STATE SUPREME COURTS, STATE CONSTITUTIONS AND CIVIL LITIGATION

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I. INTRODUCTION

State constitutions have been the motive force in American political and economic development. This is not to dismiss the role played by the national Constitution, but that document has undergone very few changes in our history while changes in state constitutions have precipitated economic and political change. These changes in turn produced notable revisions in state constitutions, which contributed to subsequent transformations of American political and economic interests.¹ In the nineteenth century, when the wheel of politics turned, many constitutions had to go, to be replaced by instruments embodying the aims and policies of the victors.² It was state constitutions that gave form to corporate organization and governance. These documents imposed hard budget constraints limiting state governments and expanding the foundations for private economic endeavor. The twentieth century witnessed not only minor technocratic adjustments but also “bloated, conflated” constitutions resulting from democratic pressures in some states.³ Overall, state constitutions have given rise to economic and political interests, and they have been revised in response to new pressures generated by these interests.⁴ Notably, change and content in state constitutions reflects the power of interest groups seeking special protections or conservative mistrust with concentrated government power.⁵ with long

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³ Id. at 39.
⁴ See id. at 246.
⁵ See Lewis A. Froman, Jr., Some Effects of Interest Group Strength in State Politics, 60
constitutions protecting the status quo and inhibiting reform through state government intervention.6

Throughout these changes one enduring feature of state constitutions has been the separation of powers, including the power of judicial review: “[T]o talk about state constitutions means to talk about state high courts and the way they use, interpret, or manipulate the state constitutions.”7 State supreme courts are the final arbiters of state constitutions, but state constitutions “are different” with some juxtaposing “broad statements of principle with subjects as mundane as ski trails and highway routes, public highways and motor vehicle revenues”.8 Some contain particularistic policy content and are replete with “super-legislation” that in length and detail are indistinguishable from statutes.9 Other constitutions are focused more narrowly on “framework” questions that detail fundamental law.10

State constitutions vary widely in their social and economic provisions. These provisions: (1) shift the inertial bias associated with the federal government (if negative rights under the federal Constitution restrain government action, positive rights under state constitutions mandate such action),11 and (2) afford state courts opportunities to reshape government structures in light of evolving needs.12 For participants in the judicial process—judges, lawyers and litigants—constitutional breadth can affect the constitutional discourse that promotes or inhibits litigation. This discourse is largely framed by constitutional language and the set of conventions that allow a participant in the legal system to make an intelligible claim about the meaning of the constitution.13 State constitutions thus serve as foundations for state supreme court action and litigant strategies. It is the premise of this study that state constitutional content—the basic rules of the game—influences the

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7 Id.
9 Friedman, supra note 2, at 36.
12 See id. at 1855.
business of state supreme courts when it comes to civil appeals.

II. A LOOK AT STATE CONSTITUTIONS

How might state constitutions influence state court dockets? James Madison reasoned that constitutions should be short and institutionally oriented rather than excessively devoted to law which could promote instability and inflexibility. In the American states, constitutions vary from shorter framework-oriented to longer policy-oriented constitutions. Because many states were inclined to amend their constitution, this produced comparatively long documents resulting in significant diversity among state constitutions. Some states maintain framework-oriented constitutions while others use constitutions as an extension of ordinary politics, making mundane policies semi-permanent through constitutional amendment. No state constitution exemplifies this approach better than that of Alabama. As the lengthiest state constitution, it has been amended on 799 occasions. Other state constitutions like those in Texas, Missouri, and California are also lengthy and have been amended frequently.

Not every state constitution is so particularistic and long, however. While the shortest state constitution (Vermont) is three times the length of the federal constitution, states sometimes prefer framework-oriented constitutions that spell out merely the operations of state government. Constitutional variation, therefore, reflects unique state differences with state constitutions explicating the rights of individuals in some states and the width of ski trails (Colorado), indemnification of peanut farmers (Alabama), or guidelines for dealing with estates of people who commit suicide in others (e.g., Vermont). Collectively, the states devote an average of forty percent of their constitutions to policy type issues, compared to six percent of the federal Constitution.

