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## De Jure Provisions for Judicial Independence in US States: 1776-2015

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DE JURE PROVISIONS FOR JUDICIAL INDEPENDENCE IN US STATES: 1776-2015

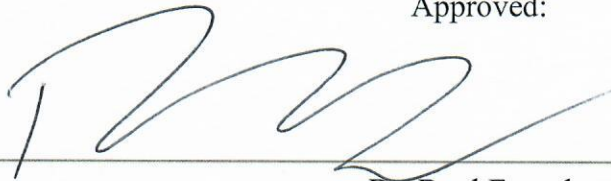
By

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Submitted in Partial Fulfillment  
of the Requirements for  
Graduation with Honors from the  
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## THESIS SUMMARY

This paper provides a descriptive analysis of an original data set I have been collecting since May 2015. The data set evaluates 137 state constitutions and their subsequent amendments (from 1776-2015) for 42 different factors identified by various political scientists as relevant to judicial independence. The concept of judicial independence, boiled down to the simplest of terms, is how isolated the judiciary is from the “political” branches of government (the executive and the legislature). The measured variables include, but are not limited to, selection method, retention method, term length, ability of court to set their own procedures, whether the salary for state supreme court justices are set by the constitution, if the courts are explicitly granted judicial review power, and the presence of intermediate appellate courts.

The collection of this data set was motivated by an apparent lack of its existence elsewhere. Court scholars that analyze US state courts have tended to focus their studies on the effect of various appointment methods (non-partisan elections, partisan elections, appointment by independent body, etc.) on the observed level of judicial independence. International court scholars have instead turned to a wide variety of other factors (including many of those mentioned previously) as explanations for judicial independence, or the lack of it. This data set, and the resulting paper, seeks to bridge the gap between both sets of literature to provide for more comprehensive and explanatory analysis on US state courts.

For the purposes of this paper, I have focused on trends formed by observed changes in the data. This is because any factors that remain stagnant through the years can be dismissed, as they are clearly not the variables that produce variations in the level of judicial independence in high state courts. The observed trends noted in this paper often align closely with global trends in judicial independence noted by international court scholars.

In this paper, I also discuss the problems that would be introduced by developing a numerical index to measure judicial independence using this data. This is something I initially wanted to do in order to get a more easily understood measure of judicial independence, but the resulting problems would be too great to proceed. However, the data set has plenty of explanatory power without as is without using that method.

I end the paper by examining potential future applications for this data set. The data can be applied to answer a wide variety of questions related to judicial independence and US state supreme courts. It will certainly prove interesting for years to come.

## ABSTRACT

In this paper I present original data collected for over three dozen factors capturing constitutional provisions for judicial independence for all 50 US states, from statehood to 2015. Drawing on insights from research on comparative courts, this data set goes far beyond simple appointment procedures, and includes tenure, rule-making ability, removal procedures, and other factors affecting the relationship between the judiciary and political branches. I further discuss how this data can be used in the future to address debates over the effect of institutional design on judicial behavior, as well as how changes in political conditions affect the role of courts.

## INTRODUCTION

To what extent do state constitutions make strides toward increased judicial independence over time? Scholars of state courts have consistently recognized that appointment procedures embedded in state constitutions affect judicial independence of state high courts, but other *de jure* provisions that profoundly affect overall judicial independence and behavior of judges receive little attention. Research on comparative judicial politics, on the other hand, focuses on constitutional provisions for a variety of factors, including salary protections, judicial review, the ability of a court to set its own procedures, and judge tenure length (Keith, 2002; Hayo and Voigt, 2007; Melton and Ginsburg, 2014). In this paper I integrate insights from comparative research into the study of state courts in order to describe the entire set of institutional factors affecting the power of state courts.

The principle of judicial independence refers to the isolation of the courts from the political branches of government: the legislature and executive. More specifically, it is the courts' ability to implement their interpretations of the law through judicial decisions independent of political pressures they may otherwise be exposed to by the other branches and the people (Boies, 2006). Judicial independence is sought after as it helps to ensure that the rule of law will be preserved over time despite the actions of political actors and the impact of political pressures (Boies, 2006). *De jure* (Latin, "in law") refers to the codified constitutional guidelines – the text of the law at face value. *De jure* constitutional provisions are not the only component that matters, as the effects of the implementation, or lack of implementation, of *de jure* provisions also plays into the level of judicial independence of a court (Feld and Voigt, 2003; Hayo and Voigt, 2007; Melton and Ginsburg, 2014; Ramseyer, 1994). This is *de facto* (Latin: "in fact") judicial independence. The focus of this paper is *de jure* independence, so it will ignore the significant and growing literature

on *de facto* independence.<sup>1</sup>

Given the wide-range of institutional differences across state courts, one should expect to observe differences across the behavior of state judges. However, scholars have not systematically examined these institutional differences and their relation to judicial independence at the state court level. Doing so requires an analysis of each state constitution to identify the institutional design of the judiciary. My paper takes steps toward addressing this gap in the literature by focusing on over three dozen factors capturing constitutional provisions related to judicial independence for all fifty states, from their original incorporation to 2015. I provide descriptive statistics and evaluate trends in constitutional provisions affecting judicial independence within the data over time. I then discuss how this data can be used to examine fundamental questions of judicial behavior among state judges.

#### THEORETICAL MOTIVATION

The current focus of much state court research is the effect of different types of appointment procedures, primarily elections, on judicial independence and behavior. However, this emphasis differs greatly from comparative court research on judicial independence, attributable in large part to the fact that electing judges is a practice unique to US states (and, recently, Bolivia), so its relevance to the rest of the world is minimal. A large gap exists in research on state courts as scholars have failed to examine other factors appearing in constitutional provisions that affect judicial independence, despite clear insights drawn from comparative court research that factors other than appointment method have a strong effect on judicial independence.

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<sup>1</sup> This literature has proved to be contentious over the question of whether *de jure* judicial independence actually matters. See also *Rios-Figueroa and Stanton, 2012*.



