model of judicial decision-making that categorizes state supreme courts according to selection method (see Appendix F, Table F3.2).

the executive can reduce the budget without legislative approval are coded as (1) and states where executives do not have this authority are coded as (0). Empirical evidence lends support to using this measure of executive budget control to capture the threat of executive retaliatory action in response to court rulings. In their analysis of court budgeting in the states, Douglas and Hartley (2003) conduct a survey of chief court administrators, legislative budget officials, and executive budget officials. They find that executive budget officials and court administrators most frequently mentioned “reducing the funding of the judiciary in the executive budget” as a gubernatorial action used against the courts (Douglas and Hartley 2003, 448).⁸¹ Their survey also finds that chief court administrators rated “rulings which have a direct impact upon the governor personally” as one of the actions by the court most likely to incur executive action against the judiciary’s budget (Douglas and Hartley 2003, 448).

In order to capture the “prestige” (or public approval) of the state executive, I collect data concerning the current governor’s vote share in the previous election. Larger vote share

⁸⁰ Information for state executive control over the budget taken from *Budget Processes in the States* 1989, 1992, 1995, 1997, 1999, 2002, 2008. The National Association of State Budget Officers. <http://www.nasbo.org/publications-data/budget-processes-in-the-states>, last accessed November 11, 2011. This budget reduction capability includes the ability to reduce appropriations, reduce expenditures, and/or withhold allotments.

⁸¹ According to Douglas and Hartley (2003, 444): “Reducing the funding of the judiciary in the executive budget-meaning reducing judicial requests-appears to be used more than any other gubernatorial budget power to influence court rulings and policies. Four executive budget officers (8.9 percent of 45) and seven court administrators (17.1 percent of 41) indicated that governors in their states had used this power to influence the courts.”

indicates a greater public mandate and I expect that as gubernatorial vote share increases, state supreme courts should be more likely to uphold executive power in court. The optimal way to measure the prestige of the state executive is to measure public approval for each executive around the time each case is litigated in court. However for many state-years under analysis gubernatorial public approval data is unavailable. For the years where gubernatorial public approval is available, I estimate an additional model using the state executive average public approval for the case year (see Table 3). I am able to estimate a model using gubernatorial public approval data for 187 cases using data from the U.S. Officials' Job Approval Rating (JARs) database.⁸²

⁸² I use gubernatorial public approval taken from the U.S. Officials' Job Approval Ratings (JARs) database, <http://www.unc.edu/~beyle/jars.html> , last accessed March 1, 2012. The database contains information regarding the public approval ratings of state executives taken from various state polls. The poll question used for my analysis concern "standard job performance" ratings from respondents. The values in the public approval measure reflect the percentage of respondents who gave a positive response. Responses of "very good," "good," "approve," and "excellent" across polls are grouped into positive responses (*U.S. Official Job Approval Ratings by State Codebook*. <http://www.unc.edu/~beyle/jars.html> , last accessed March 1, 2012. If multiple public approval polls were taken for a given year, the polls were averaged to get a public approval rating. If only one poll is available, the rating from the single poll was used. If public approval information was not available for the year in which the case was litigated, public approval data was taken from year immediately prior to or following the year in which the case was litigated. For example, if a case is litigated in 1994, but the most recent poll data for the governor involved in litigation is from 1993, the 1993 poll data is used.

Table 3.1 Descriptive Statistics

Summary Statistics for Model Variables				
Variable	Mean	Std. Dev.	Min.	Max.
Political Elite Retention	0.10	0.30	0	1
Partisan Retention	0.18	0.44	0	1
Non Partisan Retention	0.21	0.41	0	1
Retention Election	0.41	0.50	0	1
Lifetime Tenure	0.10	0.30	0	1
State Executive Budget Reduction Power	0.81	0.39	0	1
State Executive Vote Share	55.18	6.29	39	74
Governor-Court Party Identification	0.54	0.50	0	1
Divided Government	0.49	0.50	0	1
Civil Appeal Docket Discretion (Mandatory)	0.17	0.38	0	1
Original Proceeding Docket Discretion (Mandatory)	0.25	0.44	0	1
Legislative Opponent	0.27	0.44	0	1
Executive Power Appellant	0.33	0.47	0	1
Appointment Power Challenge	0.41	0.50	0	1
Executive Branch Appointment Challenge	0.26	0.44	0	1
Judicial Branch Appointment Challenge	0.14	0.35	0	1
Legislative Branch Appointment Challenge	0.01	0.09	0	1
Veto Challenge	0.30	0.46	0	1
Line-Item Veto Challenge	0.26	0.44	0	1
Executive Order Challenge	0.16	0.37	0	1
Executive Proclamation Challenge	0.04	0.20	0	1
Executive Privilege Challenge	0.08	0.27	0	1
State Executive Public Approval Rating (Year Average)	51.46	12.49	17	79
Midwest	0.16	0.36	0	1
Northeast	0.20	0.40	0	1
South	0.37	0.48	0	1
West	0.27	0.45	0	1
State Executive Appointment Power	5.16	1.70	1	9
Veto Power (Beyle Measure)	4.54	1.04	0	5
Line- Item Power	0.91	0.29	0	1

Control Variables

In addition to my key independent variables, I also control for additional factors that I suspect are correlated with the decision of courts to rule in favor of state executive power. Although concerns over retaliation and institutional legitimacy may induce judicial deference, courts may also rule in favor of the state executive because of **congruence of policy**

This substitution was required for a minority of cases utilized in the public approval estimation (13 out of 187).

preferences. In this instance, courts are not ruling in favor of executive power because of concerns regarding institutional retaliation and legitimacy, rather the case outcome is a result of opinion sharing. To control for policy agreement between the court and governor, I control for whether a majority of the judges on the court are of the same party as the governor. Observations where the majority of the judges and governor are of the same party are coded as (1) and observations where the majority of judges and the governor are of a different party are coded as (0).

Courts will be more likely to rule against the executive in periods of **divided government.** Scholars suggest that the threat of retaliation for courts is higher when the government is unified because in a unified government it may be easier for political officials to respond collectively against the court (Langer 2002). When partisan opposition to the governor is high, I expect courts to be more aggressive in restricting executive power. Because partisan opposition to the governor is highest when he lacks a party majority in either chamber I code for the simple divided government; states receive a coding of (1) if the governor's party is in the minority party in both chambers of the state legislature. In all other instances, states receive a coding of (0).⁸³

Characteristics of the litigants will also affect whether or not courts rule in favor of executive power. Because of advantages in experience and selectively in litigant behavior, many scholars find that the government is more successful in cases where they are acting as the petitioner (Sheehan, Mishler, Songer 1992). However, similar to Yate's (2002) analysis of presidential legal success, when the state executive, **or executive branch party,** is petitioning

⁸³ I also estimate models where I control for different types of divided government however, the results are consistent when varying the operationalization of divided government.

the court, state supreme courts should be less likely to rule in favor of executive power. Although a petition from the state executive herself may seemingly make a state court more likely to rule in favor of the executive, it is actually advantageous to rule in favor of the executive branch when the executive branch is the respondent. In cases where the state executive is the respondent, a court can rule in favor of the state executive *and* simultaneously uphold a lower court ruling, if present, by ruling against the petitioner (Yates 2002).

