

HOW FACTORS OF STATE SUPREME COURT RETENTION AFFECT VOTES TO OVERTURN PRIOR PRECEDENT

How do different factors of state supreme court composition effect the likelihood that salient cases will result in an overturning of precedent?

Fosteson, Autumn N

Thesis and Career Prep, Spring 2020 | First Draft

Abstract

Since the establishment of individual states supreme courts, there has been debate on the best way to retain individual judges to their court. With five different forms of retention, each comes with their own set of outside forces that determine how a judge behaves while on the court. Some of these outside forces like a judge's length of service on the court can also affect the decision to overturn a standing precedent, especially when the case captures great amounts of media attention. Salient cases are often more likely to result in an overturned precedent than other cases but outside factors can often make or break a justice's opinion on the issue at hand. These determining factors need to be identified and dissected in order to fully understand their weight in the decision process. Using the data provided in *Stare Decisis and the Electoral Connection: Do Retention Systems Affect the Judges' Deference to Precedent?* Written in 2019 by Michelle Tuma and Michael Miller, the factors of retention

Introduction

In supreme courts at the state level, there has long been debate on the best way for judges to obtain and retain their seats. Usually, when an individual thinks of how supreme courts function, the primary belief is that judges are appointed for a life term, and this is true of the national supreme court. However, this is not the norm when it comes to supreme courts on an individual state level. In fact, judges appointed for lifetime seats are the least common in terms of retention. When it comes to the decisions that are made in state supreme courts there are a number of different variables that can be applied to any decision a judge hands down (Miller, Tuma 2019) , usually these variables have to do with the system in which they operate, but what about the cases themselves?

Over the course of the last two decades, there has been a significant rise in high profile cases involving socially based constitutional questions. This growth compounded with the ever-growing strength and speed of social media as a means for communicating case outcomes on a global scale, has revolutionized the way a case is perceived and the amount of attention it receives.

Different Forms of Retention

There are in total five different ways a state supreme court judge can retain their seat on a court whereas only three of the five are directly impacted by some sort of election.

Table #1¹

Judicial Retention System By State

Life Term	Institutional Retention	Voter Retention	Non-Partisan Elections	Partisan Elections
Massachusetts	Connecticut	Alaska	Arkansas	Alabama
New Hampshire	Delaware	Arizona	Georgia	Illinois
Rhode Island	Hawaii	California	Idaho	Louisiana
	Maine	Colorado	Kentucky	New Mexico
	New Jersey	Florida	Michigan	North Carolina
	New York	Indiana	Minnesota	Pennsylvania
	South Carolina	Iowa	Mississippi	Texas
	Virginia	Kansas	Montana	West Virginia
	Vermont	Maryland	Nevada	
		Missouri	North Dakota	
		Nebraska	Ohio	
		Oklahoma	Oregon	
		South Dakota	Washington	
		Tennessee	Wisconsin	
		Wyoming		
		Utah		

¹ Table taken from Miller, Michael G., Tuma, Michelle D.(2019). *Stare Decisis and the Electoral Connection: Do Retention Systems Affect the Judges’ Deference to Precedent?*” (14)

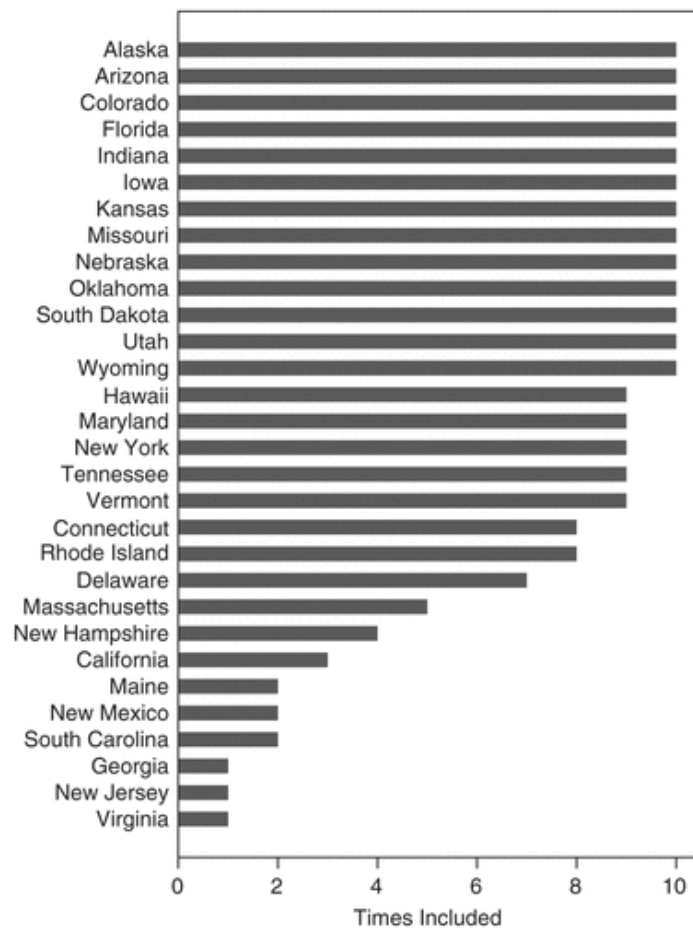
There are states in which judges are appointed for life terms, as mentioned this is the rarest form of retention, only employed in three states. Judges who are appointed for life will serve until they reach retirement age. In a handful of other states judges are chosen by a commission of elected officials and face reevaluation on a set basis. However, in the vast majority of states judges are elected by the public in one of three forms. According to McCall (2010) it is states who employ some form of public election who have much higher rates of voter interest in such races, this is because in states who employ institutional retention, voters do not have a direct say in the outcome. The most common form of voter retained judges are retained via elections where judges run for reelection on a recurrent basis but run uncontested. In a number of other states judges run in non-partisan elections, within these states it is not uncommon for the electorate to favor the incumbent and retain them based on their past service on the court. Finally, in the eight remaining states, judges run in partisan elections under party affiliations. The judges who run for this form of retention tend to see their chances of retention as the least secure, as they have the constraints of specific party lines and a more specific electorate to please (Miller, Tuma 2019). This along with term limits, progressivism in the court, and nearing the age for voluntary retirement have been the roots of judges being deemed “lame ducks” in terms of their willingness to hand down groundbreaking opinions (Hall, 2013) In the past, it has been argued that judges who are elected have had the tendency to pass down decisions that are less clear and effectively less effective than their non-elected counterparts (Goelzhausser, Cann, 2014).