The data collected for this research can be used in a wide variety of applications to answer questions about *de jure* provisions for judicial independence in state constitutions. However, in order to begin analysis on the questions that drive this research, the data must first be understood and analyzed at a basic level. This paper is the first step towards a greater understanding of applications of the data collected, and it will prove useful in later applications of the data as it is truly the building blocks of further analysis. Since the 1985 United Nations adoption of standards for creating and maintaining judicial independence (Keith, 2002), constitutions throughout the world have undergone an increase in explicit provisions designed to afford the judiciary with more independence, and as these *de jure* provisions for judicial independence become more common, *de facto* judicial independence is increasing as well (Melton and Ginsburg, 2014). With that change over time in mind, in this paper I discuss the formal powers of the judiciary in US states across 149 state constitutions and subsequent amendments. It is well known that formal rules of the judiciary are important but until now, the factor has not been evaluated at the state court level.

The authority of state courts can best be measured through the evaluation of state constitutions. State courts are laid out in detail across individual state constitutions, remaining unmentioned in the federal constitution. Statutes often build on state constitutional text in order to further clarify and expand constitutional provisions, but they provide severely inadequate evaluations of institutional design, lacking the over-arching blueprint of state government constitutions convey. Additionally, coding data for statutes is difficult. It is not only challenging to find the original text of state statutes, but statutes are often too great in number to comb through and analyze effectively.

Previously, I chose to exclude amendments passed to each constitution in analysis, instead looking at the text of the constitution itself at the time of passage. When the constitution is changed,

it is the time that a group of people, in many cases a majority of voters as well as a supermajority of the state legislature, decide that the existing structure of government within the state is failing and move to make a sweeping fundamental change. Additionally, amendments to both federal and state constitutions rarely have any effect on the judiciary.

In contrast, I have opted to use the full data set — all state constitutions passed between 1776–2015 and subsequent amendments relevant to the factors collected here — for analysis in this paper. However, after expanding the analysis, I maintain that new constitutions are more important to focus on than amendments, as previously stated. Amendments fail to bring about significant, wholesale institutional change in the way that new constitutions do. I will further detail this argument in the results section.

To get a better sense of what constitutional provisions affecting courts looked like at various points in history, I split the data into three distinct time periods: pre-Civil War, Reconstruction, and Present Day. These divisions were created to more easily analyze the data and were done so according to observed trends in similarities to changes made in constitutional provisions during these periods. The pre-Civil War period encompasses all constitutions and amendments from United States independence up to the beginning of the Civil War (1776-1860). The Reconstruction period spans 1863-1913, including constitutional provisions passed during Reconstruction and much of the Progressive Era until the start of World War I. This period also spans the union entry dates for all 48 contiguous US states (and thus, the initial constitutions passed for these states), with Arizona being the last of these to join on February 14, 1912. The final time period, Present Day, includes all constitutional provisions created and changed from 1914-2015, which includes several clusters of rapid constitutional change following World War I, World War II, and in the latter portion of the 20<sup>th</sup> century.

In this paper, I will first provide a holistic look of the construction of constitutional provisions in each period. Then I will discuss the nature of change in constitutional arrangements during these time periods. I focused my attention on the changes that occurred affecting courts within all 149 constitutions and subsequent amendments because changes within factors prove to be much more telling and interesting than those remaining stagnant. This is because unchanging factors can be dismissed as relevant factors in explaining variations and levels of judicial independence in US states.

## DATA

In recent years, great strides have been taken towards understanding the protections of constitutional provisions on global courts, but the literature on state courts does not incorporate the insights of research performed on a global scale. Many published works have elements or portions of this data in their evaluations of judicial independence, but most research on state courts has been focused on one institutional feature: whether or not judges are elected. Thus, it was important that this informational void be filled in order to further understand judicial independence and the relationship between the judiciary and the political branches of government. Over the summer of 2015, I conducted data collection to compile this previously uncollected data set. It goes far beyond the examination of appointment procedures across all 50 states, encompassing over three-dozen factors capturing de jure constitutional provisions for judicial independence. The measured factors here do include the appointment procedures for state supreme court justices, but also evaluate retention methods, judicial tenure, removal procedures, public recalls, protection from salary reduction, financial independence, formalized judicial review procedures, ability of other actors to overturn judicial decisions, ballot initiatives, referenda, and others.

This research provides insight into de jure provisions for judicial independence in all state constitutions and amendments from statehood to 2015. The coded data for this portion of research was first based upon the original text of the constitution at the time of ratification, and then each change made to the constitution through subsequent amendments was also recorded. I began the data collection process by gathering information from the most recently adopted versions of each states’ constitution, which had adoption dates ranging from 1790 (Massachusetts) to 1983 (Georgia). I turned to a variety of online sources, namely state legislature websites and WestLaw Next to do this. After, I compiled and evaluated the relevant constitutional amendments to the current documents, adopted through August 2015. Then, I began the task of collecting data from the previous constitutions of each state. Some states have only had the one (current) constitution, while Louisiana has been governed under eleven official constitutions. Throughout this process, I ensured I was using the original text of each constitution. I then proceeded to collect the amendments relevant to the judiciary for each outdated constitution. I excluded any constitutions or codified laws pre-dating statehood.

During the data collection process, each constitution and its subsequent amendments were evaluated for 42 different variables designed to evaluate judicial independence, based on factors identified as important in comparative court literature.<sup>2</sup> The factors have been grouped as shown below (Table 1):

Table 1. Summary of Groupings	
<b>Group 1:</b>	Court anchored in the constitution Statement that court is independent
<b>Group 2:</b>	Procedures for constitutional amendments
<b>Group 3:</b>	Appointment procedures for high-court judges
<b>Group 4:</b>	Retention procedures for high-court judges

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<sup>2</sup> There are some factors excluded in this paper due to either lack of variation or the desire for simplicity. The factor for which data was collected for but are excluded here are: ban on military courts, presence of an intermediate appellate court, and number of removal actors.

<b>Group 5:</b>	Judicial tenure
<b>Group 6:</b>	Removal procedures for high-court judges
<b>Group 7:</b>	Judicial salaries and finances
<b>Group 8:</b>	Miscellaneous group – includes judicial review powers and decision publication
<b>Group 9:</b>	Power to set court procedures
<b>Group 10:</b>	Ballot initiatives and referenda

The first variable is whether or not the court is anchored in the constitution (Table 2). For this to be coded as “yes,” the constitution must state explicitly that there is a state court. In the majority of constitutions studied, the court was anchored. The next variable measured whether or not the constitution states the judiciary is independent. Many times, this was not explicitly stated, instead coming in the form of a simple statement that the three branches of government within the state retain individual powers that cannot be encroached upon by the other branches.

