

# From Statehouse to Courthouse: Legislative Professionalism and High Court Auditing Behavior

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*Objectives.* The objective of this article is to determine whether the institutional resources available to state legislatures impact the cases that a state's court of last resort chooses to hear. Specifically, does legislative professionalism influence the number of cases the court audits that reference an act of the legislature? *Method.* I use time-series cross-sectional analysis to examine over 10,000 cases for 44 state courts from 1998 to 2009. *Results.* I find that courts of last resort in states low in legislative professionalism tend to hear a greater number of cases that reference the legislature than states higher in professionalism, even after controlling for confounders such as ideological disagreement and judicial resources. *Conclusion.* This suggests that state supreme courts offer themselves a disproportionate influence in public policy in states with low professionalism legislatures relative to those with lawmakers more capable of authoring litigation-proof legislation.

Central to the understanding of how government operates is determining how the actions of one branch influence the others. As it relates to states, no branch of government operates alone (e.g., Langer, 2002); as Moncrief and Thompson (2001) suggest, decreasing one branch's utility—the efficacy of internal operation and procedures, institutional knowledge, etc.—appears to lead to an increase in those traits in the other branches. Despite awareness of this type of institutional arrangement, there is little direct evidence connecting the utility of a state legislature to the utility of a state judiciary. Yet, state judiciaries, like their federal counterparts, do not operate free from extra-institutional constraints (e.g., Hall, 2001).

Here, I ask how the institutional structure of the legislature impacts the judiciary's willingness to review legislative outputs. Determining the degree to which legislative design influences the actions of the judiciary can help explain how, how much, and under what circumstances the judiciary influences public policy. Should certain judiciaries have greater opportunities to intervene in public policy interpretation and implementation, the institutional design of the legislative branch may occasionally preclude legislatures from performing their constitutionally defined duty. In other words, the judiciary may attempt to appropriate part of the legislature's electoral responsibility, possibly unbeknownst to the legislature. I suggest that there are substantively meaningful effects of legislative professionalism on the judiciary. Specifically, I argue that judiciaries in states where legislative professionalism is low will take advantage of the legislature's weaknesses (i.e., its inability to author "litigation-proof" legislation) in order to try to play a more active role in public policy via judicial decisions.

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To test this proposition, I use data from Hall and Windett (2013) for 488 court-years across 44 state courts of last resort from 1998 to 2009, and examine all court cases that make explicit reference to a statute, article, state constitution, a particular violation thereof, etc.—here deemed “legislature cases”—to determine the effects of legislative professionalism on the judiciary. I find that there are systematic differences across states in the judiciary’s willingness to audit the outcomes of the policy-making process. Specifically, lower legislative professionalism increases the number of legislature cases the state high court justices choose to place on their dockets.<sup>1</sup> Substantively, moving from the lowest level of legislative professionalism to the highest level results in a 63 percent decrease in the number of legislature cases. These findings have implications for reform movements and debates regarding the ways in which states structure both their legislative and judicial branches.

A practical implication of the effect of legislative design on the judiciary is that institutional constraints on the legislature may decrease its relative power and inadvertently increase the power of state courts of last resort, possibly resulting in underrepresentation of the state’s citizens. By being institutionally ill equipped to proactively insulate itself from potential commandeering of its authority, legislatures low in professionalism may establish contexts where judicial decisions can be a disproportionately powerful (not to mention constitutionally murky) force in public policy. Legislatures low in professionalism have fewer resources to construct quality legislation; state high courts may take advantage of these weaknesses to review cases and, when possible, shape public policy in accordance with their image. By co-opting public policy duties, judiciaries may represent a constituency by whom they were not elected, a particularly disturbing possibility in states where judges are not elected.

### Statutory Quality and Judicial Activity

Langer (2002) suggests that “[t]he system of checks and balances ties political ambitions pursued by judges to the ambitions of the other government actors. While each branch of government works against each other, they must also work together.” I argue that legislatures low in resources are unable to write bills that are difficult to litigate or, conversely, frequently write bills that are likely to be subject to litigation. In pursuit of political ambition, state high courts seize opportunities to impact policy by choosing to hear cases litigating such legislation. My argument unfolds in three parts. (1) An unprofessional legislature should be less able than a legislature not afflicted by such complications to produce quality, review-proof legislation.<sup>2</sup> (2) Low-quality outputs will lead to a greater amount of material on which legal questions may arise. (3) Finally, courts that are aware of institutional contexts take advantage of legislatures that lack the resources to proactively protect themselves from judicial decisions. I expand on each of these components in turn.