Cases involving disputes between legislative and executive power can be particularly volatile for judges. State justices have expressed that they prefer not to be dragged into power disputes between the executive and legislative branch.⁸⁴ In these disputes courts must rule either against the **legislative branch** or the executive branch, either of which could respond negatively against the court for an adverse ruling.⁸⁵ I expect state executives to be less successful when the

⁸⁴ For example, in the case of *Orton A. Jones et al v. John D. Rockefeller et al.* 1983.446. S.E. 2d 714, a case involving an ongoing dispute between the state legislature and executive branch, the West Virginia Supreme Court states: “Although we will not avoid our duty, we note our concern in routinely being called upon to resolve disputes in this continuing tug of war between the coequal executive and legislative branches of government.”

⁸⁵ When faced with a conflict between the legislature and state executive, some courts appear to “split to difference” and rule in such a way so that neither branch gains over the other. For example, in some cases involving item/partial veto cases the state legislature will bring the executive to court arguing that the executive’s use of the item veto is invalid. However in the same case, the state executive will subsequently argue that the provision which she vetoed was unconstitutional. In this situation courts will sometimes rule that item veto was invalid *and* that

party opposing the executive is composed of state legislators. Judges may face greater risks in terms of retaliation when ruling against the legislature as compared to other individuals or organization that may bring disputes against executive power.

In my analysis it is necessary to control for state supreme court **docket discretion**. I control for whether the court has a mandatory or discretionary civil appeals docket. I also control for the court's docket discretion in original proceedings. In many cases involving executive power, the petitioner demands the governor halt an action or take a particular action. For example in an appointment power case, a litigant may file a *writ of quo warranto* to have the court remove a particular gubernatorial appointee from office⁸⁶. In many states this type of case can be filed as an original proceeding to be heard originally in state supreme court. In fact, 28 percent of the cases (67/237) in my analysis reach the supreme court through original proceeding jurisdiction. In some instances, a court's original proceeding docket is classified separately from its civil proceeding dockets.⁸⁷ In other words some state courts may have a discretionary civil docket and a mandatory original proceeding docket. To take into account the docket structure I include separate indicator variables for civil and original proceeding docket discretion. I expect that in environments where courts have mandatory dockets for civil proceedings and original

the provision vetoed was invalid. For example see, *Lawton Chiles v. Robert Milligan*.1995. 659 So. 2d 1055.

⁸⁶ For example see *State of Florida v. Diane K. Kiesling*. 1994. 632 So. 2d 601.

⁸⁷ Information for civil and original proceeding docket discretion retrieved from Court Statistics Project, *State Court Caseload Statistics*, 1980-2008. National Center for State Courts. <http://www.ncsc.org/>. , last accessed February 15, 2012.

proceedings state executives will be more successful. In these environments judges may have to entertain more frivolous challenges against executive power.

State executive success should vary according to the particular **executive action being challenged**. Gubernatorial appointment power should most likely be upheld, whereas the state executive's veto power should have the lowest probability of success. Although gubernatorial appointment power in the states is subject to greater restriction as compared to the president, many state executives are granted extensive appointment powers to governmental offices. However, challenges to the governor's veto power involve legislative power disputes where courts may grant the governor less autonomy. I expect the governor's rate of success for challenges to executive privilege, executive order/proclamation to fall in between that of gubernatorial appointment and veto power. I present the results of my analysis below.⁸⁸

⁸⁸ One concern with many models of judicial decision-making is the presence of selection bias. In other words are there underlying factors that affect litigant behavior and the agenda-setting behavior of courts, which subsequently affect case outcomes (Zorn 2002, 162). For example, perhaps litigants will not bring cases challenging executive power in environments with popular executives who many institutional powers. Alternatively, perhaps executives will not petition cases to their state supreme courts in environments where they are currently unpopular with the public. To the extent that these potential biases are uncontrolled for, I suspect that my models provide conservative estimates regarding judicial decision-making on cases involving executive power. Subsequent analyses should empirically investigate the factors that predict whether executive challenges appear in state supreme courts.

Table 3.2 Executive Power Litigation in Court

Variable	Model 1		Model 2	
	Coefficient (std. error)	P-Value	Coefficient (std. error)	P-Value
<i>Court Retention Method</i>				
Politically Retained	1.262 (0.775)	0.05	1.531 (0.898)	0.04
Partisan Election	-----		0.160 (0.501)	0.38
NonPartisan Election	-----		0.505 (0.435)	0.12
Retention Election	-----		0.229 (0.356)	0.26
<i>Executive Power</i>				
State Executive Budgetary Reduction Power	0.772 (0.366)	0.02	0.791 (0.379)	0.02
<i>Executive Prestige</i>				
State Executive Vote Share	0.048 (0.029)	0.05	0.048 (0.029)	0.05
<i>Political Environment</i>				
Governor-Court Policy Agreement	0.179 (0.306)	0.28	0.172 (0.318)	0.30
Divided Government	-0.134 (0.308)	0.33	-0.100 (0.300)	0.37
<i>Court Structure</i>				
Civil Appeal Docket	0.318 (0.308)	0.15	0.274 (0.300)	0.18
Original Proceeding Docket	-0.264 (0.275)	0.17	-0.191 (0.296)	0.26
<i>Case Facts</i>				
Legislative Opponent	-0.583 (0.368)	0.06	-0.591 (0.381)	0.06
Executive Power Appellant	-0.938 (0.325)	0.00	-0.930 (0.344)	0.00
Executive Order	-0.380 (0.514)	0.23	-0.445 (0.546)	0.21
Executive Proclamation	0.114 (0.644)	0.43	0.094 (0.638)	0.44
Executive Privilege	-0.322 (0.602)	0.30	-0.346 (0.673)	0.30
Veto	-0.758 (0.352)	0.02	-0.822 (0.380)	0.02
Constant	-2.052 (1.503)		-2.357 (1.619)	
Likelihood Ratio (Model 1 nested in Model 2)		(3).90, p=.83		
Wald χ^2	(13) 51.74		(16) 56.69	
N	237		237	

Note: Dependent variable is whether the court rules in favor (1) or against (0) executive power. Tests are one-tailed. Standard errors are clustered by state.