14 See Federalist 49 (Madison) (1788), reprinted in THE FEDERALIST PAPERS 318 (Isaac Kramnick ed., 1987) (referencing James Madison’s thoughts on constitutional design); see also Hammons, supra note 10 (discussing whether Madison’s concerns about long and short state constitutions hold up statistically).
15 See Hammons, supra note 10, at 837–38.
16 See Tarr, supra note 8, at 9.
17 The most recent constitutional addition, ALA. CONST. amend. 799, was ratified in 2007.
18 See Tarr, supra note 8, at 10.
19 See Gardner, supra note 13, at 819.
20 See ALA. CONST. amend. 383.
21 See VT. CONST. ch. 2, § 65.
22 See Hammons, supra note 10, at 840.
A long tradition has mapped the business of state supreme courts, mapping general patterns in appeals across the states over extended periods. Our interest in this inquiry is to extend our understanding of the comparative business of state supreme courts by examining how state constitutions shape their business in civil appeals.

III. EXPLAINING CIVIL LITIGATION IN STATE SUPREME COURTS

Our primary hypothesis concerns the effects of state constitutional particularism on the amount of docket space devoted to civil appeals in state supreme courts. To effectively test this hypothesis, we must also consider alternative influences on state supreme court attention. As control variables, we hypothesize the following factors should encourage greater attention (or agenda space) to civil cases among state supreme courts: (1) state court systems without intermediate appellate courts; (2) competitive partisan and nonpartisan judicial election systems; (3) divided criminal and civil dockets in state supreme courts; (4) conservative state governments; (5) no prior state executions; (6) greater quantities of state lawyers; and (7) smaller less-diverse state populations. State supreme courts should devote less agenda space to civil cases where state constitutions are more framework-oriented, state court systems have intermediate appellate courts, states select judges by appointment or merit selection, state high courts are unified, state governments promote liberal policies, state executions are performed, fewer attorneys are practicing, and states have larger more diverse populations. Collectively, the impact of these several hypothesized factors places decisions to hear civil disputes in an environment where institutions, politics, and society each exercise an influence. Each of these is elaborated below.

A. Policy-Oriented State Constitutions

The literature on state constitutions illustrates that state constitutions serve not only as sources for provisions on government structure, but also for public policies and rights and liberties of
state residents. When there is more constitutionally enshrined public policy, there are more grounds for civil litigation and civil appeals, and an expectation for judicial redress of conflicts. When constitutions are more framework-oriented, there are fewer grounds for judicial appeal and less opportunity for “judicializing” private disputes.

To test this hypothesis we employ the painstaking work of Hammons who read and classified all state constitutions according to their framework and policy provisions (“particularistic content”). He coded particularistic provisions as those “that deal with statute law or public policy issues, do not relate to the establishment of the government, are rather specific, typically do not apply to all citizens, and often provide differential benefits.” His analysis reveals striking differences among the states. At the high extreme are Alabama (seventy-three percent) and Louisiana (sixty-nine percent). At the low extreme are New Hampshire and Vermont with four percent each.

B. Intermediate Appellate Courts

Recent research has shown that state court systems with intermediate appellate courts strongly affect the disposition of state supreme courts toward civil appeals. The presence of lower appellate courts seemingly provides wide latitude for state supreme courts to structure their docket. We expect that litigants will avoid uncertainty about whether their appeal will move on to the state high court in states with discretionary dockets that stop their appeal. Conversely, where litigants have certainty about the venue and direction of their appeal (e.g., states without lower appellate courts), the quantity of litigation should be greater. We hypothesize that states with intermediate appellate courts will discourage civil appellate litigation. We include in our model a dichotomous independent variable coded one if states have intermediate


26 Id. at 839.

27 See id. at 847–48.


29 See Kagan et al., supra note 23, at 131.
appellate courts ("intermediate appellate court"), or otherwise.30

C. Elective Judicial Methods of Retention

Research on state courts has directed considerable attention to the impact of judicial elections. Findings from that research suggest that elected judges are affected by the preferences of constituents.31 Elected judges feel much less secure than their appointed counterparts contributing to strategic behavior designed to avoid public dissatisfaction. A product of that behavior may be a more redistributive posture taken by elective courts, promoting policies and cases that illustrate their attentiveness to public concerns.32 Appointive courts, alternatively, face less public pressure. We anticipate that elective state supreme courts will provide outlets for political and social redistribution, encouraging civil appellate litigation. We include within our model a dichotomous independent variable coded one if states have either partisan or nonpartisan methods of judicial retention, or zero if states have appointive or merit selection forms of retention ("elective method").33