The legislative delegation literature suggests that legislators are aware that bills can have varying degrees of detail (Epstein and O’Halloran, 1999; Volden, 2002). Huber and Shipan (2002) ask how costly it is for state legislators to write detailed legislation; they find that legislators are aware of differences in statutory detail and purposefully vary this

<sup>1</sup>State supreme court, state high court, and state court of last resort are used interchangeably. While different states have different names for such institutions (e.g., California’s is the Supreme Court of California and Massachusetts’ is the Supreme Judicial Court), they all refer to the state court that sits atop the state’s judicial hierarchy. Oklahoma and Texas each have two such courts, one handling exclusively criminal appeals and the other handling the remainder.

<sup>2</sup>The use of “review” in this article does not differentiate between statutory interpretation and judicial review. Instead, it merely refers to judicial appraisal of some action of the legislature.

detail in their law writing. Lawmakers can vary detail, policy-specific language, procedural language, and the issue characterization to tighten or loosen the reins they maintain over the implementation of that policy. Huber and Shipan also note that the willingness and ability to vary these details is a product of legislative capacity. Legislators low in capacity (i.e., low in resources) will have higher costs to pay (and thus a lower willingness) to obtain the information and skills to write bills that stave off judicial examination. When costs are high (when resources are low), legislators will be both less able and less willing to overcome these costs; when costs are low (when resources are high), legislators will be better able and more willing to overcome these costs. Legislative professionalism measures the resources available to each state legislature and relates to an institution's ability to overcome these costs.

The institutional design of each state legislature constrains (or, conversely, amply provides) its resources. Bendiner, regarding the requisite abilities for success as a legislator, noted that the process of writing a bill is uncommonly complex and requires "remarkable skill" (1964:15). Scholarship on term limits—an institutional resource constraint—has investigated the link between resource constraints and legislative outputs. Indeed, Kousser (2006) demonstrates that resource-poor legislatures lack policy knowledge, which may lead to substandard outputs. Further, Kousser cites a source who remarks: "Since term limits, there is less scrutiny of legislation and less quality in both houses" (2005:37). More colloquially, another source comments, "legislation is smaller and crappier" and another states that "[p]revious legislators [i.e., those before term limits] had the skills, but not the will. The current group has the will, but not the skills" (Kousser, 2005:40). While a congressperson's principal function is to make laws, state legislators institutionally vary in the ability to perform that function well.

When the legislators individually and the legislatures together are either unable to clearly articulate their intentions or write legislation that does not contradict legislation already in place, their statutes will require more frequent supervision. As Jones comments: "Hard technical work has to be done before even the best lawmaking idea can be made into a clear and enforceable statute" (1952:441). While they may have specific policy goals, less professional legislatures may be ill equipped to structure legislation with sufficient detail for executors of the statute to uniformly, reasonably, or constitutionally enforce it. I argue that legislators and legislatures that must expend greater resources to author quality and nuanced statutes produce lower-quality outputs. States and legislatures vary in their ability to craft quality legislation.

Additionally, judges are aware of, and can respond accordingly to, the political and contextual environments in which they sit. Langer (2002) argues that "state supreme court justices are expected to alter their votes in response to the anticipated reactions from the legislature and the governor." Thus, state high courts can be expected to understand the legislative environment in their state and respond suitably. Therefore, judges who anticipate no response due to an ineffectual or weak legislature should not constrain their vote and seek to gain power in the policy-making realm. For instance, in addition to case characteristics and policy preferences, state judicial decision making has been shown to be impacted by such intra- and extra-institutional variables such as the institutional design of the judiciary (Brace and Hall, 1990), judicial selection procedures (Brace and Hall, 1997), partisan division and competition (Dubois, 1988; Brace and Hall, 1993), and even state public opinion (Devins and Mansker, 2010; Hall, 2014). Given that, at the state level, judicial behavior and votes are shaped by the environments in which the courts operate, state-specific legislative designs unrelated to the judiciary should influence the behavior of judges. Much more pointedly, the neo-institutional approach to judicial decision making at the state level argues that judges are influenced by institutional designs,

rules, and circumstances that place their decisions into a broader political context. Judges are aware of these circumstances and, when possible, utilize them to their advantage. When legislatures are low in professionalism, state high court judges can exert powerful force in the policy process.