Results

The results from my empirical analyses strongly suggest that institutional design of the court and executive branch, and state executive prestige substantially, affect the adjudication of executive power challenges in court.⁸⁹ Model 1 estimates the influence of political retention on

⁸⁹ I also estimate models that control for regional effects. Results controlling for regional effects are consistent with results reported in Table 3.2 (see Appendix F, Table F3.3). To account for possible individual state effects, I estimate 49 separate models where one state is removed from each analysis. Results from each analysis are consistent with results report in Table 3.2; however, Alabama and Florida both exert statistically significant effects. Because Alabama and Florida have a disproportionate number of cases in the dataset, I estimate an additional model that simultaneously controls for the effects of Alabama and Florida (see Appendix F, Table F3.4). When controlling for the effects of Alabama and Florida the new results reflect the findings in Table 2, however the estimate for the Partisan Elections indicator variable is now more precise and has a statistically significant effect on court rulings on executive power. This means state courts retained by partisan elections are less likely to rule in favor of executive power in court (as compared to base category, courts with lifetime tenure). Results from the fixed effects analysis suggest that this new finding is the result of controlling for the influence of Alabama (where judges are retained in partisan elections). The fact that elected state supreme court justices are selected from the same electorate as the governor would lead one to assume that these justices would be more likely to vote in favor of executive power. However, these justices also have autonomy from direct retention retaliation and this fact could explain why they are sometimes are more aggressive in ruling against the state executive as compared to justices with lifetime tenure. Importantly, courts with life tenure are selected by political elites and this

state supreme court decision-making. Model 2 incorporates additional indicator variables for state supreme court retention methods. State supreme courts with lifetime tenure are the base category in Model 2.⁹⁰ According to the findings in Model 1 and Model 2, state supreme courts that are subject to political retention decisions from political elites are more likely to rule in favor of state executive power in court. In fact, states with politically retained justices, the probability of a ruling in favor of executive power increases by 21 percent (see Table 3.3). Cases in states where justices are subject to political retention comprise approximately 10 percent of the overall sample and these courts rule in favor of executive power at a rate of 80 percent (20/24). However the success rate for executive power in all other cases is only 60 percent (127/213).⁹¹ These results support the hypothesis that justices are responsive to potential threats regarding from political elites regarding judicial tenure.

The sample size for this analysis presents limitations for examining (at the aggregate-level) the interactive effect between divided government courts retained by their state legislatures. However examination of the data reveal that judges retained by legislatures are more likely to rule in favor of executive power (11/13), and in the majority of cases where the court is retained by the state legislature, governors either have a majority in one or both houses of the state legislatures (10/13). This finding suggests that legislatively retained judges are particularly

fact may make these courts more inclined to rule in favor of executive power as compared to some elected courts.

⁹⁰ I also estimated Model 2 (Table 3.2) using various categories as the base category. Results using Partisan Election, Nonpartisan Election, Retention Election, and Political Retention as the base category are consistent with the findings presented in Table 3.2.

⁹¹ This difference is statistically significant at p-value=0.02 (one-tailed test).

wary of ruling against executive power in environments with higher levels of partisan agreement between the executive and legislature. I previously noted that state executive success should decrease in states where courts are retained by the legislature if a case involves a direct conflict between state legislators and the governor. Interestingly, the majority of the cases from states where courts are retained by the legislature do not involve a legislative litigant (11/13). These factors all appear to contribute to the high rate of success for executive power in environments with state high courts subject to legislative retention.⁹² The estimates for state supreme courts subject to Partisan, Nonpartisan, and Retention Elections in Model 2 are less precise and are not estimated within the traditional levels of statistical significance.⁹³

⁹² I also estimate a model interacting cases involving a legislative party (opposing executive power) and courts subject to legislative political retention (Legislative Retention x Legislative Opponent). The results indicate that courts retained by legislatures are less likely to rule in favor of executive power when legislators are a litigant (statistically significant at the 0.10 level, one-tailed test). I also estimate a model interacting divided government and courts subject to legislative retention (Divided Government x Legislative Retention). The results indicate that courts retained by legislatures are less likely to rule in favor of executive power when the governor lacks a majority in either chamber of government. However caution should be exercised when interpreting this finding given the small number of cases (n=2, n=3 respectively) that comprise both interaction terms.

⁹³ I also estimate models to examine whether there is an interactive effect between courts retained in partisan and nonpartisan elections, and gubernatorial vote share in the previous election. Specifically, courts subject to competitive elections may be more sensitive to public mood towards the state executive. Increased sensitivity towards public mood would translate into

The results from Model 1 and Model 2 both indicate that state supreme courts are more likely to rule in favor of executive power in environments where executives have increased unilateral control over the budget. The influence is quite substantial; the probability of success for state executives in court increases by 26 percent in environments where the state executive has increased budget reduction capability. These results lend support to the finding of Douglas and Hartley (2003) that court officials are aware that state executives will sometimes use their budgetary power in response to adverse rulings.⁹⁴

Estimates in Table 3.2 also confirm that state executive popularity substantially affects whether state courts rule in favor of executive power (statistically significant at the 0.05 level).

an increased propensity to vote in favor of executive power in court as gubernatorial vote share rises. However, examination of the coefficients and marginal effects for the interaction of partisan/nonpartisan elections and gubernatorial vote share suggest that varying gubernatorial vote share (two standard deviations) does not affect the probability that courts subject to competitive elections will vote in favor of executive power in court (within 95 percent confidence). To precisely discern whether courts subject to competitive judicial elections are more responsive to changes in gubernatorial popularity, it may be necessary to conduct an individual level analysis of judicial behavior that takes into account closeness to an upcoming judicial election (Huber and Gordon 2004) and partisan congruence between an individual judge and the state executive.

⁹⁴ In Appendix G I explore an alternative hypothesis that judges are not necessarily responding to institutional vulnerability from executive budgetary control but potentially a culture of judicial deference created by general differences in executive power (see G3.1). The results of the analysis presented in Appendix G are consistent with the findings presented in Table 3.2.

Courts are more likely to rule in favor of executive power as gubernatorial vote share increases. Specifically, if gubernatorial vote share increases by approximately 12 percent (a two standard deviation change) the probability of a state supreme court ruling in favor of executive power increases by 15 percent. The results in Table 3 provide estimates using gubernatorial public approval data to measure state executive prestige instead of gubernatorial vote share. Although the model is not estimated with the full sample of cases because of missing data, the results mirror the findings regarding the effects of executive prestige using gubernatorial vote share. State executives with higher approval ratings are more likely to have their power upheld. As gubernatorial public approval ratings increases (one standard deviation below the mean to one standard deviation above the mean), the probability of a ruling in favor of executive power in court also increases by 15 percent. Similar to findings from federal level analysis (Dudley and Ducat 1989), state justices are less willing to restrict the power of a popular state executive.