The type of retention system that a state employs will further affect the perceived legitimacy of the selected judges. In a study done by Greg (2018) of the merit of each states selection system for judges, the top 13 states who were all mentioned on each of the ten merit-

based selection lists analyzed, were all states who employ an uncontested voter retention system. Whereas 6 of the bottom ten who were mentioned in 5 or fewer merit-based selection lists were states who employ institutional retention systems or appoint judges for life terms. This is interesting because this claim is in direct conflict with Miller and Tuma's (2019) finding that judges who are appointed for life are perceived as more legitimate by legal scholars since they do not directly face voters.

Figure #1²

The Number of Times a State was Mentioned on a Merit Based Judicial Selection Classification List



² Figure taken from Greg, G. (2018). Classifying judicial selection institutions. *State Politics & Policy Quarterly*, 18(2), 174-192.

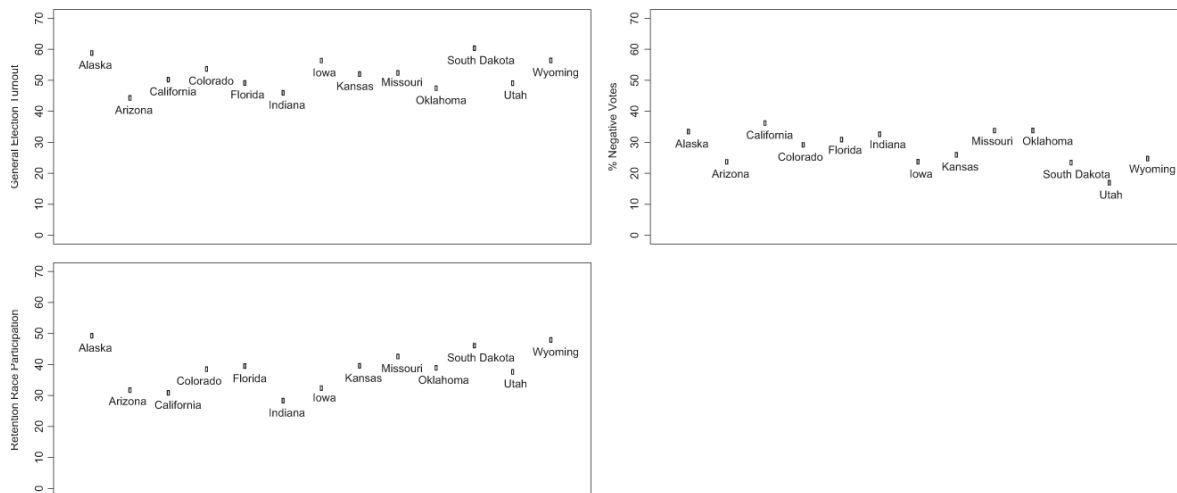
The Effects of Salience

When Supreme court cases are seen as salient it means that upon its decision and or deliberation were met with some degree of media exposure. The length to which this coverage extends effects the degree of salience a case holds. When considering how this will affect a judge's decision it is important to understand that salience will mainly affect judges who face elections. As an example, Harris (2019) analyzed the state of Iowa in the election year 2010. In 2009 Iowa one of the most salient cases judges would rule on that year was whether or not to legalize same-sex marriage. As established by the above Table #1, Iowa is one of the many states in which judges on the supreme court are voter retained.

Harris (2019) offers two sets of figures that analyze the rates of voter turnout, voter participation in judicial retention elections and the rate of votes against retention of judges, in comparison to other comparable states.