To be clear, I do not argue that judiciaries more *successfully* confront low-professionalism legislatures (i.e., overturn their statutes); while I suspect this to be the case, it is not under consideration here. Instead, I suggest that ambitious judiciaries choose to engage more frequently when the legislature is low in professionalism (i.e., select cases where a statute *may* be overturned). More colloquially, when the judiciary senses that its opponent is weak, it schedules more games; while the presumption is that the judiciary wins these matches, that proposition is not empirically investigated here.<sup>3</sup>

### Professionalism as a Resource Indicator

Several scholars have generated professionalism indices (Grumm, 1971; Citizen's Conference on State Legislatures, 1971; Bowman and Kearney, 1988). However, Squire's (1992, 1997, 2007) has become a standard predictor in the field of state politics. Despite using only three indicators, this index is equally as valid as those that include a greater number of predictors (Mooney, 1995). This index includes time in session, salary, and staff size (relative to U.S. Congress) to capture the ability and capability of a legislature.

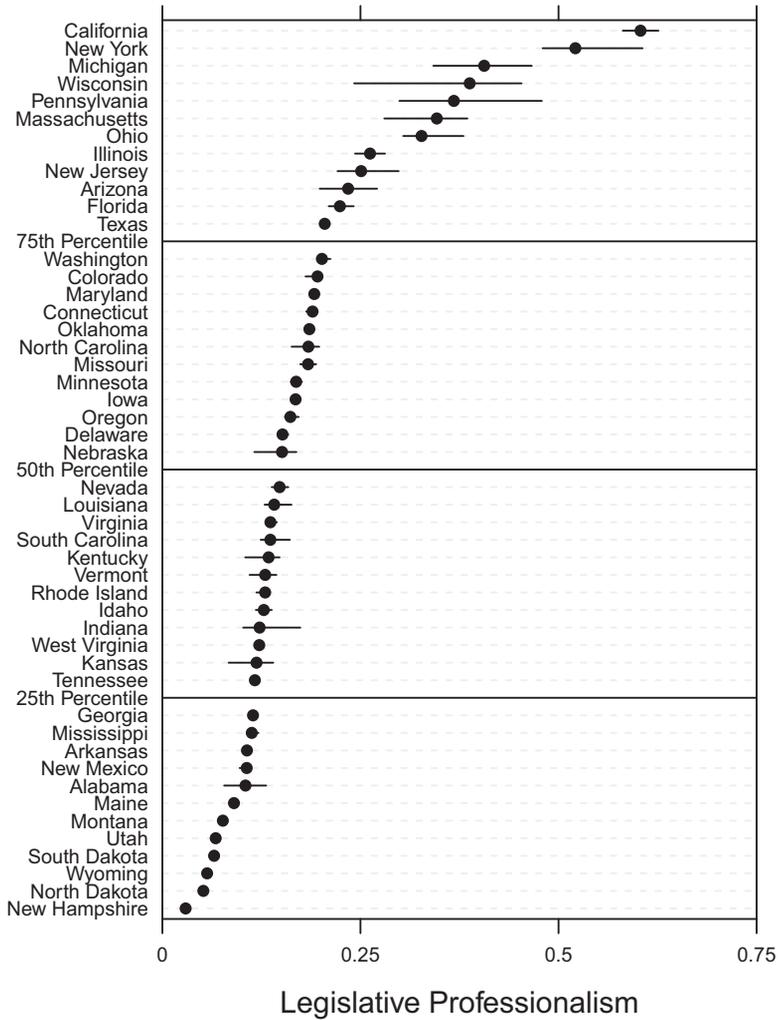
The first indicator, session length, records the frequency with which a legislature meets. For example, as of 2015, the Texas legislature meets in January of every odd-numbered year and is limited to meeting for only 140 calendar days. Conversely, Michigan's legislature meets every year, with no session limits, and meets year-round save for periods of recess. Simply, Michigan legislators have more time to cultivate expertise that will aid in authoring bills and better enable them to resist litigation. The next indicator is salary size. As of 2015, a Texas legislator is paid \$7,200/year; comparatively, a Michigan legislator is paid \$71,685/year. In addition to only working biannually, a Texas legislator may require additional employment outside of the legislature in order to maintain a living wage. This would further remove an elected official from legislative duties, reducing opportunities to generate the necessary experience detailed above. Finally, the legislative professionalism index includes a measure of staff size. Consider two states of nearly equal size: Florida and New York. The former, in 2009, had 1,457 permanent legislative staff and the latter, in the same year, had 2,676, nearly an 84 percent difference in staff size. All else equal, the legislature in Albany has more resources dedicated to policy making than the legislature in Tallahassee.