<b>Group 1</b>	
Is the court anchored in the constitution (Feld and Voigt, 2003)?	Yes No
Does the constitution state the judiciary is independent (Keith, 2002)?	Yes No

The next grouping of variables (Table 3) evaluates the procedures for amending the constitution in each state. The first of these asks whether the procedures for amendment are explicitly stated within the text of the constitution. The second and third, respectively, ask if the legislature has the power to initiate constitutional change or if other actors can initiate the change. If the legislature alone holds the power to begin the process of changing the constitution, it is coded as “exclusive power,” but if other actors can as well, they are specified in the third variable and the legislature’s ability to initiate is coded as “yes.” The next two variables ask if the legislature holds any power to change the constitution, regardless of whether or not they can initiate the changes. This was to be coded as one of five levels: no power, yes, shared with constitutional convention, shared with public, or exclusive power.

<b>Group 2: Amendments</b>	
Are the procedures for amending the constitution explicitly stated (Feld and Voigt, 2003)?	Yes No
Can the legislature initiate constitutional change?	Exclusive Power Yes No Power Not Specified
Can other actors initiate constitutional change?	Executive The People No Not Specified
Does the legislature have any power to change the constitution?	Yes Shared with Public Shared with Public & Con. Conv. Shared with Con. Conv. No Not Specified

In order to evaluate the ability of other actors to alter the document, the next few variables record the legislative majority required to change the constitution, if there is a requirement of a future legislature to consent to the change and what majority is needed in that instance, as well as what popular majority is required to change the constitution (excluded from table). These variables give insight to the ease of changing the constitution entirely in order to bypass a state court decision. While never a simple process, it is easier to attain a two-thirds majority to call for an amendment, followed by a simple majority vote between both houses for ratification and a majority vote of the people (as is the case in the Louisiana Constitution of 1974) than it is when an initial two-thirds majority is required to call for an amendment, followed by a ratification process of another two-thirds vote of the present legislature, two-thirds vote by the next legislature, in addition to a majority of the people. Recent events in Poland and Hungary demonstrate that Constitutions that are easy to alter can produce situations in which political actors engage in repeated constitutional change to circumvent judicial review of legislation (Agence France-Presse, 2015; Scheppele, 2015).

Appointment methods of high court judges are considered strong indicators of the independence of judges (Landes and Posner, 1975; Melton and Ginsberg, 2014). The appointment method of state court judges, especially through the lens of election procedures, is the most commonly studied factor in state court research for evaluating judicial independence to date. However, given its importance, it was again studied in this paper, and it is introduced in the next grouping of variables (Table 4).

The first variable within the group simply reflects what the constitution specifies as the appointment method for judges to the highest state court (Table 4). This yields three different categories: none (if left up to legislative statute or amendments), appointment, or election. If judges are elected, it is coded as one of five different categories: none, type unspecified, legislative, partisan, or nonpartisan. If judges are instead appointed to the high court, the factor is broken down into nomination and appointment procedures. In all constitutions, nominations are made by a commission, the governor, or are not specified within the constitution, while appointments are made by the governor, the governor with the Senate, the legislature as a whole, a commission, or are not specified.<sup>3</sup>

<b>Group 3: Appointment Methods</b>	
What is the method of appointment for judges to the high court (Feld and Voigt 2003; Skaar 2002)?	Appointment Election Not Specified
Elections	Legislature Partisan Non-Partisan Type Unspecified None
Nominations	Commission Governor Type Unspecified None

<sup>3</sup> The sole exception to these categories comes from the 1776 Constitution of Delaware, in which three Supreme Court justices are appointed by a legislative council and the other three justices are appointed by the House of the Assembly. This is the only instance in which different groups nominate and appoint a certain specified proportion of judges to the high courts.

Appointments	Legislature Governor Governor with Senate Commission Other Type Unspecified None
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The next subgroup of variables follows almost identically to the previous one, but it instead evaluates retention methods (Table 5). The first variable within the group shows what the constitution specifies as the method for judicial retention on the highest state court. All methods fall into essentially the same three categories as initial appointment method: none (in the case of statutes, amendments, or life terms with good behavior), reappointment, or election. The type of election is coded as either none, type unspecified, retention, legislature, partisan, or non-partisan, and the type of reappointment is coded as none, type unspecified, commission, legislature, governor with Senate, or governor. There are very few cases in which the type of appointment method differs from the type of retention method.<sup>4</sup>

<b>Group 4: Retention Methods</b>	
What is the method of retention for judges on the high court (Nardulli, 2012)?	Appointment Election Type Unspecified None
Elections	Legislature Partisan Non-Partisan Type Unspecified None
Appointments	Legislature Governor Governor with Senate Type Unspecified None

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<sup>4</sup> These are the instances in which a judge is appointed initially and then subject to a retention election after their first term or elected by the people initially and then subject to a legislative vote to stay in office after their first term.



The subject of the fifth grouping of variables is judicial tenure (Table 6). The first of these variables is simply whether or not the constitution specifies the tenure of judges. If specified, which is the case for all but two constitutions (left up to statute in the Michigan Constitution of 1908 and the New Hampshire Constitution of 1776), the length of initial and subsequent terms is recorded next. This spans from a term of one year in Georgia’s 1777 Constitution to life terms with good behavior. Only three current state constitutions have provisions for life terms for high court judges (Massachusetts Constitution of 1780, New Hampshire Constitution of 1784, Rhode Island Constitution of 1986), but Massachusetts and New Hampshire have since passed laws for mandatory retirement at a certain age.<sup>5</sup> The final variable within this category answers the question of how the length of tenure for judges compares to the terms of members of other political branches of government (Rios-Figueroa, 2011). The only constitutions in which judicial tenure does not exceed that of other political actors are the first two constitutions of Georgia, dated 1777 and 1789, and this was only changed with the ratification of a new constitution in 1865.<sup>6</sup>

<b>Group 5: Judicial Tenure</b> (Feld and Voigt, 2003; La Porta et. al., 2004; Smithey and Ishiyama, 2000; Skaar, 2002)	
Does the constitution specify tenure for judges?	Yes No
Length of tenure	Misc.
Tenure longer than other officials?	Longer Longer than House & Governor Same length as others

Removal procedures are the topic of the sixth group of variables (Table 7). Of the constitutions studied, 98% explicitly state procedures to remove justices from the high court bench.