Figure #2³

Mean Level Voter Turnout Between 1984 and 2008

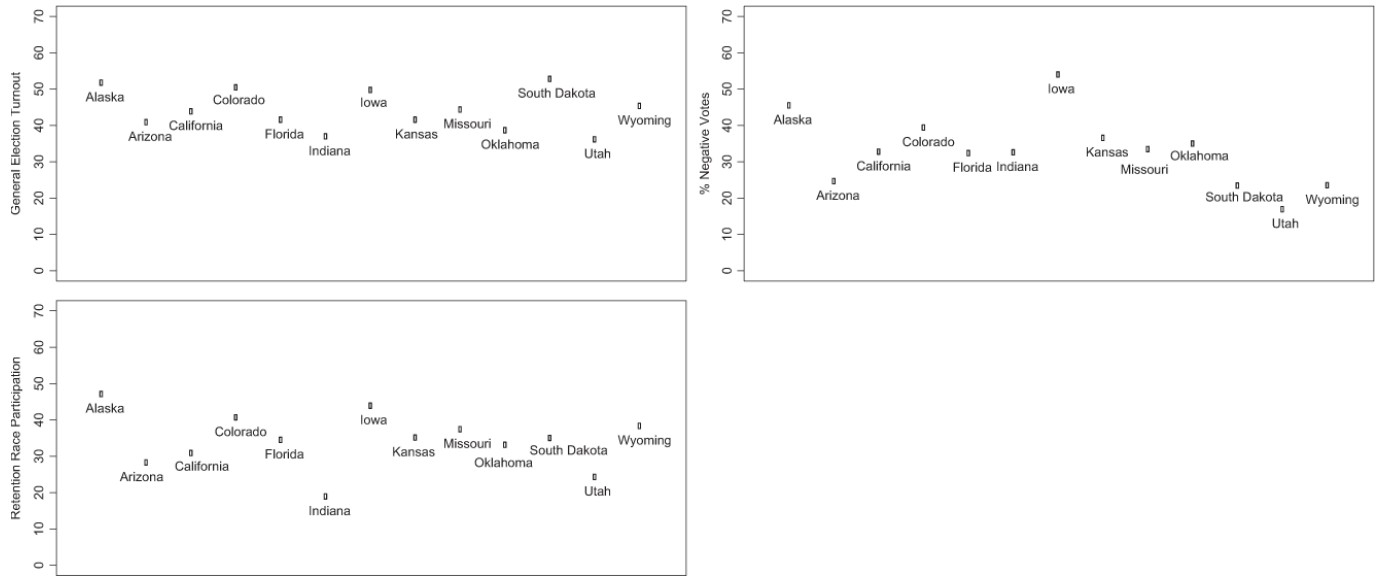


³ Table taken from Harris, A. (2019). Voter Response to Salient Judicial Decisions in Retention Elections. *Law & Social Inquiry*, 44(1), 170-191 Analyzing the mean outcomes of voter turnout (top left), votes against judicial retention (top right) and voter participation in retention elections (bottom left) between 1984 and 2008

In the first set of figures, data was compiled on a basis of mean level outcomes of voter turnout between the years 1984 and 2008. The outcome of the tables show that Iowa fell, in all three figures, within the linear average range. Though in terms of negative retention votes and overall retention race participation, Iowa fell on the low end comparatively.

Figure #3⁴

Voter Turnout for the Year 2010



In this second set of figures, the state of Iowa, after the legalization of same sex marriage within the state, in all three areas fell on the high end of both retention election participation and voter turnout and was significantly higher than any other state in terms of votes against retention of the three judges who were up for reelection that year. Since Iowa is a state in which judges face voters on a recurrent basis even when they run uncontested, in a landmark case such as upholding the constitutional right to gay marriage it is no surprise that the swing state mustered the voters to vote against retention of three judges who just a year earlier made the liberal