Table 3.3 Executive Power Litigation in Court: Public Approval Models

Variable	Model 1		Model 2	
	Coefficient (std. error)	P-Value	Coefficient (std. error)	P-Value
<i>Court Retention Method</i>				
Politically Retained	1.579 (0.775)	0.02	1.821 (0.828)	0.01
Partisan Election	-----		0.396 (0.543)	0.23
NonPartisan Election	-----		0.381 (0.420)	0.18
Retention Election	-----		0.132 (0.459)	0.39
<i>Executive Power</i>				
State Executive Budgetary Reduction Power	1.046 (0.478)	0.01	1.071 (0.486)	0.01
<i>Executive Prestige*</i>				
State Executive Public Approval (Year Average)	0.034 (0.013)	0.00	0.034 (0.013)	0.00
<i>Political Environment</i>				
Governor-Court Policy Agreement	0.081 (0.347)	0.41	0.103 (0.368)	0.39
Divided Government	-0.355 (.3460)	0.15	-0.359 (0.347)	0.15
<i>Court Structure</i>				
Civil Appeal Docket	0.704 (0.339)	0.02	0.666 (0.293)	0.01
Original Proceeding Docket	-0.260 (0.352)	0.23	-0.165 (0.372)	0.32
<i>Case Facts</i>				
Legislative Opponent	-0.724 (0.386)	0.03	-0.735 (0.393)	0.03
Executive Power Appellant	-1.110 (0.376)	0.00	-1.127 (0.412)	0.00
Executive Order	-0.546 (0.543)	0.13	-0.578 (0.574)	0.15
Executive Proclamation	-0.632 (0.525)	0.11	-0.560 (0.535)	0.15
Executive Privilege	-0.447 (0.683)	0.26	-0.384 (0.707)	0.29
Veto	-0.898 (0.451)	0.03	-0.852 (0.465)	0.04
Constant	-1.005 (0.801)		-1.308 (0.832)	
Likelihood Ratio (Model 1 nested in Model 2)		(3).55, p=.91		
Wald χ^2	(13)60.74		(16) 64.33	
N	187		187	

Note: Dependent variable is whether the court rules in favor (1) or against (0) executive power. Tests are one-tailed. Standard errors are clustered by state.

Table 3.4 Executive Power Litigation in Court: Predicted Probabilities (from Table 2, Model 2)

Variable	Δ	Percent Change
<i>Court Retention Method</i>		
Politically Retained	+0.16	21%
Partisan Election	n.s.	n.s.
NonPartisan Election	n.s.	n.s.
Retention Election	n.s.	n.s.
<i>Executive Power</i>		
State Executive Budgetary Reduction Power	+0.16	26%
<i>Executive Prestige</i>		
State Executive Vote Share	+0.10	15%
<i>Political Environment</i>		
Governor-Court Policy Agreement	n.s.	n.s.
Divided Government	n.s.	n.s.
<i>Court Structure</i>		
Civil Appeal Docket	n.s.	n.s.
Original Proceeding Docket	n.s.	n.s.
<i>Case Facts</i>		
Legislative Opponent	-0.12	15%
Executive Power Appellant	-0.20	25%
Executive Order	n.s.	n.s.
Executive Proclamation	n.s.	n.s.
Executive Privilege	n.s.	n.s.
Veto	-0.17	21%
N	237	

Note: Changes in predicted probabilities calculated for variables statistically significant variables. For continuous variables, changes in predicted probability calculated as change from one standard deviation below the mean to one standard deviation above the mean. For indicator variables, change in predicted probability calculated as change from 0 to 1. Continuous variables held at their mean and indicator variables at their mode for calculation of predicted probabilities.

The estimates for the variables for political environment are in the hypothesized direction however, they lack precision and do not achieve the traditional levels of statistical significance. I cannot reject the null hypothesis that there is no relationship between governor and court partisan congruence, and court rulings in favor of executive power. I also cannot reject the null hypothesis that there is not a relationship between divided government and court rulings on questions of executive power.

The identity of the litigants of the case and the particular executive power challenged also have an important influence on executive success in court. As hypothesized, when executive power is challenged by legislators the probability of a court ruling in favor of state executive power drops substantially (significant at the 0.05 level). When legislators oppose executive power in court, the probability that the court rules in favor of executive power decreases by 15 percent. Courts are well aware of the political sensitivities involved when navigating disputes between the executive and legislative branches. Although courts are more likely to rule in favor of executive power overall, these findings suggest that judges are willing to rule against the executive to potentially avoid conflicts with the legislative officials.

Also, when the state executive (or executive party) petitions the court in favor of executive power, judges are much less likely to rule in favor of executive power. In fact, the probability of a ruling in favor of executive power decreases by 25 percent in these instances. These results are consistent with Yates' (2002) finding that judges are less likely to vote in favor of the president (or president's party) when the president is the appellant. This finding does not necessarily indicate that executives (or executive officials) bring extremely weak cases to court. It more than likely reflects that *comparatively*, courts are more likely to rule in favor of executive

power when an outside litigant is challenging the executive's authority given the assumption of validity executive power usually enjoys (Schubert 1957).

Results from the model also show that executive success in court varies according to executive power challenged. When compared to the base category (appointment power), executives are less likely to win in cases that involve challenges to their veto power. This finding is understandable given that many veto power cases involve legislative litigants. Although courts must be attentive to retaliation from the executive, the legislature can also act against a court are perceived as antagonistic or hostile to legislative authority. The estimates for other executive powers (executive orders, proclamation, and executive privilege) are not statistically significant; however the lack of precise estimates may be a result of the smaller sample size for these categories. Overall the results of the various models show that retaliation and legitimacy threats substantially influence whether a court votes to rule in favor of executive power.

Appointment Power and Veto Power

The two largest executive power categories in this analysis are appointment power challenges and veto challenges. The types of challenges within each of these categories are not uniform. However, many challenges to gubernatorial appointment power involve challenges to judicial branch appointments. In one example from the analysis, a citizen challenged a judicial appointment by the governor of Alabama on the grounds that the appointment violated the state's Anti-Nepotism Act (the judicial appointee was the brother of the governor's wife).⁹⁵ For appointment power cases, most challenges involve executive branch appointment. In my dataset sixty-two cases involve executive branch appointments, 33 cases involve judicial branch

⁹⁵ *State of Alabama and Harry Lyon v. Hubert Taylor*. 1983. 437 So. 2d 482.

appointments, and 3 cases involve agencies that were either a part of the legislative branch or the agencies whose institutional placement could not be readily determined. State supreme courts should be most supportive of appointment power concerning the governor's own branch compared to appointments to other branches of government. Although just shy of statistically significance, results from a difference of means analysis suggests that courts are more likely to rule in favor of gubernatorial power when the case involves an executive branch appointment (p value=0.14). The results in Model 1 (Table 3.5 reflects these findings).