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<sup>5</sup> Massachusetts passed a law in 1975 declaring a mandatory retirement age of 70 for judges (Massachusetts General Laws Part I, Title IV, Chapter 32, Section 65D). By 1792, New Hampshire added Article 78 to their constitution, limiting judges from serving beyond the age of 70. Justices of the Rhode Island Supreme Court are the only judges in the US states that have life terms and are not subject to a mandatory retirement age.

<sup>6</sup> In the Georgia Constitution of 1777, the term lengths for high court judges, Senators, members of the House, and the Governor were all equal at one year. By 1789, the state had changed the term of judges and Senators to three years, which was longer than the one-year term for House members and the Governor’s two-year term.

These removal procedures come in the form of impeachment, address of the governor with a vote of the legislature, judiciary-appointed commissions on judicial conduct, or disciplinary action by the Supreme Court itself. Some states have made all of these methods available to remove high court judges (Wisconsin Constitution of 1848), while other states, like West Virginia, only lay out one method for judicial removal.<sup>7</sup> There are varying levels of difficulty to remove justices, from impeachment requiring a simple majority vote in both houses without the participation of any other political actors (Indiana Constitution of 1816, West Virginia Constitution of 1863) to a two-thirds vote of each house of the general assembly following an address by the governor (South Carolina Constitution of 1868). Additionally, in some states, removal of high court justices can come from the people in the form of a recall election.

<b>Group 6: Removal Procedures</b>	
Are the removal procedures for judges specified in the constitution (Feld and Voigt, 2003; Keith, 2002; Smithey and Ishiyama, 2000)?	Yes No
Can the state legislature remove judges from office?	Majority one house, supermajority other Supermajority both Majority both Not Specified No
Can the governor remove judges from office?	Yes Shared with legislature Not Specified No
Can the judiciary remove judges from office?	Judiciary-appointed commission Supreme Court No
Can the public remove judges from office?	Recall No

The next few variables do not fall into a particular group, but are important nonetheless. First is a variable denoting whether or not the constitution states that judges are protected from salary reduction (Table 8). This protection is important as it prevents high court judges from

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<sup>7</sup> In West Virginia (Constitution of 1872), judges can only be impeached in order to be removed. This requires a simple majority vote by the house, followed by a two-thirds vote of the senate.

fearing retribution for unpopular or contentious decisions in the form salary reduction.<sup>8</sup> In 76% of constitutions and amendments studied, judges are protected from salary reduction. This protection typically comes in the form of the constitution stating that salary is left up to legislative statute, but that it cannot be reduced during the judges’ tenure. However, in five constitutions, the salary of high court judges is explicitly stated in the constitution. The financial independence of the judiciary was evaluated as well. If the judiciary had control over its own budget, this variable was coded as “yes,” but if it was not stated or if the judicial budget is set by the legislature, it was given a “not specified” or “budget set by legislature,” respectively. In the majority of constitutions and amendments, the judicial budget is left up to statute to be decided by the legislature in their annual setting of the budget with no explicitly stated requirement of input from the judiciary. The Chief Justice and the judiciary have the power to set their own budget in only three state constitutions throughout history (Michigan Constitution of 1963, Nebraska Constitution of 1875, South Dakota Constitution of 1889).

<b>Group 7: Salary and Finances</b>	
Do state supreme court judges have salary protection (Feld and Voigt, 2003; Nardulli, 2012)?	Salary set by constitution Yes Not Specified No
Is the judiciary financially independent (Skaar, 2002)?	Yes Not Specified Budget set by legislature

The variables evaluating a requirement for publication of decisions as well as formalized judicial review yielded interesting results that will be excluded from analysis for the remainder of the paper following a brief discussion here. Thirty-three constitutions explicitly state that judicial decisions must be publicized. However, the time periods in which publication of decisions were required in constitutions seems random. In several state constitutions, like the Maryland

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<sup>8</sup> See Chavez, 2003; Posner and Yoo, 2005; Resnik, 1999

Constitution of 1851, one of the intermediary documents requires publication of judicial decisions, but the constitutions before and after it do not. Judicial review is only formalized in 34 constitutions (23.4%), and it retains concrete review powers in 33 of those instances. None of the subsequent amendments to these constitutions changed this. In two constitutions, the high court retains formalized abstract review power as the legislature can go to the court to ask if a proposed legislative act would be deemed constitutional. In the Michigan Constitution of 1963, this abstract review power is seen in combination with concrete review power, but abstract judicial review is seen alone in the New York Constitution of 1777, easily explained by the fact that it was drafted and ratified before *Marbury v. Madison* (1803). Concrete judicial review had yet to be established, and thus it is obvious it would be left out of that early constitution.

For the purposes of this paper, judicial review will be left out of analysis. Court scholars have often focused on the type of judicial review: abstract, concrete, or amparo (Ginsburg, 2003; Stone Sweet, 2000). In the context of state supreme courts, constitutions rarely explicitly state that courts have judicial review power. This is unsurprising considering the power also does not appear in the federal constitution or any of its subsequent amendments. Since there is a lack of variation in states' failure to include judicial review in constitutions, this factor can be excluded from analysis. It can be dismissed as explaining variations and levels of judicial independence in US states because it simply does not change.<sup>9</sup>

<b>Group 8: Miscellaneous</b>	
Is judicial review power included in the constitution (Feld and Voigt, 2003; Skaar, 2002)?	Yes No
Are court decisions required to be published (Feld and Voigt, 2003)?	Yes No

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<sup>9</sup> For the same reason, I have chosen to exclude the factor measuring constitutional bans on military courts as well. Keith (2002) mentioned this as a factor may be relevant to an overall measure of judicial independence. However, in the data collected for this project, there was no variation in the factor, as none of the states have a constitutional ban on military courts.

I grouped the final four factors together for purposes of presenting them here. The first two factors assess which actor is given the power to set court procedures (Table 10). In some cases, the court is constitutionally permitted to set its own procedures. In others, the legislature is given the power to decide how the courts will operate. An entirely independent court should be able to set its own procedures with no legislative oversight or the approval of any other political body (Morgan, 1918; Shanfeld, 1934).<sup>10</sup> The last two factors collected are the presence of ballot initiatives and referenda. These are the two factors least associated with the state judiciary directly, but both provide the people the power to potentially alter constitutional provisions affecting state courts, so they were included in data collection.