Figure 1 displays the average and range of legislative professionalism for each state. While states generally maintain their position through the years here analyzed, some states—such as Wisconsin and Pennsylvania—have seen drastic changes in their legislature's level of professionalism. Figure 1 also makes clear that two groups of states—namely, California and New York, but also Michigan, Wisconsin, Pennsylvania, Massachusetts, and Ohio—commit much greater resources to their legislatures relative to their counterparts. The sample observed range of legislative professionalism, which is bound 0–1, is 0.02–0.62. The distribution is positively skewed; the mean score is 0.18, and nearly 60 percent of observations fall below the average.

<sup>3</sup>Various data limitations complicate testing such a question.

FIGURE 1

Range of Legislative Professionalism



NOTE: Closed circles represent average legislative professionalism score for each legislature. Solid horizontal bars represent the minimum and maximum professionalism values for each state from 1998 to 2009. Alaska and Hawaii are absent in analysis due to missing independent variables, and as such are absent here.

**Measurement and Methodology**

To test the expectation that courts are more likely to audit legislatures when they lack the resources to protect themselves, and because the resources available to each branch are not static, I analyze court-years.<sup>4</sup> The dependent variable is “legislature” cases, which are cases where the text for the reason for the appeal or litigation refers to the legislature or

<sup>4</sup>Some independent variables are missing for certain court-years. A model with 574 court-years across 48 state courts (excludes Alaska, Hawaii, Nebraska, and Indiana), found in the supplementary materials, produces results similar to those presented below.

an act thereof.<sup>5</sup> To calculate this variable, I utilize Hall and Windett's (2013) data set and determine when the procedural posture for a particular case mentions a specific legislative act, statute, etc. I select legislature cases to test this hypothesis because they represent cases that the legislature itself had a hand in crafting. It would be inappropriate to suggest that a high court is considering the strength of the legislature when deciding to review a criminal procedure case that is challenging, say, law enforcement practices. In such a case, the high court would be exercising its authority over either law enforcement or a lower court.<sup>6</sup> Instead, the goal is to record only those cases where an appeal is being sought in a case that referenced or challenged specific legislation, its constitutionality, its implementation, etc.<sup>7</sup>

Two examples from Alabama highlight the types of cases that comprise legislature cases. First, regarding an instance in which a legislature's outputs were challenged, a lower Alabama court "found that Ala. Code . . . 15-22-26 was not unconstitutionally vague on its face . . ." The constitutionality of an Alabama statute was unclear and needed clarification by the judiciary. As noted above, the lower court's ruling has no bearing on inclusion in legislature cases. Second, in an instance where the legislature signals its weakness but not necessarily through a low-quality legislative output: "The Alabama Senate, through Ala. S. Res. 88, requested the opinion of the Justices of the court as to whether Ala. S. Bill 20 violated Ala. Const. § 213 as amended."

State high courts generally hear around 10–30 legislature cases in a given year. The number of legislature cases ranges from 1 to 79 in a court-year, the mean number of such cases per court-year is 21.6, and the modal value is 23. Although many studies operationalize docket allocation of a certain issue as a proportion of total cases (e.g., Brace and Hall, 2001), my dependent variable is a count. I do this for two reasons. First, there is a relatively low absolute number of these cases compared to overall docket size. Second, and more importantly, a proportion would only be appropriate if judicial dockets were at capacity, a circumstance that is unlikely to be true and unreasonable to assert.

### *Control Variables*

I control for a number of factors that may be related to the number of total cases that may arise in a state, as well as the judiciary's willingness to oversee the legislature. First, and

<sup>5</sup>Information regarding the search criteria for selecting these cases appears in the supplementary materials. It is possible that the selection procedure missed some cases that would reasonably fall within this category. The "ProceduralPosture" variable in the Hall and Windett (2013) data set only contains so many characters of the text for the reason for appeal. If one of the search criteria appears after the character limit (i.e., if a complaint actually mentioned the legislature, but the invocation occurred after the character limit), then that case would not be coded as a legislature case. However, there is no reason to believe that this would be a systematic problem. That is, it is unlikely that appeals from, say, Vermont invoke the legislature later in their procedural posture than do appeals from New Hampshire. Further, on occasion, a case makes reference to the legislature only to denote the act of the legislature under which an individual was convicted; as detailed in the supplementary materials, the results displayed below are robust to excluding both civil and criminal procedure cases and eliminating all cases that use terms such as "pursuant" and "under."