Most governors have the ability to issue line-item or partial vetoes; however this alternative form of veto comes in many forms across states. While some cases in the executive power dataset involve challenges to gubernatorial use of regular vetoes, the majority of veto cases in my analysis involve disputes over executive use of the item (or partial) veto. Sixty-one out of 72 cases involve item/partial veto. A difference of means analysis suggests that executives appear to be at a disadvantage in court when cases involve an item veto (p value=0.12). This finding is confirmed in Model 2 (see Table 3.5) which shows that state courts are more likely to rule against state executives in cases that involve the line-item veto power as compared to regular vetoes (statistically significant at the 0.10 level). The examination of veto and appointment power cases illustrates that it is important to consider distinctions *within* state executive power categories when assessing judicial deference to executive authority. Although courts are highly supportive of executive power, judicial support declines as executive authority reaches into other branches of government.

Table 3.5 Executive Power Litigation in Court: Appointment & Veto Models

Variable	Model 1		Model 2	
	Coefficient (std. error)	P-Value	Coefficient (std. error)	P-Value
<i>Court Retention Method</i>				
Politically Retained	1.554 (0.917) 0.177	0.05	1.539 (0.902) 0.147	0.04
Partisan Election	(0.502) 0.577	0.36	(0.501) 0.491	0.39
NonPartisan Election	(0.456) 0.285	0.10	(0.454) 0.201	0.14
Retention Election	(0.385)	0.22	(0.354)	0.29
<i>Executive Power</i>				
State Executive Budgetary Reduction Power	0.754 (0.386)	0.03	0.808 (0.372)	0.01
<i>Executive Prestige</i>				
State Executive Vote Share	0.050 (0.030)	0.05	0.048 (0.029)	0.05
<i>Political Environment</i>				
Governor-Court Policy Agreement	0.168 (0.320) -0.111	0.30	0.187 (0.319) -0.093	0.28
Divided Government	(0.298)	0.35	(0.301)	0.38
<i>Court Structure</i>				
Civil Appeal Docket	0.287 (0.306) -0.228	0.17	0.187 (0.292) -0.193	0.26
Original Proceeding Docket	(0.296)	0.22	(0.283)	0.26
<i>Case Facts</i>				
Legislative Opponent	-0.604 (0.382) -0.908	0.06	-0.606 (0.393) -0.921	0.06
Executive Power Appellant	(0.345) -0.183	0.00	(0.354) -0.382	0.00
Executive Order	(0.640) 0.375	0.39	(0.804) 0.214	0.31
Executive Proclamation	(0.678) -0.087	0.29	(0.574) -0.236	0.35
Executive Privilege	(0.752) -0.562	0.45	(0.984) -----	0.41
Veto (All)	(0.425)	0.09	----- -0.0865	
Line- Item Veto	-----		(0.667) 0.083	0.10
Appointment Power (All)	----- 0.447		(0.746)	0.45
Executive Branch Appointments	(0.433) -2.735	0.15	----- -2.424	
Constant	(1.772)		(1.805)	
Wald χ^2	(17) 57.43		(17) 63.17	
N	237		237	

Note: Dependent variable is whether the court rules in favor (1) or against (0) executive power. Tests are one-tailed. Standard errors are clustered by state.

Discussion and Conclusion

This project examines state supreme court decision-making on legal questions of executive power. The overall increase in executive power throughout the 20th century makes investigation of judicial decision-making on questions of executive power a timely analysis. Given the dramatic increases in executive power, it would seemingly be the responsibility of the courts rein in executive authority that violates constitutional and statutory law, or individual rights. However, aggressive action against executive power could be met with multiple forms of retaliation against the court. It is this threat of retaliatory or negative action towards the court that appears to increase judicial deference.

Although many scholars have analyzed judicial behavior on cases involving presidential power, my analysis examines judicial decision-making on cases involving executive power within a variety of institutional and political environments. Using an original dataset of state supreme court cases involving challenges to executive power, I find that the decision by state courts to uphold executive power is driven by institutional and political factors linked to institutional retaliation and threats to judicial legitimacy. State executive power is more likely to be upheld in environments where state supreme courts are politically retained, where executives have increased budget control, and states with politically popular state executives. State courts are also much more likely to rule in favor of executive power in cases involving appointment challenges as compared veto power challenges. The results presented above reflect the findings from federal level research regarding the effects of presidential approval ratings on judicial behavior (Ducat and Dudley 1989, Yates 2002). The reported results also supports previous research regarding state supreme court responsiveness to their institutional environment when rulings on cases involving executive branch actors (Johnson 2011a, 2011b).

Many scholars have studied factors that contribute to the growth of state executive power and its influence. However, a comprehensive understanding of executive power is incomplete without examining how courts define and delineate the authority an executive is allowed to yield. Although state executives have a high success rate in the legal arena, there are many recent examples of state high courts taking governors to task for overreaching with their executive powers. In June 2011, the South Carolina Supreme Court ruled that Governor Nikki Haley's executive order, which attempted to force the state legislature into session, was invalid.⁹⁶ The Florida State Supreme Court ruled that Governor's Rick Scott executive order which put a freeze on agency regulations in process went beyond the recognized executive authority of Florida governors.⁹⁷ Additionally, in November 2011 the Arizona Supreme Court ruled that Governor Jan Brewer must reinstate the head of the Arizona Independent Redistricting Commission, whom the governor attempted to remove.⁹⁸ State executives are typically viewed as the policy leader in each state. As governors across the country confront challenges related to the governance of their state citizenry, executives should become increasingly more assertive in utilizing tools of

⁹⁶ Severson, Kim. 2011. "S. Carolina Supreme Court Rules Against Governor." *The New York Times*. June 6. http://www.nytimes.com/2011/06/07/us/07carolina.html?_r=2, last accessed January 25, 2012.

⁹⁷ Zink, Janet. 2011. "Florida Supreme Court rules against Gov. Rick Scott in rulemaking case." *Tampa Bay Times*. August 7. <http://www.tampabay.com/news/courts/florida-supreme-court-rules-against-gov-rick-scott-in-rulemaking-case/1186234>, last accessed October 19, 2011.