<b>Group 10: Court Procedures</b>	
Does the judiciary have the authority to set their own procedures (Smithey and Ishiyama, 2000; Keith, 2002)?	Exclusive Authority Shared Authority No Authority Not Specified
Does the legislature have the authority to set court procedures?	Exclusive Authority Shared Authority No Authority Not Specified
<b>Group 11: Ballot Initiatives and Referenda</b>	
Does the constitution specify procedures for ballot initiatives?	Constitutional and Statutory Constitutional Statutory None
Does the constitution specify procedures for referenda?	Constitutional and Statutory Constitutional Statutory None

## RESULTS

Before discussing overall trends in state constitutions, it is important to provide a description of de jure constitutional provisions for judicial independence during each of the three designated time periods. In this section, I will again focus on new constitutions and amendments to existing

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<sup>10</sup> Justice Steven Breyer called the ability of a court to set its own procedures “the power that is nearest the core of institutional judicial independence” (Breyer, 1996).

constitutions that brought a change to factors measuring judicial independence. More importantly, I will closely evaluate the overall trends for these changes in each of the three period instead of discussing all 42 factors. I will also highlight notable exceptions to these trends as necessary.

As noted, the vast majority of change in constitutional provisions regarding state courts comes from new constitutions, not from amendments. Throughout this paper, this will be highlighted as a general trend, but I will indicate the exceptions to the trend as well. For instance, the only two factors for which amendments seemed to bring about a higher proportion of change than new constitutions did are ballot initiatives and referenda. However, of the factors collected, ballot initiatives and referenda are the factors furthest removed from the courts. This highlights how unimportant the amendments themselves are in the context of state supreme courts and the subsequent analysis of them.

#### PRE-CIVIL WAR

Before 1860, the majority of selection and retention methods for state supreme court justices changed from appointment to election. Eight of the nine states that changed selection methods during the period switched from appointment to election, and 11 of the 13 states altering judicial retention methods also switched from appointment to election. These changes were often simultaneous, frequently occurring alongside significant decreases in the tenure of high court justices as well. A notable trend stems from this as states moved from life term appointments to a specified term length ranging from six to 15 years. The trends in these three variables are especially important as it is frequently accepted in court scholarship that appointed judges are more independent from political processes than those who can be held accountable for potentially unpopular decisions through elections, and judges who enjoy life terms once in office are more likely to make independent decisions without fear of being removed from office at the expiration of their term instead of being re-elected (Boies, 2006).

In the pre-Civil War period, none of the states allowed high courts to set their own operating procedures, instead opting to give the state legislature that power. This also exemplifies the trend of reduced judicial independence in the period, as courts that are given the opportunity to set procedure, or at least those granted shared authority to do so, are considered more independent than those relying on the state legislature to develop procedures. Constitutional provisions also allowed court budgets to be determined by the state legislature in all states at this time. However, this is true in nearly all states over the course of history, not just in this period.

#### RECONSTRUCTION

Overall, more trends in de jure provisions for judicial independence are evident in Reconstruction than the pre-Civil War period. Reconstruction (and the Progressive Era) brought a greater number of changes to appointment and retention methods (34 changes versus 25 in the pre-Civil War period). All of the states that made changes to appointment and retention methods provided for election of their high court justices by 1913. Whereas these changes in the previous time period were accompanied by decreases in judicial tenure, tenure length stayed consistently short (between six to 14 years) for states ratifying new constitutions and passing amendments affecting tenure length during this period. Maryland, however, extended judicial terms to life with their constitution of 1864, but a mere three years later with the ratification of a new constitution, it was reduced back down to 10 years.

All ten of the constitutions that altered judicial provisions affecting court procedures in the Reconstruction period granted the court exclusive power to set their own operating procedures. Nine of the states had previously granted the court no power to do this through the ratification of new constitutions, while the Supreme Court in the tenth state, Arkansas, shared authority with the state legislature to set procedures until the 1876 amendment to the constitution. This is consistent with my findings from an earlier version of this paper showing a trend toward granting the court

exclusive power to set their own procedures after the Civil War (illustrated with the accompanying graph):

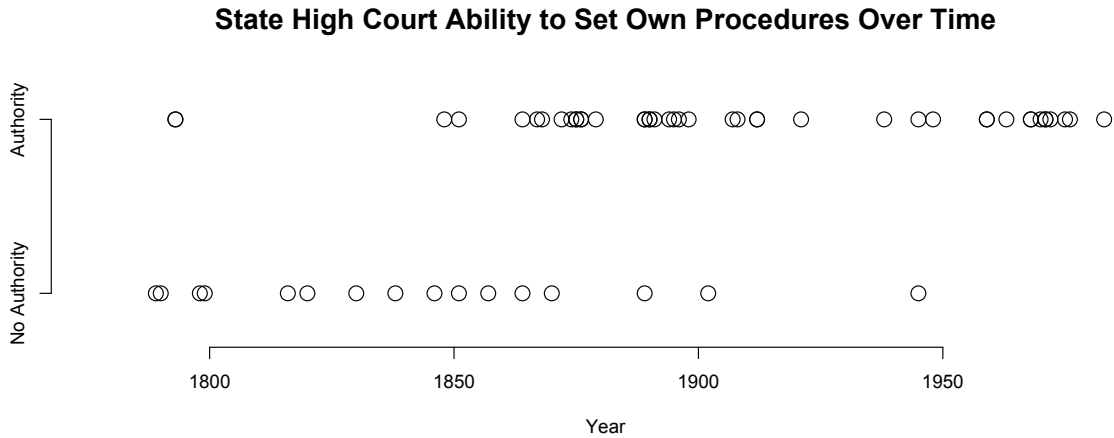


Figure 5. This graph creates a visualization over time of the power given in state constitutions for the high court to set their own procedures. The variables coded as shared authority and exclusive authority in initial data collection were collapsed into one variable here, “authority,” in order to more effectively demonstrate the shift from not affording the high court any power to make decisions regarding procedure to giving the court that authority.