<sup>6</sup>Exercising authority over a lower court is not itself problematic; indeed, most legislature cases are those that are appealing lower court rulings. Cases that are challenging a lower court's dispensation of a challenge to a state legislature's work (i.e., appeals to overturn a lower court's ruling on a legislature case) are an indicator of the quality of legislative output. Appeals are costly. While there is no explicit (or implicit) assumption that frivolous appeals are not pursued, if there is lower court controversy, or if appellant attorneys cannot decide which appeals are worth pursuing, it is an indication to the high court that a case is worth carefully reviewing.

<sup>7</sup>Implementation may also be a complaint toward the body implementing the legislation. However, this should still signal a state's high court that something is awry. It is also important to note that some cases that make their way to the high courts are legislative requests for advisory opinions. Their inclusion is similarly justified; such requests act as a signal that the legislature must defer to the judiciary.

highly related to legislative professionalism, legislative term limits may impact the outputs of the legislature. The impact of legislative term limits are well studied and the evidence suggests that term-limited legislatures are simply less capable of producing high-quality outputs when compared to their temporally unconstrained counterparts (e.g., Kousser, 2005, 2006; Lewis, 2012). I control for the possibility that this increases the dimensions on which litigation and judicial inquiry may focus.

Importantly, it seems obvious that the judiciary should be less inclined to review a legislature that is ideologically proximate, regardless of the ideological distance when the act of the legislature in question was penned. In other words, if judicial review is an intentional act by the judiciary to expropriate policy making, it may have little desire to do so if it is appropriating power from a political ally. As such, *Ideological distance* is a measure of the distance between the judiciary and the legislature in a given year. These values were calculated using information from Bonica (2013, 2014), which produces comparable ideology scores based on common financial donors. The ideology scores for the judiciary are from Bonica and Woodruff (2015). To calculate legislature ideology, I determined the winners in each election, relative to the last election cycle, to identify who comprised a Congress for a given time period. The variable is calculated as the absolute difference between the median state high court justice and the median ideology score for a state's lower chamber.<sup>8</sup> Low values indicate ideological proximity and large values indicate ideological divergence.

Similarly, judges may be more or less willing exercise judicial oversight when they feel less threat of retribution. Therefore, I include *Divided government* for when the legislature and governor are of different parties.<sup>9</sup> When this is the case, the justices may perceive the likelihood of a governor passing court-curbing legislation to be low, and therefore expect to realize little retaliation.

Further, 40 states have *Intermediate appellate courts (IAC)*. This presence could impact the number of legislature cases a high court is willing to place on its docket if case outcomes at the lower court are congruent with the decision a higher court believes it would reach, or if illegitimate cases are weeded out. The presence of an IAC is an imperfect measure of docket control. That said, it still serves as an indicator of when high court justices are less constrained and when the amount of information available to them regarding a case is greater. Further, some justices do not have discretion over certain types of cases, regardless of whether they have some measure of docket control. Most notably, many courts are required to hear appeals on capital punishment cases. *Death penalty state*, an indicator that the state exercises capital punishment, accounts for the lack of control over this element of the docket.

The number of legislature cases placed on a docket may be directly related to state court capacity. As Brace and Hall (2001) note, much like state legislatures, state judiciaries vary in the resources available to them. For example, some states have five high court justices, others have nine. Indeed, it would be remiss to assume that underresourced judiciaries are capable of exploiting underresourced legislatures. Simply, larger, more heavily resourced courts will be better equipped to hear more cases, write more decisions, and better select cases where they can disproportionately influence public policy. Therefore, *Judicial resources* must be controlled for to rule out the possibility that the number of cases referencing an act of the

<sup>8</sup>This excludes Nebraska, which has a unicameral legislature, from consideration. I choose the lower chamber because the chamber that tends to have less experienced officials may be more responsible for lower-quality legislation.