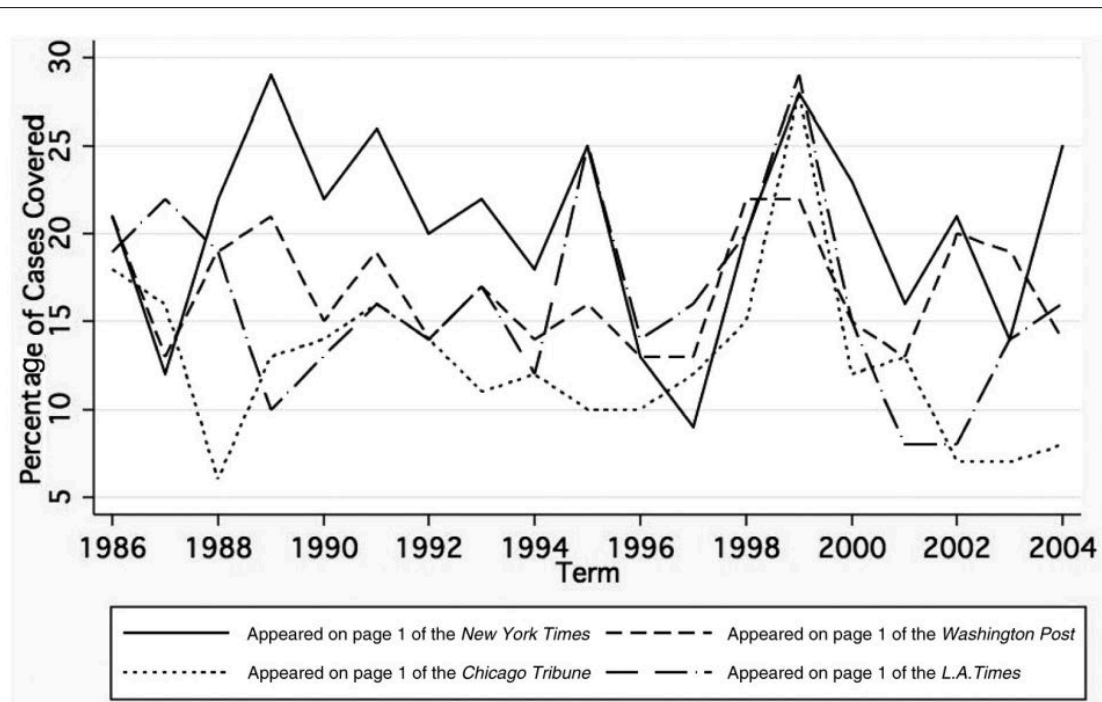
⁴ Table taken from Harris, A. (2019). Voter Response to Salient Judicial Decisions in Retention Elections. *Law & Social Inquiry*, 44(1), 170-191 Analyzing the mean outcomes of voter turnout (top left), votes against judicial retention (top right) and voter participation in retention elections (bottom left) for the year 2010 specifically

decision to sign onto the majority in the 2009 case. It is not uncommon for a high salience case to have this kind of effect on judicial retention.

The next question that must be answered is: what exactly is salience and how is it quantified? Collins (2012) offers three different figures to explain the quantification of salience and how it has evolved.

Figure #4⁵

Case Salience Between 1986 and 2004 By Major Newspaper Front Page Coverage

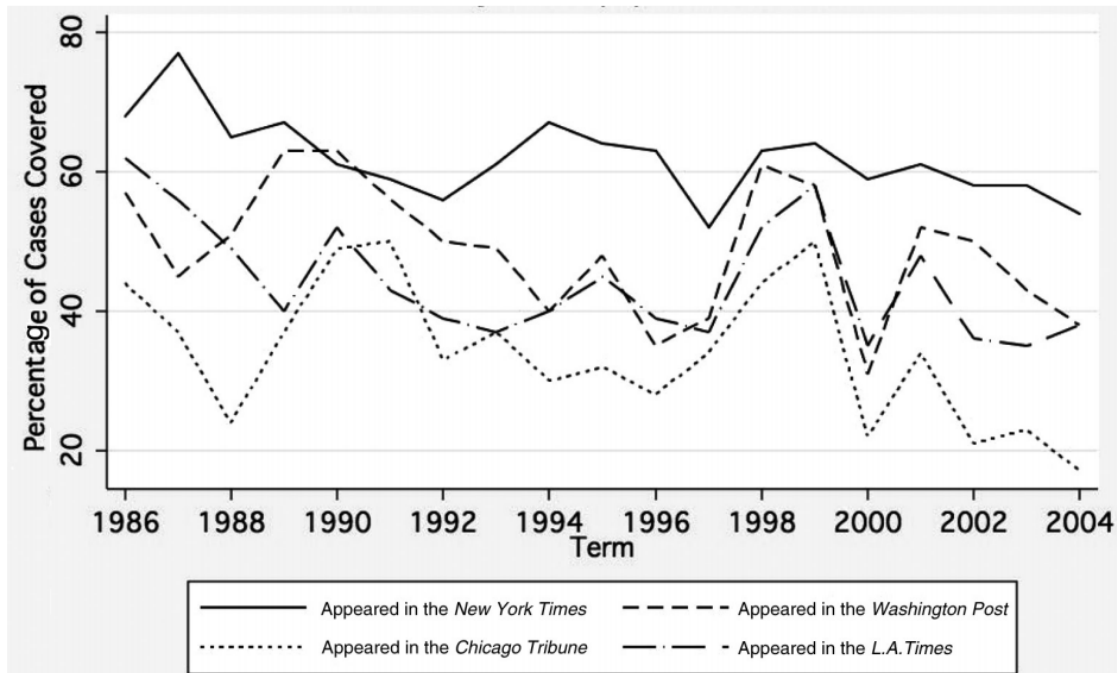


Originally the most popular way of measuring case salience was to analyze whether or not a case decision was covered on the front page on any of four major newspapers, however in terms of forming a scaled perception of salience, this made it difficult to establish a sliding salience index.