D. Divided Appellate Jurisdictions

Among the fifty states, two states have divided jurisdictions for their state’s highest appellate level. In both Oklahoma and Texas, their respective state constitutions stipulate that criminal appeals should move to the court of criminal appeals while civil and miscellaneous issues move to the supreme court. While both states have lower appellate courts that allow for discretionary dockets for the high court of each state, we anticipate that the Oklahoma and Texas Supreme Court will grant access to more appeals than states with unified supreme courts. We hypothesize that the agenda space attached to civil appeals will be greater where the diversity of appeals is less such as in states with divided criminal and civil

32 See Brace & Hall, Allocating Docket Space, supra note 31.
33 See American Judicature Society, supra note 30.
jurisdictions. We place in our model a dichotomous independent variable coded one if an appeal occurs in either the Oklahoma or Texas Supreme Court, or zero if the appeal occurred in any of the remaining forty-eight states (“divided appellate jurisdiction”).

E. Elite Ideology

Research on state elite ideology shows that elite policy preferences vary and that such variation can explain outcomes in state policy. While many states prefer redistributive policies, other state governments prefer more conservative philosophies. We consider such variation and the impact on each state’s least majoritarian institution—the judicial branch. Where state elite preferences are identified as those most likely to protect the politically disadvantaged and favor economic redistribution, we anticipate that state supreme courts will consider fewer civil cases. The political systems in states with liberal elite preferences are more likely to produce legislative policies to address citizen demands. Alternatively, where state elite preferences are conservative, there will be more demand for judicial resolution of disputes by state supreme courts. We employ Berry et al.’s continuous measure of state elite preferences to test this hypothesis (“liberal elite ideology”).

F. Capital Punishment

Since the United States Supreme Court decided Gregg v. Georgia in 1976, allowing states to reintroduce capital punishment following their decision in Furman v. Georgia in 1972 to invalidate the death penalty, thirty-eight states have reinstated death sentences. Among those states, thirty-three states have executed

54 See id.; see also Tex. Const. art. 5, § 3; Okla. Const. art. 7, § 4.
56 See Erikson, Wright & McIver, supra note 35, at 168–73.
57 See id.
58 See Berry, Ringquist, Fording & Hanson, supra note 35.
60 408 U.S. 238 (1972).
61 Following a moratorium on executions in 2006, the state of New Jersey on December 17,
a convicted murderer. In states where the death penalty has been reinstated and used, there should be considerable pressure on judges to uphold and consider the death penalty. Consider North Carolina where more than half of its docket dealt with issues involving the death penalty. Contrast this with the states without the death penalty in the period under study (Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia and Wisconsin) or states with the death penalty but that have not executed anyone where capital appeals constitute less than ten percent of state supreme court dockets (Colorado, Montana and Wyoming). Given that death penalty cases require mandatory review, the use of this punishment in the states can dictate a sizable proportion of state supreme court activity. We therefore hypothesize that use of the death penalty will result in less agenda space devoted to civil appeals. We include in our model a dichotomous independent variable for the thirty-three states that have re-enacted and used the death penalty, zero for the remaining seventeen states (“executions”).

G. Supply of Attorneys

Where states have more resources or opportunities for legal representation, this should encourage suits to continue through the appellate process. On the other hand, where litigants have fewer attorney resources, they should be placed at a comparative disadvantage. Where the supply of lawyers is comparatively scarce, the availability of legal resources will be lower. We hypothesize that more attorneys per capita will make the appellate process comparatively less expensive, thereby increasing access to the judicial process and the quantity of civil appeals. To test this hypothesis, we utilize a continuous measure based on U.S. census

2007 repealed the death penalty citing concerns about cruel and unusual punishment. That repeal represents the first state since 1976 that enacted the death penalty but later chose to abolish it. Thirty-seven states now have the death penalty. New Jersey has not executed an individual convicted of murder following the reinstatement of the death penalty in 1982.