<sup>9</sup>Governor Angus King from Maine was elected as an independent. As a U.S. senator, he caucuses with the Democratic Party. I consider him a Democrat.

legislature on the docket is a product of judicial capacity, not legislative professionalism. This variable comprises the predicted values from the first unrotated factor of an exploratory factor analysis that included the following items: judges per capita, staff allocated to the chief justice, staff allocated to the associate justices, and central staff.<sup>10</sup>

Judges may be less willing to review the legislature when they are electorally accountable and such actions may be used against them in an election cycle. Indeed, there is evidence of behavioral changes in state judges due to electoral pressures, such as altering votes in death penalty cases to align with state public opinion when nearing election (Hall, 2014). Therefore, the number of cases added to a docket could vary if a justice faces an election in that state's *Electoral system*, which is an indicator that the selection method in the state is electoral, as opposed to appointment.<sup>11</sup>

Regarding characteristics of the state environment that may alter the number of cases on the docket, pressures from nongovernmental actors (i.e., special interest groups) may affect the quality of legislation produced as well as docket size. Business interests may, for example, pressure legislators to include loopholes, breaks, or exemptions that increase the complexity of the tax code; such statutes may lead to legal action. Further, certain interest groups may utilize the courts as an avenue for their policy agendas. Alternatively, a high density of interest groups may reduce judicial burden, possibly via legal briefs, and reduce the number of cases the justices see as viable. Thus, I include *Interest group density*, as measured by Tandberg (2007), to account for the possibility that certain groups alter the number of appeals in a given year.

I also include the total number of cases each state high court heard in a given year. This is in order to control for the possibility that more legislature cases are simply a result of a greater number of cases overall. Finally, we might expect variation in a state's capacity to produce cases to account for some of the variation in the actual number of cases. Thus, I include *Attorneys*, which is the number of attorneys in a given state in a given court-year, as an exposure variable that accounts for the fact that different states vary in their "ability" to produce such cases.<sup>12</sup> Exposure (or offset) variables constrain a particular predictor to be equal to 1 and "transforms" the dependent variable into a rate (e.g., Baetschmann and Winkelmann, 2012). This is an advantageous approach for a number of reasons. First, it utilizes the proper probability distribution. More importantly, given that all the predictor variables are "interactions" when related to the dependent variable through a link function, when including the term in a model and obtaining appropriate standard errors (as opposed to merely placing it as the denominator of a dependent variable), the variance-covariance matrix will reflect this association between all of the estimates. That is, one can gain greater precision in a variables of interest (as well as controls) when estimating the offset/exposure variable. To be clear, this approach transforms the count to make it the number of legislature cases heard per court-year across the number of attorneys, yet model interpretation remains unchanged.

<sup>10</sup>The factor analysis indicates that these items reduce to a decidedly unidimensional factor; the eigenvalue for the first factor is 1.54 (the second is 0.16) and these items account for about 89 percent of the variance in the latent dimension.

<sup>11</sup>This includes partisan, nonpartisan, and retention elections.

<sup>12</sup>An alternative specification would be to use state population. Using state population—which is correlated with the number of attorneys;  $\rho = 0.77$ —yields similar substantive and identical statistical results. However, number of attorneys is more appropriate theoretically. An individual can file multiple cases, as can an attorney, but it is less likely that an individual can do so *without* the attorney. Therefore, I argue that attorneys more closely approximate capacity than does population. Moreover, I purposely avoid using anything that the court itself can influence—such as the total number of cases—as an exposure variable. Finally, total number of cases would be inappropriate for the reasons listed above regarding assumptions about docket capacity.

TABLE 1  
Mixed-Effects Negative Binomial Regression of Legislature Cases onto  
Legislative Professionalism

Variable	Coefficient	SE
Legislative professionalism	-2.07*	0.77
Ideological distance	0.03	0.06
Judicial resources	-0.59*	0.16
Term limits	-0.10*	0.05
Divided government	0.04	0.04
Intermediate appellate court	-1.30*	0.32
Death penalty state	0.41	0.20
Electoral system	0.39	0.25
Interest group density	-0.31	0.19
Total cases heard	0.00*	0.00
Attorneys	—	Exposure
Constant	-5.55*	0.33
Dispersion parameter	-2.29*	0.12
State random effects	0.65*	0.15

\* $p < 0.05$  with respect to two-tailed test.

In a long-term analysis there is some concern regarding the endogeneity of judicial oversight and legislative outputs. That is, the legislature may pass court-curbing legislation that can hamper the court's ability to review the legislature. And while this does occur from time to time (e.g., in 2015 in Georgia), I harbor few concerns regarding this matter. I contacted (via email and telephone) state high courts to inquire on staffing changes in the time period analyzed. Montana (which is one standard deviation above the average number of legislature cases) noted that there were staffing changes in this period (although the person whom I contacted could not confirm the exact year they occurred). However, these institutional changes were internal decisions *by the judiciary*, as opposed to legislatively decreed. Further, the legislature in Florida—a state with multiple court-years in the 95th percentile of legislature cases—passed legislation that *increased* the number of clerks in response to increased workload. Given this evidence, it does not appear that legislatures, even those that are reviewed at the highest rates within the data, are enacting any retributive legislation in response to high judicial oversight.