⁹⁸ Bingham, Amy. 2011. "Ariz. Court Sides with Dems in Redistricting, Deals Blow to Gov. Jan Brewer." *Abcnews.com*. November 18. <http://abcnews.go.com/blogs/politics/2011/11/ariz-court-sides-with-dems-in-redistricting-deals-blow-to-gov-jan-brewer/>, last accessed February 3, 2012).

executive action. As executives attempt to expand their boundaries of power, legal clashes between courts and state executives will most likely persist, if not increase, in the future.

APPENDIX F

Table F3.1. Case Distribution by State

State	Number	Percentage
Alabama	22	9.28
Alaska	6	5.06
Arizona	3	1.27
Arkansas	3	1.27
California	5	2.11
Colorado	6	2.53
Connecticut	1	0.42
Delaware	2	0.84
Florida	22	9.28
Georgia	2	0.84
Hawaii	2	0.84
Idaho	1	0.42
Illinois	2	0.84
Indiana	1	0.42
Iowa	7	2.95
Kansas	1	0.42
Kentucky	5	2.11
Louisiana	1	0.42
Maine	0	0.00
Maryland	5	2.11
Massachusetts	13	5.49
Michigan	7	2.95
Minnesota	7	2.95
Mississippi	8	3.38
Missouri	1	0.42
Montana	1	0.42
Nebraska	1	0.42
Nevada	2	0.84
New Hampshire	3	1.27
New Jersey	3	1.27
New Mexico	8	3.38
New York	6	2.53
North Carolina	5	2.11
North Dakota	1	0.42
Ohio	4	1.69
Oklahoma	6	2.53
Oregon	4	1.69
Pennsylvania	4	1.69
Rhode Island	6	2.53
South Carolina	6	2.53
South Dakota	2	0.84
Tennessee	2	0.84
Texas	1	0.42
Utah	2	0.84
Vermont	4	1.69
Virginia	3	1.27
Washington	9	3.80
West Virginia	8	3.38
Wisconsin	3	1.27
Wyoming	3	1.27
Total	237	100

Table F3.2 Executive Power Litigation in Court: Regional Controls

Variable	Model 1		Model 2	
	Coefficient (std. error)	P-Value	Coefficient (std. error)	P-Value
<i>Court Retention Method</i>				
Politically Retained	1.439 (0.788)	0.04	1.677 (1.138)	0.07
Partisan Election	----		0.485 (1.002)	0.31
NonPartisan Election	----		0.617 (0.996)	0.27
Retention Election	----		0.219 (0.970)	0.41
<i>Executive Power</i>				
State Executive Budgetary Reduction Power	0.703 (0.394)	0.04	0.699 (0.402)	0.04
<i>Executive Prestige</i>				
State Executive Vote Share	0.049 (0.029)	0.05	0.050 (0.030)	0.05
<i>Political Environment</i>				
Governor-Court Policy Agreement	0.203 (0.308)	0.25	0.204 (0.329)	0.26
Divided Government	-0.177 (0.313)	0.27	-0.160 (0.299)	0.29
<i>Court Structure</i>				
Civil Appeal Docket	0.169 (0.378)	0.33	0.154 (0.350)	0.33
Original Proceeding Docket	-0.334 (0.342)	0.16	-0.326 (0.316)	0.15
<i>Case Facts</i>				
Legislative Opponent	-0.636 (0.382)	0.05	-0.620 (0.394)	0.06
Executive Power Appellant	-0.847 (0.344)	0.01	-0.842 (0.365)	0.01
Executive Order	-0.470 (0.601)	0.22	-0.539 (0.614)	0.19
Executive Proclamation	0.171 (0.700)	0.40	0.220 (0.693)	0.38
Executive Privilege	-0.409 (0.614)	0.25	-0.389 (0.703)	0.30
Veto	-0.898 (0.391)	0.01	-0.878 (0.403)	0.02
<i>Regional Controls</i>				
Midwest	0.003 (0.510)	0.50	-0.357 (.965)	0.36
South	-0.146 (0.514)	0.39	-0.458 (0.913)	0.31
West	0.433 (0.392)	0.13	0.204 (0.904)	0.41
Constant	-2.059 (1.638)		-2.212 (1.668)	
Likelihood Ratio (Model 1 nested in Model 2)		(3).90, $p > \chi^2 = .83$		
Wald χ^2	(16) 51.38		(19) 59.65	
N	237		237	

Note: Dependent variable is whether the court rules in favor (1) or against (0) executive power. Tests are one-tailed. Standard errors are clustered by state.

Table F3.3 Executive Power Litigation in Court: State Controls

Variable	Model 1		Model 2	
	Coefficient (std. error)	P-Value	Coefficient (std. error)	P-Value
<i>Court Retention Method</i>				
Politically Retained	1.265 (0.785)	0.05	1.544 (0.915)	0.05
Partisan Election	-----		-0.522 (0.408)	0.10
NonPartisan Election	-----		0.502 (0.465)	0.14
Retention Election	-----		0.338 (0.362)	0.18
<i>Executive Power</i>				
State Executive Budgetary Reduction Power	0.756 (0.368)	0.02	0.765 (0.377)	0.02
<i>Executive Prestige</i>				
State Executive Vote Share	0.047 (0.029)	0.05	0.048 (0.029)	0.05
<i>Political Environment</i>				
Governor-Court Policy Agreement	0.243 (0.301)	0.21	0.250 (0.309)	0.21
Divided Government	-0.239 (0.304)	0.19	-0.228 (0.310)	0.23
<i>Court Structure</i>				
Civil Appeal Docket	0.292 (0.331)	0.19	0.243 (0.341)	0.24
Original Proceeding Docket	-0.231 (0.294)	0.21	-0.182 (0.328)	0.29
<i>Case Facts</i>				
Legislative Opponent	-0.524 (0.367)	0.08	-0.551 (0.390)	0.08
Executive Power Appellant	-0.984 (0.370)	0.00	-0.977 (0.372)	0.00
Executive Order	-0.395 (0.558)	0.24	-0.556 (0.574)	0.17
Executive Proclamation	0.232 (0.635)	0.36	0.147 (0.642)	0.41
Executive Privilege	-0.241 (0.627)	0.35	-0.421 (0.678)	0.27
Veto	-0.0711 (0.363)	0.03	-0.904 (0.377)	0.01
<i>Outlier Controls</i>				
Alabama	0.656 (0.269)	0.01	1.379 (0.362)	0.00
Florida	-0.414 (0.315)	0.09	-0.505 (0.381)	0.09
Constant	-2.000 (1.497)		-2.225 (1.622)	
Likelihood Ratio (Model 1 nested in Model 2)		(3)3.10, p> χ^2 =. 83		
Wald χ^2		(15)39.49	(18)42.59	
N		237		

Note: Dependent variable is whether the court rules in favor (1) or against (0) executive power. Tests are one-tailed. Standard errors are clustered by state.