42 See Brace & Hall, Allocating Docket Space, supra note 31; see also Paul Brace & Brent D. Boyea, State Public Opinion, the Death Penalty, and the Practice of Electing Judges, 52 AM. J. POL. SCI. 360 (2008).
44 See id.
45 See id.
47 See Brace & Hall, Allocating Docket Space, supra note 31, at 404.
data that describes the quantity of attorneys per capita in all fifty states (“legal resources”).

H. State Population

Where state populations are larger and more diverse, there should also be a greater diversity of appeals. Where state populations are larger, appeals other than civil disputes including criminal and juvenile appeals should produce additional demands on state supreme courts, decreasing their time to deal with civil appeals. Consequently, we anticipate that larger state populations will decrease the amount of agenda space devoted to civil appeals. We include a measure of each state’s population to test this hypothesis (“state population”).

Finally, we include a fixed effects dummy variable for each year in the analysis, to control for any temporal trends that may influence all states (“1995, 1996, 1997”). For specific information about variable measurement and source, a description of each variable is located in Appendix A.

IV. RESEARCH DESIGN AND STRATEGY

Our interest is in the attention state supreme courts devote to tort cases. The Brace-Hall State Supreme Court Data Archive (“SSCDA”) provides comprehensive information about all state supreme court cases from 1995 to 1998. Using this database, we are able to identify the number of state supreme court civil cases for each state for each of these years. As revealed below, the number of civil cases addressed by state supreme courts differs substantially between states. There are also notable differences in the number of these cases within states over this time-period. Our primary interest is on the persistent influences of state constitutional

49 See Brace & Hall, Allocating Docket Space, supra note 31, at 404–05.
50 See U.S. Census Bureau, supra note 48.
51 The excluded year, or base category, is 1998.
53 See Paul Brace & Melinda Gann Hall, Comparing Courts Using the American States, 83 JUDICATURE 250 (2000) (discussing the coding criteria for state supreme court cases within the Brace-Hall State Supreme Court Data Archive). Since Oklahoma and Texas utilize high court systems with divided appellate dockets, we direct our attention to the civil court of last resort for both states.
content: How do differences in state constitutions shape state difference in civil dockets? Our control variables address other fixed differences between states (e.g., appellate court structure) and variables that change over time (e.g., population) to account for alternative influences on both between and within state variation in civil dockets.

The statistical procedure for analyzing data with repeated measures across states we use is pooled cross sectional time series analysis. The method takes into account differences between states and within states over time. Like simple regression analysis, it provides a linear equation that estimates the effects of differences in explanatory influences on variations in the dependent variable. The advantage of this procedure is that it allows us to systematically examine the alternative effects of both fixed and longitudinal influences. It provides the basis to make stronger inferences about state constitutions while considering the rival impact of other influences, some that differ across the states, and some mapping changes within states over time. To control for the effects of changes that affect all states over time, this procedure also allows us to incorporate yearly dummy variables that function like intercepts in more traditional regression analysis. These variables (1995, 1996 and 1997) capture any differences across states over-time that are not explained by the specific variables in our analysis.

In sum, our research design addresses our comparative interest in state constitutions while controlling for the affect of alternative state differences, as well as the impact of national trends that influence all states.

We identify civil cases addressed by state supreme courts each year, combining civil private and civil government appeals. Our dependent variable, Civil Docket, measures the percentage of the overall cases decided each year devoted to these civil cases.

We employ the following model:

Civil Docket = f (particularistic content, intermediate appellate court, elective method, divided appellate jurisdiction, liberal elite ideology, executions, legal resources, state population, 1995, 1996, 1997)

Each of these variables is described in Appendix A, below.

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54 Civil private litigation includes matters involving domestic relations, estates, contracts, and torts.
55 Civil government litigation includes matters involving elections, the First Amendment of the U.S. Constitution, government regulation, public contracts, privacy, and public torts.
V. ANALYSIS

Figure 1 reveals state supreme court attention to civil litigation varies. Some states pay comparatively little attention to civil matters while others devote the overwhelming majority of their time to these disputes. North Carolina and Florida devoted less than fifty percent of their dockets to civil cases across this period. Not surprisingly, the state supreme courts that paid the greatest attention to civil litigation were the two state high courts with exclusively civil jurisdictions: Oklahoma (96.8 percent) and Texas (99.6 percent). Attention to civil litigation was also very high in conventional states with broad jurisdiction with civil dockets at or above eighty percent in Alabama, Alaska, New Jersey, Ohio, Oregon, and Virginia. With significant differences across the states, Figure 1 makes clear that attention to civil matters varied dramatically in this period.