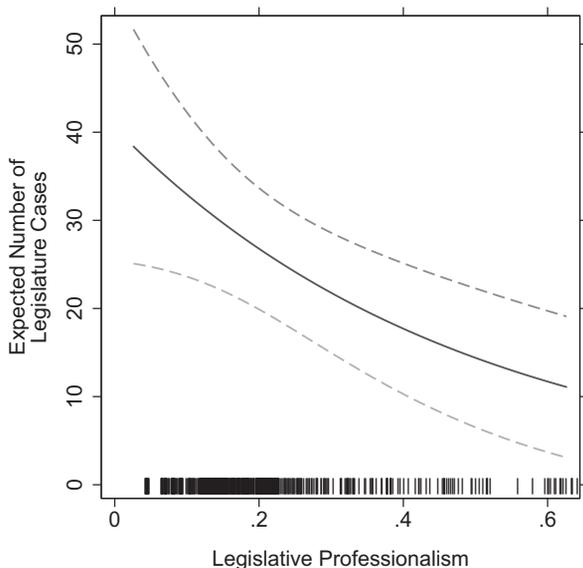
To determine the effect of legislative professionalism on the use of judicial oversight in cases that reference an act of the legislature, I estimate a mixed-effects negative binomial regression. A negative binomial is more appropriate than its Poisson counterpart given the overdispersion of the dependent variable. The mixed-effects model allows for random variation by state. Should there be any nuance in states that may impact docket size that cannot be accounted (e.g., differences in legal culture), these effects should be captured by the random component.

## Results

The regression explaining the effects of legislative professionalism on high court justices' evaluation of legislature cases appears in Table 1.

FIGURE 2

Effect of Legislative Professionalism on the Number of Legislature Cases Placed on a High Court Docket in a Given Year



NOTE: Dashed lines represent 95 percent confidence intervals. Vertical lines indicate placement of x-axis observation.

The main variable of interest—legislative professionalism—is, as expected, negatively related to the number of legislature cases added to a docket in each year.<sup>13</sup> This suggests that there is indeed a relationship between legislative professionalism and judicial auditing behavior. Stated differently, the institutional design of one branch of government has unintended consequences on the behavior of the other branches; in this instance, the design of the legislature has unintended consequences on the behavior of state high courts. It appears that legislatures low in resources cannot craft legislation in such a manner to keep it off of state high court dockets, which indicates more active oversight on the part of the judiciary. It may also suggest that the judiciary attempts to insert itself in the interinstitutional struggle for policy creation. In other words, state judiciaries might attempt to appropriate policy-making power from weaker branches.

The practical effect of this relationship is displayed in Figure 2. All else equal, across the range of legislative professionalism, the expected number of legislature cases drops from around 30.4 cases to around 11.1, a –63 percent change. In other words, while there is no level of legislative professionalism at which the judiciary entirely foregoes oversight, review cases become rarer as professionalism increases. This is equivalent to moving from legislature cases comprising just under 20 percent of the average court-year docket to around 4 percent. There are two interpretations of this effect. The first is that

<sup>13</sup>Multiplicative interactions between legislative professionalism and both ideological distance and judicial resources were investigated. As shown in the supplementary materials, neither has any substantial impact on legislative professionalism's effect on state judicial oversight. Likewise, an interaction between ideological distance and divided government was tested to determine if ideologically deviant judiciaries avoided review when the legislature and executive were unified and capable of curbing the court. There is no statistically or substantively significant relationship.

the judiciary is more wary of reviewing a legislature that is capable of defending itself from constitutional encroachments. The second is that more professional legislatures simply require less oversight. Regardless of the true nature of the relationship, the effect is clear: when legislatures are institutionally rich (poor) in resources, the judiciary plays a smaller (larger) role in public policy making.

Other predictors are also significant in the model. First, there is a negative relationship between judicial resources and the number of legislature cases heard annually. The negative sign of this coefficient might indicate that the most professional judiciaries are adept at selecting only the cases where they can contribute politically. Next, the presence of an IAC—a coarse measure of docket control—is, as expected, negatively related to the number of legislature cases that appear on a high court’s docket. State court judges with a plenary docket appear able to be selective regarding the cases they choose to hear, possibly choosing to review cases that offer the best opportunity to create public policy or those for which they expect the least amount of legislative backlash. Term limits have a small and negative impact on legislature cases, which counters expectations. The total number of cases does appear to increase the number of legislature cases, but only to a small degree. Finally, there is a nontrivial random effect for each state.