⁵ Figure taken from Collins, T. A., & Cooper, C. A. (2012). Case salience and media coverage of supreme court decisions: Toward a new measure. *Political Research Quarterly*, 65(2), 396-407. Shows the percentage of cases covered on the front page of four major regional news outlets

Figure #5⁶

Case Salience Between 1986 and 2004 By Major Newspaper Coverage Anywhere

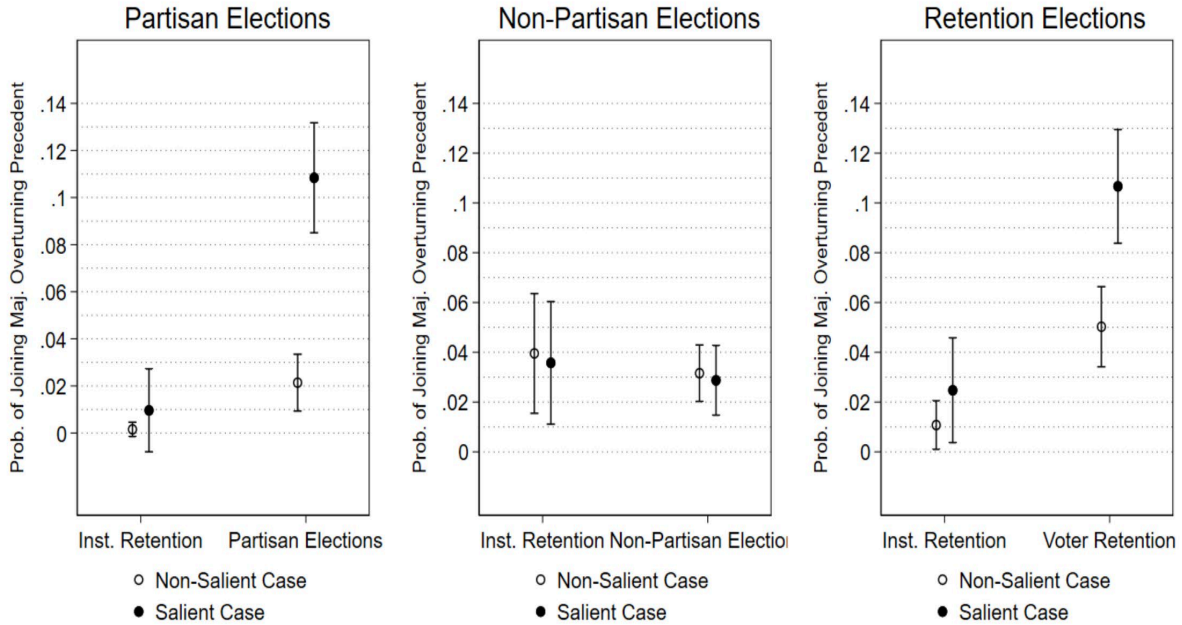


In figure #5 the new scale is established in which salience is dependent on any mention on any page of the same four major news sources. This is much more valid in terms of measuring salience on a sliding scale. When it is considered in a broader sense a sliding scale is much more beneficial to this study especially when remembering that salience may affect judges in different ways depending on their form of retention. As covered earlier, the three major retention systems in which judicial opinions are most malleable in terms of salience are voter retained judges, judges retained in non-partisan elections and judges retained in partisan elections.

⁶ Figure taken from Collins, T. A., & Cooper, C. A. (2012). Case salience and media coverage of supreme court decisions: Toward a new measure. *Political Research Quarterly*, 65(2), 396-407. Shows the percentage of cases covered on any page of four major regional news outlets

Figure #6

Comparing Partisan, Non-Partisan and Retention Systems in terms of Probability to Join a Majority Opinion to Overturn Precedent



As shown in the above graph, judges who face an electorate in retention elections and partisan elections are more likely than both institutionally retained judges and judges elected in non-partisan elections to overturn past precedent. This can be attributed to the fact that non-partisan retained judges of the three groups see their chances of reelection as less fleeting than judges who face a more specific electorate. But how does this change when considering the changes in voting patterns? How does this effect change further on courts of varying sizes? Finally, how do these effects change when considering the length of time a justice have been sitting on the court, as well as the length of time that remains before their next reelection bid?

Methods

For the purposes of this paper I have used the Replication Data for: *Stare Decisis and the Electoral Connection: Do Retention Systems Affect Judges' Deference to Precedent?* This data set, used originally for the purpose of determining a State level supreme court Judge's attention to precedent, is used to determine how the salience of state supreme court cases effects a judge's deference to precedent. Case Salience is defined as the media attention a case draws in the days or weeks surrounding a decision. There are a variety of situations in which case salience may become more relevant to a decision, in this case, I will be examining how court size, length of service on the court and reelection proximity change the effects of salience when used as a weighing force. All analysis is weighed out by the data sets salience weight variable, used to compensate for the resulting lack off salient cases within the time period in question, this oversampling was inevitable as the salience off cases could not have been decided by those who conducted the study.