Figure 2 provides preliminary bivariate evidence that differences in state supreme court attention to civil matters parallels differences in the amount of policy content in state constitutions.

\[\text{See Brace & Hall, supra note 52.}\]
Consistent with our central argument, the fitted line reveals the quantity of appeals devoted to civil disputes rises as the policy-based content of state constitutions increases. But does this connection hold when rival influences are controlled? The following analysis provides an answer.

![Figure 2](image)

Table 1 presents the results of our pooled cross sectional time series analysis that estimates the effects of the policy content of state constitutions and rival influences on state supreme court attention to civil matters. Our first concern is with the statistical adequacy of the model: Does it provide a compelling account of variation in civil dockets overall, and do the specific variables perform in the manner we anticipated? The model produces an $R^2$ statistic of .45 indicating nearly half of the variation in docket space is accounted for by the combined influence of variables. Given the myriad idiosyncratic forces that influence civil litigation, the combined effects of the general forces in the model nonetheless capture a substantial and significant amount of variation that state supreme courts devote to these cases. Individually, each variable
within the model is statistically significant at .05 level or better, and each increases or decreases civil docket attention in the manner we expected as well. Overall, the sum and the parts of the analysis provide substantial statistical evidence that variation in state supreme court civil dockets relates systematically to the influences identified by our hypotheses.

Table 1
Access to Civil Litigation in State Supreme Courts
Dependent Variable = Civil Docket

<table>
<thead>
<tr>
<th>Variable</th>
<th>Coefficient</th>
<th>St. Error</th>
<th>t</th>
<th>Expectation</th>
<th>∆Pr</th>
</tr>
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<tbody>
<tr>
<td>Particularistic Content</td>
<td>.365</td>
<td>.069</td>
<td>5.32*</td>
<td>β&gt;0</td>
<td>25.0%</td>
</tr>
<tr>
<td>Intermediate Appellate Court</td>
<td>-6.289</td>
<td>1.971</td>
<td>-3.19*</td>
<td>β&lt;0</td>
<td>-6.3%</td>
</tr>
<tr>
<td>Elective Method</td>
<td>3.346</td>
<td>1.934</td>
<td>1.73*</td>
<td>β&gt;0</td>
<td>3.3%</td>
</tr>
<tr>
<td>Divided Appellate Jurisdiction</td>
<td>31.992</td>
<td>2.534</td>
<td>12.63*</td>
<td>β&gt;0</td>
<td>32.0%</td>
</tr>
<tr>
<td>Liberal Elite Ideology</td>
<td>-.112</td>
<td>.036</td>
<td>-3.11*</td>
<td>β&lt;0</td>
<td>-11.0%</td>
</tr>
<tr>
<td>Executions</td>
<td>-5.558</td>
<td>1.922</td>
<td>-2.89*</td>
<td>β&lt;0</td>
<td>-5.6%</td>
</tr>
<tr>
<td>Legal Resources</td>
<td>6.020</td>
<td>1.102</td>
<td>5.46*</td>
<td>β&gt;0</td>
<td>21.3%</td>
</tr>
<tr>
<td>State Population</td>
<td>-.001</td>
<td>.0002</td>
<td>-6.48*</td>
<td>β&lt;0</td>
<td>-30.1%</td>
</tr>
<tr>
<td>1995</td>
<td>-3.773</td>
<td>2.424</td>
<td>-1.56</td>
<td>N.E.</td>
<td>-</td>
</tr>
<tr>
<td>1996</td>
<td>.289</td>
<td>2.207</td>
<td>.13</td>
<td>N.E.</td>
<td>-</td>
</tr>
<tr>
<td>1997</td>
<td>.190</td>
<td>2.193</td>
<td>.09</td>
<td>N.E.</td>
<td>-</td>
</tr>
<tr>
<td>Constant</td>
<td>56.720</td>
<td>3.588</td>
<td>15.81*</td>
<td></td>
<td>-</td>
</tr>
<tr>
<td>N</td>
<td>200</td>
<td></td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>F (11, 188)</td>
<td>28.25</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Prob &gt; F</td>
<td>0</td>
<td></td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>R²</td>
<td>.45</td>
<td></td>
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</table>