*This graph shows a distinct transition from state constitutions explicitly giving the legislature exclusive power to set court procedure to giving the judiciary either exclusive or shared power to set procedure...this shift occurred after the Civil War, during the Reconstruction era...as a period of rapid constitutional change began... This is important as it shows the overall trend towards more judicial relevance in politics seen in the United States, as well as other countries throughout the world (Hirschl, 2008). (Pilatovsky, 2016)*

More specifically, this trend began with Maryland’s move to exclusive authority for the court to set their procedures in 1867, and it ended (at least for this period) with Michigan’s shift in 1908. Thus, in the comparatively short span of 40 years, ten states followed the trend.

There are notable trends during this period for two more of the factors: the judiciary as an independent branch of government and ballot initiatives. States moved towards the inclusion of constitutional provisions explicitly stating the judiciary is an independent branch of government in the Reconstruction period. By the end of the period, five more states said that the judiciary is an independent branch of government along with the legislative and executive branch. This is



significant because no changes were seen for this factor in the most recent period of time (Present Day), so all states that had previously failed to explicitly state that the judiciary was independent did so by the end of the Reconstruction period. Additionally, an increasing number of states moved to provide for statutory and constitutional ballot initiatives from previously not allowing any at all. Two-thirds of changes to constitutional provisions for ballot initiatives were made through passing amendments as opposed to the ratification of an entirely new constitution. This comes in contrast to the overall trend that most changes to the factors collected occurred through the ratification of new constitutions.

While more trends in constitutional provisions are apparent in this time period, Reconstruction did not bring widespread change in de jure constitutional provisions that may theoretically decrease judicial independence like the pre-Civil War period did. It is true that a greater number of states moved toward electing high court judges during Reconstruction, but this trend was noted before 1960, so this period did not greatly impact decreasing judicial independence in the states. Reconstruction introduced a greater number of de jure constitutional provisions to increase judicial independence for state courts compared to the previous period as a large number of states moved to allow the court to exclusively set their own operating procedures (Keith, 2002; Smithey and Ishiyama, 2000) and a several more states explicitly declared their courts independent of other branches of government (Keith, 2002).

#### PRESENT DAY

Once again, the most notable trends in the Present Day period stem from changes to constitutional provisions for appointment and retention methods and court procedures. Constitutions and amendments passed during this time period show the reverse of the trend from pre-Civil War and Reconstruction in that the appointment and retention methods changed from election to appointment. However, this trend is expected as the Missouri Plan was developed in 1940 and

states began to adopt the system. The Missouri Plan provided for judicial appointments by an independent selection committee. However, this shift back to appointments from elections did not bring an increase in judicial tenure for high state court justices as the reverse trend brought a sharp decrease in tenure length. Justices retained essentially the same tenure lengths as in the previous periods with most states setting term length at 10 years.

Since 1914, fifteen states have changed constitutional provisions that determine who has the authority to set state high court procedure. Through 2015, twelve of these states gave exclusive power to the court to set their own procedure, while the remaining three states moved from a system in which the legislature had exclusive authority to set court procedure to shared authority between the court and the state legislature. This is even more change for this factor than what was seen in the previous time period. It is indicative of increased *de jure* provisions for judicial independence as it gives the court some power to set their own procedures instead of delegating that power to the state legislature (Keith, 2002). New York provides one interesting case of a state taking power away from the court through the ratification of a constitution. It moved in the opposite direction as the states following this trend as it changed from providing the court exclusive authority in setting procedure to only allowing the court shared authority to do so with the help of the state legislature.

I will refrain from discussing ballot initiatives and referenda in great detail because these are the factors that are least applicable to the state judiciary specifically. However, this period follows the same trend as the Reconstruction period in regards to ballot initiatives and referenda: an overall increase in the number of states including constitutional provisions for these procedures. Among the states that have added these provisions to their constitutions, ballot initiatives are most

commonly allowed for statutory and constitutional measures, while referenda are frequently reserved for statutes only.

In sum, states have taken strides toward increased de jure judicial independence through changes to constitutional provisions since 1914. To do this, lawmakers have focused primarily on changing appointment method, retention method, and the courts' ability to set procedure. Many states have switched their appointment and retention methods from electing high court justices to appointing them by following the Missouri Plan. A great number of states have also increased de jure judicial independence by affording the high court the power to set their own operating procedures, a trend beginning in the Reconstruction period but greatly expanded upon since.

#### OVERALL ANALYSIS

Most changes to constitutional provisions for US state courts overall have occurred through the ratification of entirely new constitutions. Few changes affecting the 42 factors studied here stemmed from the passage of amendments. There are, however, a few factors that were changed with amendments at a higher rate than others, most notably ballot initiatives, referenda, and tenure length. Tenure length was one of the most frequently changed constitutional provisions affecting high state courts, so it is unsurprising that the changes occurred both through ratification of new constitutions and amendments. All the drastic changes to term length, like changes from life terms for high court judges to a term 15 years or less, occurred through new constitutions, while incremental changes occasionally took place through the passage of an amendment.

A greater number of changes stemming from amendments occurred in the Present Day period than in the earlier pre-Civil War and Reconstruction periods. The inclusion of both ballot initiatives and referenda are the primary reason this is true. Many states have moved toward offering citizens these powers in recent decades, and most have done so through enacting amendments. Since ballot initiatives and referenda are the two factors that least affect judicial

independence, it is more telling to evaluate the percentage of changes to the judiciary occurring through amendments. Without those factors, 84% of changes in constitutional provisions for state judiciaries occur through the ratification of new constitutions. Thus, it is clear the claim that amendments are less important than new constitutions in evaluating de jure provisions for judicial independence is valid.

From 1776–2015, few isolated constitutional changes affecting courts occurred. Isolated constitutional changes, in this context, are defined as new constitutions or amendments that only altered one of the 42 factors that this data collected for. There are 235 total changes to constitutional provisions affecting courts within the data set: 53 occurred in the pre-Civil War period, 104 occurred during Reconstruction, and 78 occurred Present Day. Of those changes, only 44, or 18.72%, were isolated.