Hypotheses and Analysis

The first variable we will be examining is the effect of court size as a weight variable. Courts in this data set are split into 3 categories, sets of five, seven and nine, depending on the state. It is my hypothesis that the larger the court, the higher the likelihood that that court will vote to overturn precedent. This is because on larger courts there are a more diverse set of opinions present. That would mean that courts of five would have the lowest likelihood of judges voting to overrule precedent, courts of seven would be slightly higher and sets of nine would have the highest likelihood.

Table 2
Justice Votes to Overrule Precedent by Size of Court with Salience Layer

salient			Size of Court			Total	
			5	7	9		
no	Justice Votes to Overrule Precedent	no	Count	582	1945	455	2982
			% within Size of Court	97.8%	97.3%	97.6%	97.4%
		yes	Count	13	55	11	79
			% within Size of Court	2.2%	2.8%	2.4%	2.6%
		Total	Count	595	2000	466	3061
			% within Size of Court	100.0%	100.0%	100.0%	100.0%
yes	Justice Votes to Overrule Precedent	no	Count	339	1412	489	2240
			% within Size of Court	92.9%	90.6%	92.8%	91.4%
		yes	Count	26	147	38	211
			% within Size of Court	7.1%	9.4%	7.2%	8.6%
		Total	Count	365	1559	527	2451
			% within Size of Court	100.0%	100.0%	100.0%	100.0%
Total	Justice Votes to Overrule Precedent	no	Count	921	3357	944	5222
			% within Size of Court	95.9%	94.3%	95.1%	94.7%
		yes	Count	39	202	49	290
			% within Size of Court	4.1%	5.7%	4.9%	5.3%
		Total	Count	960	3559	993	5512
			% within Size of Court	100.0%	100.0%	100.0%	100.0%

Salient	Chi-Squared	Cramer's V
yes	.271	.059
no	1.338	.016

According to the table, courts with the smallest number of judges are the least likely to overturn precedent on both salient and non-salient cases, however, this seems to be the only instance out of the three that falls along the lines of the hypothesis. In courts of seven, there is a substantial difference in their likelihood to overturn precedent on salient matters, but this effect is not as drastic on non-salient issues. This makes sense as the media attention is an influencing matter more often than not for judges when they make their decisions. In the table, it can be observed that percentages either way vary more depending on whether a case is salient or not than depending on the size of the court.

Next, we look into the correlation between how states voted in the 2016 election and their respective judges' votes on overturning precedent. My hypothesis is that the states won by

democratic candidate Hillary Clinton will be more likely to overturn precedent on salient cases. This is due to the more socially conscious stance taken by the left end of the spectrum.

Table 3
Justice Votes to Overrule Precedent * salient * elect2016 Crosstabulation

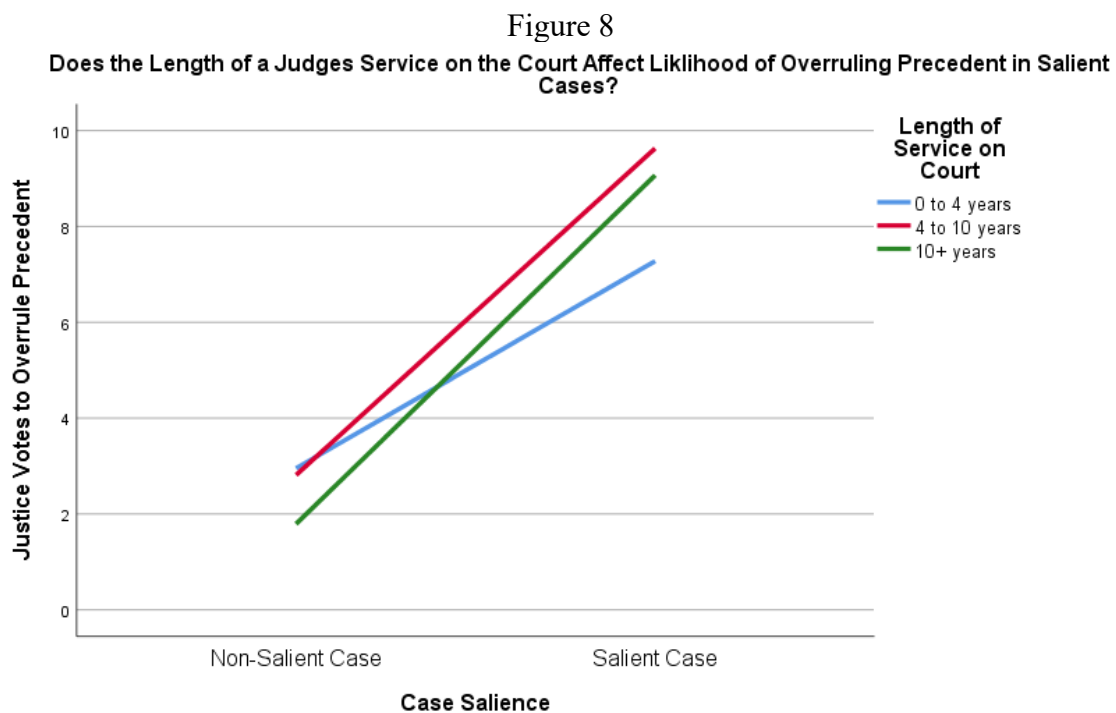
elect2016				salient		Total
				no	yes	
democrat	Justice Votes to Overrule Precedent	no	Count	1715	27	1742
			% within salient	99.7%	90.0%	99.5%
		yes	Count	5	3	8
			% within salient	0.3%	10.0%	0.5%
	Total		Count	1720	30	1750
			% within salient	100.0%	100.0%	100.0%
republican	Justice Votes to Overrule Precedent	no	Count	3639	45	3684
			% within salient	96.4%	91.8%	96.3%
		yes	Count	136	4	140
			% within salient	3.6%	8.2%	3.7%
	Total		Count	3775	49	3824
			% within salient	100.0%	100.0%	100.0%
Total	Justice Votes to Overrule Precedent	no	Count	5354	72	5426
			% within salient	97.4%	91.1%	97.3%
		yes	Count	141	7	148
			% within salient	2.6%	8.9%	2.7%
	Total		Count	5495	79	5574
			% within salient	100.0%	100.0%	100.0%