Note: Statistically significant parameter estimates are denoted by * *(p ≤ .05). r²

While these general patterns are promising, our central interest
is in the comparative effects of these alternative variables on civil
dockets, with particular attention to the influence of the policy
content of state constitutions. In addition to its statistical
significance, the analysis reveals that the effect of state
constitutional policy content exerts a substantively important
influence as well. Specifically, the more particularistic a state
constitution, the more attention will be directed to civil litigation.
The model estimates that a supreme court in the state with the
most policy-oriented constitution would devote twenty-five percent
more of its docket to civil appeals than the court in the state with
the least policy-oriented constitution. Even with other major
influences controlled, constitutional content is a major force in
shaping the civil dockets of state supreme courts.

Among other influences that emerge as statistically significant,
the structure of a state’s appellate court system is an important
negative influence on civil dockets. State supreme courts with
lower appellate courts process more than six percent fewer civil
appeals than state supreme courts without lower appellate courts.
The process for retaining judges is also a discernable influence.
Elective courts, likely compelled by majoritarian impulses, hear
greater than three percent more civil appeals than their appointed
counterparts. The final structural variable, divided appellate
jurisdiction, has a pronounced influence on civil litigation. States
with divided appellate jurisdiction (Oklahoma and Texas) heard
thirty-two percent more civil appeals than the remaining state
supreme courts with general jurisdictions.

Variables that describe the political, legal, and social impact on
civil agendas are also enlightening. State elite ideology has a strong
discernable effect on civil litigation. The most liberal state elite
ideology contributes to state supreme courts with eleven percent
less of their agenda dedicated to civil litigation than states with the
most conservative ideology. The results for state death penalty
executions show that prior decisions to execute discourage civil
appeals. States with histories of executions have almost six percent
less of their agenda space devoted to civil disputes, indicating that
capital punishment litigation works to displace civil appeals. The
results for lawyers per capita indicate that the availability of legal
resources within states shape civil appeal rates. States with the
most abundant legal resources had state supreme courts with
twenty-one percent more of their dockets devoted to civil appeals.
Civil dockets also reflected differences in state populations: state
supreme courts in the most populous states allocated thirty percent
less of their court agendas to civil disputes than the least populated state.

The fitted model provides a strong account of forces affecting agenda space. While civil litigation is undoubtedly initiated in the first instance by particular wrongs, perceived or real, and the individual proclivities of litigants and counsel reacting to particular stakes involved in civil wrongs, perceived or real, our analysis reveals that the attention state supreme courts devote to appeals arising in civil litigation is significantly influenced by very general institutional and contextual forces. It also reveals that our variable of primary interest, the policy content of state constitutions, is a major influence on state supreme court attention to civil appeals. Even where other factors are considered (and controlled), state constitutions with greater quantities of policy content very significantly increase attention to civil disputes.

VI. CONCLUSION

State supreme courts are the final arbiters of their state constitutions. Moreover, litigants formulate their appellate strategies at least partly on constitutional grounds. Is it surprising that state constitutions play a major role in civil litigation? We think it would be more surprising if they did not. What is surprising and disturbing is how little attention the scholarly literature pays to the impact of state constitutional design on patterns of litigation in the states. The results of this analysis point to the critical role of state constitutions in shaping the business of state supreme courts.

The policy content of state constitutions, our primary focus, exerts a statistically significant and substantively striking influence on civil litigation in the states. Several other features of state constitutions also warrant comment. The legal structure of state supreme courts establishing specialized jurisdiction, lower appellate courts, and procedures for judicial selection, were also statistically and substantively important influences on the amount of attention these supreme courts devoted to civil litigation in their states. While our attention has only been on civil appeals at the level of the highest state court, it is clear from our analysis that state constitutions provide varying means, through their language, and varying opportunity, through the legal structures they establish, for civil adjudication.