Table F3.4. Executive Power Litigation in Court: Judicial Selection Method Model

Variable	Model 1		Model 2	
	Coefficient (std. error)	P-Value	Coefficient (std. error)	P-Value
<i>Court Selection Method</i>				
Politically Appointed*	0.478 (0.377)	0.10	0.262 (0.494)	0.30
Merit Selection	-----		-0.128 (0.403)	0.38
Partisan Election	-----		-0.430 (0.495)	0.19
<i>Executive Power</i>				
State Executive Budgetary Reduction Power	0.798 (0.357)	0.13	0.785 (0.356)	0.02
<i>Executive Prestige</i>				
State Executive Vote Share	0.047 (0.028)	0.04	-0.888 (0.313)	0.05
<i>Political Environment</i>				
Governor-Court Policy Agreement	0.127 (0.309)	0.34	0.109 (0.319)	0.37
Divided Government	-0.230 (0.316)	0.23	-0.218 (0.329)	0.25
<i>Court Structure</i>				
Civil Appeal Docket	0.477 (0.388)	0.11	0.381 (0.384)	0.16
Original Proceeding Docket	-0.407 (0.268)	0.06	-0.364 (0.291)	0.11
<i>Case Facts</i>				
Legislative Opponent	-0.618 (0.364)	0.05	-0.651 (0.379)	0.05
Executive Power Appellant	-0.920 (0.323)	0.00	-0.888 (0.313)	0.00
Executive Order	-0.302 (0.514)	0.28	-0.412 (0.540)	0.23
Executive Proclamation	0.048 (0.649)	0.47	-0.021 (0.648)	0.49
Executive Privilege	-0.216 (0.666)	0.37	-0.293 (0.724)	0.34
Veto	-0.679 (0.348)	0.03	-0.770 (0.370)	0.02
Constant	-1.961 (1.424)		-1.707 (1.449)	
Likelihood Ratio (Model 1 nested in Model 2)		(2).04, $p > \chi^2 = .83$		
Wald χ^2	(13) 51.90		(17) 51.70	
N	237		237	

Note: Dependent variable is whether the court rules in favor (1) or against (0) executive power. Tests are one-tailed. Standard errors are clustered by state. Base category in Model 2 is nonpartisan elected courts. Although the effect of the political appointment variable in Model 1 is statistically significant, the substantive effect from this variable (+.05, 7% change) is smaller than the substantive effect of political retention in Table 2, Model 1 (+.16, 21% change).

APPENDIX G

Culture of Deference Hypothesis

In the preceding analysis I describe factors that may make courts vulnerable to retaliation from the state executive and explain how those factors influence judicial outcomes. In terms of institutional power, I attribute state justice responsive to variation in executive resource control as reflecting judicial concern over retaliation. However, an alternative argument is that judges are not responding to the threat of retaliation in regards to state executive control over resources, but rather variation in executive power in general. In other words, the level of executive power across multiple spheres can create an environment of judicial deference, or activism, in relation to executive power challenges. In order to analyze whether judges are responding specifically to resource control, I estimate models that control for varying levels of state executive appointment power and veto power (Table G3.1).

Using information from the *Book of the States*, I create a variable that measures whether the government appoints administrative leadership across 10 different policy areas; secretary of state, treasurer, agriculture, corrections, education, insurance, labor, public utilities, taxation, and transportation. If the governor appoints agency leadership the governor receives a score of one. If someone else selects agency leadership (or the agency leadership is elected) the governor receives a score of zero. The lowest score a governor can receive is zero and the highest score a governor can receive is ten. I use two separate measures for veto power. The veto measure in Model 1 is an indicator variable that measures whether or not the state executive has the item veto power. However, because this measure is potentially biased against executives that do have the item veto power (because the majority of veto cases involve the item veto) I estimate an

additional model that uses Beyle's measure of veto power. Beyle's measure utilizes a 0 to 5 scale that captures whether the executive has the item veto power and the majorities required to override executive vetoes. See Table G3.2 for a full description of Beyle's veto power variable. In both models, the variable for budgetary control is statistically significant ($p < 0.5$, $p < 0.10$), whereas state executive appointment power and veto power do not appear to have a significant effect on court outcomes. The results from Model 1 and Model 2 support the hypothesis that when ruling on cases directly involving executive power, justices are responding to the threat of retaliation from executive resource control and not simply differences in the general executive power environment.

Table G3.1. Executive Branch Litigation in State Supreme Court: Executive Power Environment

Variable	Model 1		Model 2	
	Coefficient (std. error)	P-Value	Coefficient (std. error)	P-Value
<i>Court Retention Method</i>				
Politically Retained	1.459 (0.910)	0.05	1.447 (0.914)	0.06
Partisan Election	-0.026 (0.539)	0.48	0.093 (0.507)	0.42
NonPartisan Election	0.308 (0.484)	0.26	0.293 (0.465)	0.26
Retention Election	0.038 (0.457)	0.47	0.008 (0.429)	0.50
<i>Executive Power</i>				
State Executive Budgetary Reduction Power	0.765 (0.765)	0.02	0.745 (0.374)	0.02
<i>Executive Prestige</i>				
State Executive Vote Share	0.051 (0.030)	0.05	-0.896 (0.335)	0.04
<i>Political Environment</i>				
Governor-Court Policy Agreement	0.184 (0.318)	0.28	0.186 (0.319)	0.28
Divided Government	-0.064 (0.320)	0.42	-0.055 (0.319)	0.43
<i>Court Structure</i>				
Civil Appeal Docket	0.336 (0.326)	0.15	0.336 (0.314)	0.14
Original Proceeding Docket	-0.262 (0.311)	0.20	-0.283 (0.310)	0.18
<i>Case Facts</i>				
Legislative Opponent	-0.600 (0.377)	0.06	-0.610 (0.378)	0.05
Executive Power Appellant	-0.908 (0.336)	0.00	-0.896 (0.335)	0.00
Executive Order	-0.456 (0.548)	0.21	-0.463 (0.548)	0.20
Executive Proclamation	0.048 (0.633)	0.47	0.046 (0.636)	0.47
Executive Privilege	-0.336 (0.693)	0.31	-0.337 (0.697)	0.31
Veto (All)	-0.850 (0.386)	0.01	----- -0.036	
State Executive Appointment Power	-0.036 (0.073)	0.31	(0.073)	0.31
State Executive Veto Power	0.400 (0.644)	0.27	----- 0.159	0.18
State Executive Veto Power (Beyle Measure)	----- -2.493		(0.176) -2.901	
Constant	(1.966)		(2.141)	
Wald χ^2	(18)73.64		(18) 75.78	
N	237		237	

Note: Dependent variable is whether the court rules in favor (1) or against (0) executive power. Tests are one-tailed. Standard errors are clustered by state.