Political Party	Chi-Squared	Lambda	Cramer's V
Democrat	61.084	.000	.187
Republican	2.853	.000	.027

As stated earlier, there is a drastic oversampling of non-salient cases with almost seventy times more non-salient cases in the set than salient. Upon first look at the table, it's obvious that the decisions on salient cases are more tightly correlated across party lines whereas the spread slightly widens on non-salient issues. There is really no distinct difference in how party lines effect votes to overturn precedent, as can be seen in the similar percentages across both democrat and republican judge rulings. Democratic and Republican judges are only three percent apart in overturning precedent on salient issues. However, it can be observed that Cramer's V for

democrats is five times as high, suggesting that being a democrat is five times more likely to effect the choice to overturn precedent.

The third variable to be examined is how a judge's length of service on the court effects their votes. When it comes to the amount of time a judge has served on a court, it becomes more likely that a judge was involved in setting the precedent the longer they have sat on the court. When a judge is involved with a case in which they set precedent for, reconsidering precedent they had a hand in setting is a dangerous game, no matter the salience or lack thereof. One misstep can make a judge look wishy washy. The hypothesis then becomes, when a judge has served a longer amount of time on the court, they will be less likely to overturn precedent on issues regardless of salience.

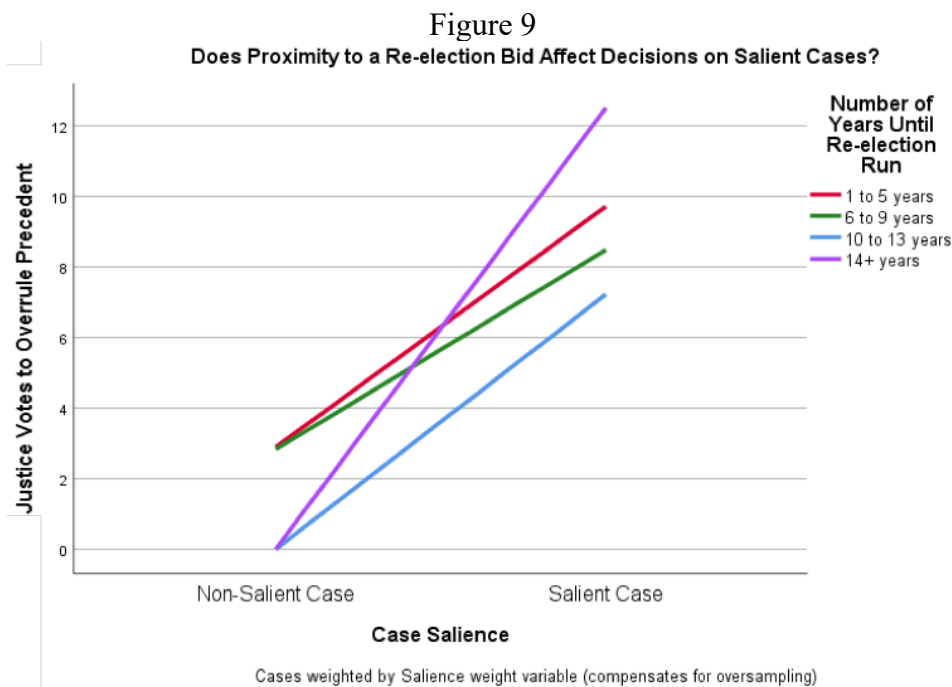


Cases weighted by Salience weight variable (compensates for oversampling)

As the figure shows however, there is a discrepancy in the hypothesis. Judges who have served ten or more years on the court on which they sit are in fact the least likely to overturn non-salient precedent, however the most junior judge class, those serving for less than 4 years are the least

likely to overturn salient cases. This can be explained in a variety of ways. Judges who are new to a court could feel as though their term could be cut short due to a misstep in the beginning of their tenure. It could also be the case that the judges who are younger face annual reelections on 2-year terms and they lack the same amount of control as those who are appointed for life. Regardless, the relation between case salience and votes to overturn precedent are extenuated when length of service is considered as a weighing variable.