The number of isolated changes occurring in the Present Day period (23) is more than the number of isolated changes in the other two combined (12 and 9, respectively, for a total of 21). Only 7 of the amendments affecting state high courts in the Present Day period were not isolated, thus affecting two or more of the collected factors simultaneously. This is especially interesting as more changes in this period occurred via amendments, versus entirely new constitutions, as well. Of the 23 isolated changes in the Present Day period, 12 (or 52%) resulted from the passage of amendments. This is compared to 16.6% for the pre-Civil War period and 33% for the Reconstruction period. For both the pre-Civil War and Reconstruction periods, the greatest number of isolated changes affected the length of tenure for high court judges, while in the Present Day period, court procedures were the most frequently affected factor, followed closely by tenure length.

Given the trend of court scholarship focusing on appointment procedures for high court judges, one question stuck out when evaluating isolated change: have changes regarding appointment procedures occurred at the same time as other changes made to constitutional provisions for courts or are they happening independently of other changes? Overwhelmingly, the data shows that changes in appointment procedures bring about changes in other collected factors. Only 6 constitutions and amendments only affected appointment procedures independent of all other change. This is a mere 15% of constitutional provisions affecting appointment procedures. Retention method and tenure length are the factors most commonly associated with a change in appointment procedures, with at least one, or both, occurring in 76% of changes to constitutional provisions affecting appointment procedures.

Some may argue that since changes in appointment methods are highly correlated with changes in retention methods, the calculations above should be refigured with the constitutions and amendments that only changed those two factors in isolation versus the constitutional changes that affected more than appointment and retention method. Thus, to get a more accurate measure of the independence of changing court procedures, it may be important to exclude the constitutional provisions that only affected retention method in addition to appointment procedures. This argument can be made because retention methods are typically closely tied to appointment methods – if the judges are appointed to their positions, they are usually re-appointed upon the expiration of their term. However, the results are still significant if this argument is followed. Two-thirds of constitutions and amendments affect additional factors alongside appointment and retention method, bringing much more wholesale institutional change to state courts at one time.

As shown, even if it is the case that we exclude constitutions and amendments that

simultaneously bring changes to appointment and retention methods, we still miss 2/3 of the changes that affect the judiciary. Clearly, this data is evidence that in an overwhelming majority of changes, those writing the laws think other factors also matter. State court scholars often focus attention on the effect of appointment method on judicial independence exclusively. Since those writing the rules do not think appointment methods can be focused on without also turning attention to other factors, there is no reason for scholars to evaluate judicial appointment methods while ignoring other factors of explanatory value. Institutional packages are clearly important to those creating laws, so it is imperative for scholars to explore the changes to other factors alongside appointment methods to draw accurate conclusions about judicial independence.

In the context of constitutional changes to state high courts, it does not appear that states serve as laboratories of democracy.<sup>11</sup> Several of the major trends observed in this data set indicate this, as large groups of states made the same changes to constitutional provisions affecting courts at roughly the same time. The first instance of this comes in the pre-Civil War period as states moved to shorter term lengths for high court judges. Before this, the majority of judges enjoyed life terms. However, by the beginning of the Civil War, the 11 states that made changes to the tenure of high court judges during this period had decreased the term length from life to between 6-15 years. This is especially significant because during the same period, seven of the eight states that altered appointment method of high court judges moved from a method of appointment to election. Through pre-existing research on term lengths and appointment procedures, it has been established that short term lengths in combination with subjecting judges to initial and retention elections

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<sup>11</sup> The concept of states as laboratories of democracy is a phrase famously popularized by former U.S. Supreme Court Justice Louis Brandeis. It refers to the idea that states can “serve as a laboratory” by experimenting with and testing policies without posing a threat or risk to other states.

makes for a much less independent judiciary as judges often feel that they Only 7 of the amendments affecting state high courts in this same span of time were not isolated, affecting more than one of the collected factors simultaneously. must make decisions to please those that hold their fate in their votes.

The next example of a trend that undermines the theory of states as laboratories of democracy is the move toward ballot initiatives and referenda in constitutional provisions. In the Reconstruction period, nine states incorporated the power to call for ballot initiatives for both statutes and constitutional provisions, and eight states (six of the same states who granted ballot initiatives) included the power for referenda. Most of the states, 62.5%, extended referenda power to statutes only, while the others did so for both statutes and constitutional provisions. Additionally, 66% of states who added ballot initiatives during this time period did so through the passage of amendments instead of passing new constitutions with this power added. The same states who passed ballot initiatives through amendments included referenda power within the same amendment. Similarly, during the Present Day period, five additional states incorporated ballot initiatives and six states incorporated referenda. Of these, 70% occurred through the ratification of new constitutions, which comes in contrast to the majority of these powers that were incorporated through amendments in the preceding period.

Finally, the last instance of changes of constitutional provisions affecting courts forming a trend that appears to undermine the theory of states as laboratories of democracy is the increasing number of these provisions that allow the court to set its own procedure. Throughout the pre-Civil War period, no states granted their high courts the power to set their own procedures, instead leaving this power to the state legislature. As discussed, in the Reconstruction period, ten states included constitutional provisions in new constitutions or passed amendments that explicitly

granted state high courts to set their own procedures. This trend is important because it shows that after the Civil War, US states shifted to affording the state high courts more judicial independence overall.

#### BARRIERS TO INDICES

Ultimately, I wanted to develop a measure of judicial independence to compare all state constitutions over time, and I recognize that some scholars would prefer a single score applied to this research that would represent judicial independence. However, I have come to the realization that this will ultimately not be appropriate for this data. There are several reasons why a single score may not capture what is, in essence, a multi-dimensional phenomenon.

I originally thought it would be important to first aggregate the data due to the large number of factors in the data set. The Polity IV codebook (Marshall, Gurr, and Jagers 2013) is held as one of the best examples of the utilization of an aggregate index like the one that could potentially be developed for this data set. However, the Polity IV codebook has statistical and conceptual problems that would be unavoidably introduced if the method was applied to this data as well. If I were to follow this method, I would collapse the broken down factors back into broader groups within each sub-group so that there are as few responses for each variable as possible. Ideally, there would be no more than 3-4 response values per factor. Then I would need to develop a Thurstone scale within each independent variable. In Thurstone scaling, each response is ordered from least favorable to the concept (a score of 1) to most favorable to the concept (a score of  $n$ -responses minus 1). Thus, in my analysis, the responses within each factor would be assigned a value from 0 = least indicative of judicial independence to  $(n-1)$  = most indicative of judicial independence. This ranking would be based on what previous scholars have found in their studies of judicial independence. For instance, for the court's ability to set their own procedures, a value



of 1 would be applied to “no authority” [identified by Smithey and Ishiyama, 2000; Keith, 2002 as low judicial independence], a value of 2 would be applied to “shared authority,” and a value of 3 would be applied to “exclusive authority” (most representative of high judicial independence). Then, by adding up the scores for all of the factors by constitution, a measure of judicial independence for each constitution would be generated. In this context, the constitutions with the highest raw scores would be indicative of the greatest judicial independence.