## **Conclusion and Discussion**

In this article, I sought to determine whether the institutional structure of the legislature impacts judicial willingness to audit the legislature. Specifically, do legislative outputs produced by a low-professionalism legislature lead to greater judicial oversight, potentially creating disproportionate judicial power in the public policy-making process? The results suggest that this is the case. Supreme courts in states low in legislative professionalism will add a greater number of cases evaluating the legislature to their docket; conversely, supreme courts in states high in legislative professionalism will add fewer such cases to their docket. The number of cases that specifically reference an act of the legislature that make their way to state high court dockets is a product of that state’s level of congressional resources.

These effects are irrespective of factors that may decrease a judge’s willingness to oversee his or her political counterparts, as well as state characteristics that may produce court cases. Indeed, it appears that highly professional legislatures are able to avoid review. These results demonstrate that the provisions offered to a state’s legislature influence the behavior of the judiciary. A state whose legislature is institutionally constrained by the resources provided to it involuntarily empowers judicial oversight more than an unconstrained state. These findings speak volumes about the importance of institutional resources. Finally, this finding holds normative implications for democratic theory, the separation of powers, and both constitutional and institutional design.

There are, however, potential weaknesses to this study. First, the behavior captured here only signals concern with the legislature. More pointedly, judiciaries in states where legislative professionalism is low add more legislature cases to their docket, but this says little of how frequently the legislature is actually overturned. It may be the case that some judiciaries are not behaving exploitatively but instead simply monitor the outputs of the legislature and only act (i.e., overturn) when necessary. This possibility does not detract from the relationship here uncovered. Indeed, signaling greater concern with the legislature is still an audit of its outputs, and the evidence here shows that more professional legislatures are audited fewer times per court-year.

Further, there are other ways that the judiciary could check the legislature that may not be reflected here. For example, a state high court could establish rules on how lower

courts must decide on certain legislature cases. Such an instance, while not necessarily overturning the legislature, may be a particularly attractive way for the judiciary to oversee a low-professionalism legislature. Finally, in this design I assume entirely rational behavior. In other words, I assume that higher-professionalism legislatures are better resourced to retaliate and that judges will know when retaliation is likely and therefore avoid review. However, there are many instances—for example, at the inception of a new Congress—where judges may be uncertain about their ability to review.

There are troubling normative implications of the legislature inadvertently delegating part of its constitutional authority to other branches, particularly the production of a democratic deficit. While there is evidence that, where possible, the public holds judges responsible for their actions on the bench (e.g., Hall, 2014), it is far less likely that citizens will be aware of disproportionate judicial influence in an ordinary audit of the legislature than in, say, capital punishment cases. Beyond this, if judges are actively pursuing cases where they can implement public policy, they are choosing to claim the silences left by inadequate legislative resources, as opposed to advocating those silences be redressed. What is more, even for judges that are elected, by co-opting legislative responsibility they are representing constituencies by which they were not elected; this is an even more troubling prospect where judges are appointed. While most certainly unintended, states that institutionally ill equip their legislatures to perform their constitutionally defined duty are openly subjecting themselves to less representation than states that properly equip their deliberative branch. Limiting the resources offered to the legislature may induce a democratic deficit.

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## Supporting Information

Additional supporting information may be found online in the Supporting Information section at the end of the article.

**Figure S1:** Histogram of Specific-Mention Cases by State 1998–2009

**Figure S2:** Histogram of Specific-Mention Cases from 1998–2009

**Figure S3:** Marginal Effect of Legislative Professionalism Across Observed Range of Absolute Ideological Distance Between the Judiciary and Legislature

**Figure S4:** Marginal Effect of Legislative Professionalism on State Judicial Review Across Observed Range of Judicial Resources

**Table S2:** How the Legislative Professionalism Indicators Impact the Legislature/Legislators

**Table S3:** Mixed-Effects Negative Binomial with Ideological Distance Removed

**Table S4:** Mixed-Effects Negative Binomial with Procedure Cases Removed

**Table S5:** Mixed-Effects Negative Binomial with “Violation” Cases Removed

**Table S6:** Mixed-Effects Negative Binomial with “Violation” & Procedure Cases Removed