The final variable to be considered is a judge’s proximity to a reelection campaign. In terms of the article from which this data originated, it is highlighted that for judges who do face reelection or evaluation on fixed terms, there is a chance that as the daunting day approaches, a judge may make a big move to gain momentum with their electorate. Before running tests, however it was necessary for the variable to be binned with 3 equally spaced cut points, so as to make the figure easier to understand. It is my assumption that as an election approaches, judges will be more likely to overturn precedent on salient matters.



According to the figure, there seems to be little to no correlation between the time leading to reelection and votes to overturn precedent, however this does not mean there is nothing to be taken from the figure. On the figure, the judges who compose the purple line, representing fourteen or more years to a reelection bid, are those appointed for lifetime terms. Judges serving lifetime terms as well as those ten to thirteen years from reelection, had no votes to overturn precedent on non-salient cases, however for lifetime judges voting on salient issues, they are the most likely to overturn precedent, this can be explained by their lack of an electorate to respond. Lifetime appointed judges have tendencies to vote closer to the true moral stance of society.

Conclusion

There are a variety of factors believed to have an impact on how a state supreme court justice votes, however, it is only upon closer inspection one begins to understand what has the greatest effect. Of the variables investigated above, a judge's proximity to reelection as well as the length of time spent on the court seems to have the greatest impact on the decision to overturn precedent. The most junior off judges, those serving four years or less on the court, have the least variance in overturning precedent between salient and non-salient cases. Further, judges who serve lifelong terms on their courts are least likely to overturn precedent on non-salient cases but also the most likely to overturn precedent on salient issues, because they are not responsive to an electorate and have more freedom to make decisions that align with how they actually feel about the issue. Furthermore, there is very little evidence to suggest that the size of the court as well as the political direction of the state have any significant impact on overturning salient precedent.

Supplementary Materials

- ◆ <https://www.ncsc.org/>
- ◆ <http://www.courtstatistics.org/>
- ◆ http://popup.ncsc.org/CSP/CSP_Intro.aspx
- ◆ <https://dataverse.unc.edu/dataset.xhtml?persistentId=doi:10.15139/S3/1MCPQF>

References

- ◆ Chanbrasegaran, P. (2013). *The American supreme court: The politicization of the nation's highest court* (Order No. 1522049). Available from Politics Collection. (1288909745).
- ◆ Collins, T. A., & Cooper, C. A. (2012). Case salience and media coverage of supreme court decisions: Toward a new measure. *Political Research Quarterly*, 65(2), 396-407. doi:<http://dx.doi.org.bsuproxy.mnpals.net/10.1177/1065912911398047>
- ◆ Goelzhauser, G., & Cann, D. M. (2014). Judicial independence and opinion clarity on state supreme courts. *State Politics & Policy Quarterly*, 14(2), 123-141.
- ◆ Greg, G. (2018). Classifying judicial selection institutions. *State Politics & Policy Quarterly*, 18(2), 174-192.
- ◆ Hall, M. G. (2014). Representation in state supreme courts: Evidence from the terminal term. *Political Research Quarterly*, 67(2), 335-346
- ◆ Hall, M. E. K., & Windett, J. H. (2013). New data on state supreme court cases. *State Politics & Policy Quarterly*, 13(4), 427-445.
- ◆ Harris, A. (2019). Voter Response to Salient Judicial Decisions in Retention Elections. *Law & Social Inquiry*, 44(1), 170-191.
- ◆ Lyle, D. (2017). The politicization of state courts threatens fundamental rights: The empirical case. *Human Rights*, 42(3), 5-8
- ◆ Lewis, D. C., Wood, F. S., & Jacobsmeier, M. L. (2014). Public opinion and judicial behavior in direct democracy systems: Gay rights in the American states. *State Politics & Policy Quarterly*, 14(4), 367-388
- ◆ Miller, Michael G., Tuma, Michelle D. (2019). *Stare Decisis and the Electoral Connection: Do Retention Systems Affect the Judges' Deference to Precedent?*
- ◆ McCall, M. M. (2010). In defense of judicial elections. by Chris Bonneau and Melinda Gann Hall. (Routledge press, 2009.). *The Journal of Politics*, 72(3), 906.
- ◆ Owens, R. J., Tahk, A., Wohlfarth, P. C., & Bryan, A. C. (2015). Nominating commissions, judicial retention, and forward-looking behavior on state supreme courts: An empirical examination of selection and retention methods. *State Politics & Policy Quarterly*, 15(2), 211-238
- ◆ Yates, J., Tankersley, H., & Brace, P. (2010). Assessing the impact of state judicial structures on citizen litigiousness. *Political Research Quarterly*, 63(4), 796-810.