For over thirty years observers have debated the existence of a
civil “litigation explosion” in the United States.\textsuperscript{57} Whether such an explosion exists has been subject to extensive debate but it has served to direct attention to the rates of litigation in various courts. Our interest in this study has not been with over time increases in litigation but with notable differences in civil litigation appearing before state supreme courts. Our analysis reveals that state high court attention to civil appeals is very unevenly distributed. We believe state constitutions contribute to an important part of these stark differences.

Judicial review has been a central feature of state constitutions since our nation’s inception. In large measure they perform the same functions (with the exceptions of Oklahoma and Texas specialized supreme courts noted). Most fundamentally, state supreme courts are the final arbiters of their state constitutions. While these courts are in many ways functionally equivalent, they perform very differently when it comes to civil disputes, because they arbitrate disputes arising under very different constitutions. Historically, state constitutions provoked economic, social and political change that in turn resulted in many revisions. These societal changes and constitutional revisions were not evenly distributed across the states. They resulted from the constellations of legal, economic, and political interests they encouraged,\textsuperscript{58} resulting in constitutions that to varying degrees codified particular policies in the form of super-legislation.\textsuperscript{59} The codification of social and economic provisions into many state constitutions invites greater court involvement by implying positive rights and expanding the substantive scope of justiciable issues.

State constitutions contain legacies of battles concerning the powers of government, the distribution of those powers, and to varying degrees power struggles over substantive policy. These legacies, in turn, shape conditions for economic and political activity, and for seeking the ultimate resolution of disputes that arise from that activity. Because they narrow or broaden opportunities for judicial review, and the opportunities for litigants to pursue appeal, the state legal culture of civil litigiousness is shaped substantially by the content and structures established by state constitutions. While there are many forces operating in states

\textsuperscript{57} Marc S. Galanter, \textit{Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) About Our Allegedly Contentious and Litigious Society}, 31 UCLA L. REV. 4, 5 (1983).

\textsuperscript{58} See Wallis, \textit{supra} note 1, at 211.

\textsuperscript{59} See Friedman, \textit{supra} note 2, at 36.
that generate civil conflicts, state constitutions play a vital role in
determining the extent to which these civil conflicts become a
matter of state supreme court concern.
Appendix A: Measurement of Variables and Data Sources

**Dependent Variable:**

**Civil Docket:** Percentage of docket devoted to civil litigation, ranging from 24.8% to 100%.  

**Explanatory Variables:**

**Particularistic Content:** Percentage of policy content in state constitution, ranging from 4.17% to 72.52%.  

**Intermediate Appellate Court:** Equal to 1 in states with a lower appellate court, 0 otherwise.  

**Elective Method:** Equal to 1 in states with partisan or nonpartisan methods of judicial retention, 0 otherwise.  

**Divided Appellate Jurisdiction:** Equal to 1 for states with separated appellate jurisdictions (Oklahoma and Texas), 0 otherwise.  

**Liberal Elite Ideology:** Longitudinal measure of state elite liberalism, ranging from 0 (indicating the most conservative state elites) to 100 (indicating the most liberal state elites).  

**Executions:** Equal to 1 in states with prior executions, 0 otherwise.  

**Lawyers Resources:** Proportion of lawyers per 1,000 state residents, ranging from 1.5 to 5.  

**State Population:** Size of a state’s population divided by 1,000, ranging from 453.6 to 9811.4.  

**1995:** Equal to 1 if case occurred in 1995, 0 otherwise.  

**1996:** Equal to 1 if case occurred in 1996, 0 otherwise.  

**1997:** Equal to 1 if case occurred in 1997, 0 otherwise.

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60 See Brace & Hall, supra note 51.  
61 See Hammons, supra note 10.  
62 See American Judicature Society, supra note 30.  
63 See id.  
64 See id.; see also Tex. Const. art. 5, § 3; Okla. Const. art. 7, § 4.  
65 See Berry, Ringquist, Fording & Hanson, supra note 35.  
66 See Death Penalty Information Center, supra note 46.  
67 See U.S. Census Bureau, supra note 48.  
68 See id.