However, as mentioned, there are significant problems with this approach. The greatest problem with this measure is that if one factor has an exceptionally large number of responses, and a constitution receives the highest score possible for that one factor, it has the potential to greatly increase the overall score for judicial independence for that constitution, even if it is not truly the constitution with the most judicial independence. In other words, one individual factor can drive all of the results (in this case, the total score for judicial independence). When a mid-range score appears, it would carry no explanatory value as it is impossible to decode what that score actually means. Pointedly, we do not know, from an empirical standpoint, what these factors do to the judiciary. Even if the data were somehow normalized by  $\text{normalized value} = \text{raw value} / \text{maximum raw value}$  to generate scores between 0 and 1, the same problems would exist.

The best way to get around this problem would be to collapse all of the factors into binary variables from the beginning, assigning a value of 1 to the response more indicative of judicial independence and 0 to the response showing no judicial independence. This way, there would be a maximum possible score of 42 for the constitution with the highest level of de jure judicial independence and a minimum score of 0 for no judicial independence at all. However, while this would work for some of the factors (for instance, collapsing the court’s ability to set their own procedures into “no authority” and “some authority”), it is virtually impossible to collapse all of

the variables down that far (i.e. the type of elections category – currently it is “none,” “non-partisan,” “partisan,” “legislative,” “unspecified”). That said, this method of measuring de jure judicial independence for this project would not work either.

Thus, after further evaluation, it does not seem like developing an empirical measure of judicial independence for this data will be possible. However, doing so is not necessary to properly evaluate the data. This data set provides great explanatory value without developing such a measure. There is simply no reason to introduce needless error into the research by forcing the data to fit a statistical method it is not well-suited for.

## CONCLUSION

As my dataset deals exclusively with de jure judicial independence, it would be useful and wonderful to have a pre-developed measure of de facto judicial independence in each state over time to compare it to, in order to see how much of a predictor of de facto judicial independence the de jure provisions are. However, this is a seemingly impossible task for this data set for many reasons, both statistically and conceptually.

Despite this problem, there are many unique and useful applications for this data. In one application, the data could be used to explain differences in judicial behavior due to institutional design and constraints. De jure provisions for institutions have a major effect on the individual actors operating under those institutions. Take, for example, the differences between the United States House and Senate. Both levels of the bicameral structure make up the federal legislative body, but they have a fundamentally different institutional design that heavily differentiate one from the other. They are each comprised of individual members elected to the national legislature. Applying theories of individual behavior to this situation would lead one to conclude that both bodies of the federal legislature should behave similarly because they are comprised of

individual members, but time and time again, it is observed that the behavior of the institutions themselves are completely different. Therefore, these observations cannot be accounted for by evaluation at an institutional level. The only explanation for these variations in behavior are the multitude of institutional design differences between the two bodies. For instance, according to the Constitution, Senators are elected for six-year terms while members of the House are elected for two-year terms, which leads to a much higher turnover rate and less lifetime politicians in the House than the Senate. Senators are elected from a state-wide jurisdiction while members of the House are elected from much smaller districts. Additionally, the Senate is governed by much laxer rules with features like open debate and the ability to filibuster, where a minority of members can block legislation in its entirety. The House, on the other hand, follows much stricter rules of procedure, follows a tighter timeline, and members lack the ability to filibuster a bill. Due to these de jure differences between the US House and Senate, a variety of de facto behavioral differences are obvious. Seeing that de jure provisions for institutional design have a large impact on the observed behaviors of the United States legislature, researchers have since applied the theory to comparative international institutions as well, notably in the study of comparative judicial politics (Hayo and Voigt, 2007; Melton and Ginsburg, 2014). Further, we should expect to see the same effect on state courts.

Additionally, the data could be used to trace the trends in judicial independence versus the factors collected under various political conditions and shifts. Levels of judicial independence afforded to state high courts fluctuate over time due to the de jure constitutional provisions studied here. Studies similar in nature to this have been applied to Argentina, tracing the strength of judicial independence under Argentina's unstable government throughout much of the twentieth century (Chavez, 2003; Iaryczower, Spiller, and Tommasi, 2002). Additionally, the effects of changing

political conditions and the ongoing construction of the rule of law on judicial independence have been noted in other countries, including Mexico (Rios-Figueroa, 2007). While US state governments are not necessarily unstable, 60% of them have experienced more constitutional change since their statehood than the US federal government has seen in almost 230 years. When taken into consideration alongside amendments that alter portions of state constitutions relating to factors collected here, the changes made are sufficient to evaluate effects on judicial independence. Further, constitutional provisions and subsequent amendments are byproducts of the political conditions at the time of their adoption. Thus, political conditions have been shown to have a large effect on judicial bodies. For example, more powerful judges are typically found under conditions of greater political competition, while weaker judges usually stem from one-party states (Ginsburg, 2003; Ramseyer, 1994). This is due to the fact that when there is little political competition, political actors do not have a reason to respect the authority of the judiciary when it makes decisions counter to their political agenda. Given the research on comparative courts, similar effects of political conditions on judicial independence should be seen in US state courts.

Integrating comparative court research into the study of state courts, I have collected data evaluating over three dozen factors – from appointments to tenure to removal procedures and more – on 145 state constitutions throughout the history of US states. This paper serves as a step towards a deeper understanding of de jure constitutional provisions for judicial independence at the state level. Here, I have given descriptive statistics about the data set in order to further understand it in future applications. Additionally, I have identified trends within state constitutions and subsequent amendments over time for factors affecting de facto judicial independence. These trends show an increase in de jure provisions in state constitutions that strengthen and increase judicial independence. The data collected for this research has opened avenues for state court research that

can take it far beyond the effects of election procedures on judicial behavior and its utility in this paper alone.

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