Table G3.2. Executive Branch Litigation in State Supreme Court: Executive Power Environment; Beyle Veto Measure⁹⁹

Beyle Veto Power Measure: 1980	
0	No Veto Power
1	No item veto, simple legislature majority needed to override veto
2	Governor has no item veto, special majority needed to override veto
3	Governor has item veto, more than simple majority required to override veto
4	Governor has item veto, majority of legislature needed to override
5	Governor has item veto, at 3/5 of legislature needed to override
Beyle Veto Power Measure: 1988-2007	
0	No Veto Power
1	No item veto, simple legislature majority needed to override veto
2	Governor has no item veto, special majority needed to override veto
3	Governor has item veto, more than simple majority required to override veto
4	Governor has item veto, majority of legislature (elected) needed to override
4.5	Governor has item veto, majority of legislature (elected) needed to override; 2/3 of elected needed for override of appropriations bills
5	Governor has item veto, 3/5 of legislature (elected) or 2/3 of (present) legislators) needed to override.

⁹⁹ Beyle, Thad. Gubernatorial Power. The Institutional Power Ratings for the 50 Governors of the United States. <http://www.unc.edu/~beyle/gubnewpwr.html>, last accessed April 16, 2012.

CHAPTER V

CONCLUSION

This dissertation has examined the interaction of judicial and executive power in the U.S. states. The results from each analysis showed that the institutional design of judicial and executive institutions affect judicial deference in cases involving challenges to executive branch policy and power. In Chapter Two I examined state supreme court decision-making on cases involving state executive branch agencies and found courts subject to political appointment and political retention decisions from the governor and/or legislature are more likely to rule in favor of executive branch agencies. Other factors such as state court adherence to the non-delegation doctrine and policy agreement between the court and executive also affected whether courts rule in favor of executive agency litigants in court.

The third chapter of this dissertation also examined state supreme court decision-making on state executive agencies. However the focus of this analysis was how state supreme courts respond to variation in executive control within, and across, the executive branch structure. The premise of this analysis was that courts would be more likely to rule in favor of executive branch agencies in environments with institutionally powerful governors because of concerns of enforcement resistance and executive retaliation against the court. Findings of this analysis did not support the hypothesis that judges are responsive to the threat of executive retaliation in executive agencies cases, however the results did show that courts are more likely to rule in favor of executive branch agencies when the executive has increased appointment

power and rule review power. Courts were more likely to rule in favor of executive branch agencies when the state executive has more appointment control within individual executive branch agencies and across the entire executive branch structure.

Chapter Four investigated state supreme court decision-making on cases that involved direct challenges to state executive power. These cases included challenges to executive appointment power, veto power, executive orders/proclamations and executive privilege. When ruling on these cases, which are arguably of higher salience compared to administrative agencies cases, I explained that courts faced political retention decisions would be more likely to rule in favor of executive power. I also stated that courts will be more likely defer to executive authority when the executive has increased budget reduction capacity and higher levels of public support. Contrary to results from Chapter Three, the findings from this analysis showed that courts are responsive to variation in executive control over state resources. The discrepancy in this result from Chapter Three and Chapter Four could partly stem from differences in case salience. Judges may be more likely to fear institutional retaliation in cases that have direct implications for executive power as compared to cases involving administrative agency policy, which are usually less visible to the public and political officials. The results from Chapter Four also confirmed the hypotheses that politically retained courts are more likely to rule in favor of executive power and that politically popular executives have an advantage in court when their power is challenged.

Previous studies have examined how political environments can make courts vulnerable to threats regarding executive enforcement of judicial decisions and multiple types of retaliation. However, my dissertation contributes to existing conceptions of judicial behavior by illustrating that executive institutional power and capacity are important in understanding how courts rule when adjudicating cases involving the executive branch. Political support from the public and

legislatures may provide executives the leverage to respond against unfavorable court rulings. However, the institutional capacity of the executive to negatively affect court resources or restrict agencies from promulgating policy unfavorable to executive policy preferences is also an important component of the court's calculus when deciding to defer to the executive branch.

As mentioned previously, the development of executive power in the U.S. states illustrates a tension between creating an executive capable of managing state policy and preventing a dangerous concentration of institutional authority in the hands of the executive. However, the trend in state institutional development reflects a willingness on the part of state officials to grant governors enhanced mechanisms of bureaucratic and institutional control. As states have allowed executives to increase their institutional capacity for action and policy influence, it would seemingly be left to state courts to ensure that governors do not overreach and abuse their authority. However, the results from the preceding analyses showed that if increased institutional powers result in judicial anticipation of executive enforcement resistance and/or executive retaliation, courts are less willing to rule against executive activity. Judicial vulnerability to executive power is problematic given the normative expectation of judicial independence. In regards to judicial independence, few would argue that concerns surrounding institutional retaliation and/or enforcement resistance are proper legal considerations that should influence court outcomes. The success of litigants who challenge executive policy is seemingly not only influenced by the legal facts of the case, but also by the institutional vulnerability of the court in which litigants raise their claims.

Also, recent trends in state government illustrate that officials are attempting to increase *accountability* of the court to political officials by granting the state executive more power to control the makeup of state high courts. Specifically in 2011 state legislatures proposed multiple

constitutional amendments and statutes to alter the selection of state supreme courts to increase executive control over judicial appointments.¹⁰⁰ Some of these proposals include increasing the state executive's power to select the membership of nominating commissions; allowing the governor to ignore the recommendations of the nominating commission; or completely doing away with merit selection and allowing the governor (along with the legislature) to directly appoint and retain state justices. With increased control over judicial appointment and retention, executives can appoint more judges who support executive policy preferences and executive power, and dismiss judges who oppose state government action. If these attempts to reshape state judiciaries are successful and executives continually gain more institutional privileges, litigants who challenge executives (and executive power) will find themselves at a clear disadvantage in court.

¹⁰⁰ For example, a proposed constitutional amendment in Arizona would allow the governor to select the lawyer members of the judicial nominating commission instead of the state bar. Proposals in Arizona, Oklahoma, and Tennessee would specifically allow the governor to ignore the list of candidates provided by judicial nominating commissions. "Attacks on Merit Selection." 2011. *The New Politics of Judicial Election 2009-2010*. <http://newpoliticsreport.org/site/wp-content/uploads/2011/10/JAS-NewPolitics2010-Online-Imaged.pdf>, last accessed April 20, 2012.

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